



April 18, 2023

Comments of the Competitive Enterprise Institute

RE: Non-Compete Clause Rule

Docket ID No.: FTC-2023-0007-0001

On behalf of the Competitive Enterprise Institute (CEI), we respectfully submit comments regarding the Federal Trade Commission’s (FTC) proposed ban of non-compete agreements in employment contracts as an unfair method of competition and in violation of Section 5 of the FTC Act. Founded in 1984, the Competitive Enterprise Institute is a non-profit research and advocacy organization that focuses on regulatory policy from a pro-market perspective.

The Federal Trade Commission’s proposed rule asserts authority under Sections 5 and 6(g) of the Federal Trade Commission Act. It reads, “The proposed rule would provide it is an unfair method of competition—and therefore a violation of Section 5—for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or, under certain circumstances, represent to a worker that the worker is subject to a non-compete clause.”¹

These comments will leave the policy questions of the merits and harms of non-competes aside and discuss the more fundamental matter that the FTC lacks the statutory and constitutional authority to promulgate major rules with the force of law.

The Federal Trade Commission does not have the authority to promulgate substantive rules defining unfair methods of competition.

The FTC’s proposed rule banning non-compete clauses in employment contracts relies on Section 5 and Section 6(g) of the Federal Trade Commission Act. Section 5 of the FTC Act states that “unfair methods of competition” are unlawful and directs the FTC to “prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce.”² Section 6(g) of the FTC Act authorizes the Commission to “classify corporations and . . . make rules and regulations for the purpose of carrying out the provisions” of the Act.³ Read together, the FTC asserts that these two provisions grant the statutory authority to promulgate substantive rules defining unfair methods of competition.

While the FTC Act grants the Commission rulemaking powers for the purpose of “carrying out” the Act, neither the plain reading nor the legislative history of the Act supports the asserted

¹ Federal Trade Commission, “Non-Compete Clause Rule,” Notice of Proposed Rulemaking, 88 Fed. Reg. 3482 (January 19, 2023), <https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule>.

² 15 U.S.C. § 45(a)(1)-(2).

³ 15 U.S.C. § 46(g).

delegation of legislative power to promulgate substantive rules with the force of law. Rather, Section 6(g) grants procedural or ministerial rulemaking authority for the purpose of carrying out the “FTC Act’s defining feature of case-by-case adjudications.”⁴

There are clues that Congress intended the FTC to have authority only for internal procedural rulemaking. First, Congress did not grant any statutory penalties for violations. In their 2002 *Harvard Law Review* article, Professors Thomas Merrill and Kathryn Watts explained that, at the time of the FTC Act’s passage, “Congress followed a drafting convention that signaled to agencies whether particular rulemaking grants conferred authority to make rules with the force as opposed to mere housekeeping rules.”⁵ According to Merrill and Watts,

That convention was simple and easy to apply in most cases: If Congress specified in the statute that a violation of agency rules would subject the offending party to some sanction—for example, a civil or criminal penalty; loss of permit, license, or benefits; or adverse legal consequences—then the grant conferred power to make rules with the force of law. Conversely, if Congress made no provision for sanctions for rule violations, the grant authorized only procedural or interpretive rules.⁶

The FTC Act did not include these sanctions.⁷

Furthermore, why would Congress go to the trouble of laying out in detail the quasi-judicial powers granted to the FTC in Section 5, only to provide them a ‘skip the line’ option to promulgate rules with the force of law in Section 6? It seems more likely that Section 6(g) intends only to equip the FTC to properly conduct investigations, not make a rule that would render those investigations unnecessary.⁸

As former FTC Commissioner Maureen K. Ohlhausen and former FTC senior attorney Ben Rossen write:

The original FTC Act contained only one sentence describing the agency’s ability to make rules, buried inconspicuously among various other provisions. Section 6(g) provided that the FTC would have authority “[f]rom time to time [to] classify corporations and . . . to make rules and regulations for the purpose of carrying out the

⁴ Maureen K. Ohlhausen and James Rill, “Pushing the Limits? A Primer on FTC Competition Rulemaking,” U.S. Chamber of Commerce white paper, August 12, 2021, https://www.uschamber.com/sites/default/files/ftc_rulemaking_white_paper_aug12.pdf.

⁵ Thomas W. Merrill and Kathryn Tongue Watts, “Agency Rules with the Force of Law: The Original Convention,” *Harvard Law Review*, Vol. 46, p. 472 (2002), https://scholarship.law.columbia.edu/faculty_scholarship/375.

⁶ *Ibid.*

⁷ Berin Szóka and Corbin Barthold, “The Constitutional Revolution That Wasn’t: Why the FTC Isn’t a Second National Legislature,” TechFreedom, June 2022, p. 3, <https://techfreedom.org/wp-content/uploads/2022/06/FTC-UMC-Rulemaking-Authority-TF-Version.pdf>.

⁸ Corbin K. Barthold, “National Petroleum Refiners v. FTC: A Tale of Two Opinions,” Truth on the Market (blog), April 27, 2022, <https://truthonthemarket.com/2022/04/27/national-petroleum-refiners-v-ftc-a-tale-of-two-opinions/>.

provisions of this [Act].” Unlike the detailed administrative scheme in Section 5, the FTC Act fails to provide for any sanctions for violations of rules promulgated under Section 6 or to otherwise specify that such rules would carry the force of law. This minimal delegation of power arguably conferred the right to issue procedural but not substantive rules.⁹

The statute text suggests Congress did not intend to grant the FTC powers to promulgate unfair method of competition rules under Section 6(g) of the FTC Act.

Chair Lina Khan points to the 1973 case *National Petroleum Refiners Association v. FTC* as support for unfair methods of competition rulemaking under the FTC Act.¹⁰ In that case, the D.C. Circuit Court of Appeals ruled that the FTC did have substantive rulemaking authority under Sections 5 and 6(g). But the proposed rule’s reliance on this case is misplaced in light of modern statutory interpretation and more recent Supreme Court decisions.

This argument must be further tempered with Congress’ reaction to the decision. Two years later, Congress acted expressly to grant the FTC ruling making powers for unfair, deceptive or abusive acts or practices (UDAP). Importantly, this power was delegated in combination with heightened procedural requirements, the Magnuson-Moss procedures. It proved such an effective impediment that the FTC abandoned its efforts to use rulemaking to implement Section 5.¹¹ All of this implies that the FTC did not previously have this authority and currently does not have this authority in areas where Congress has not given express permission, including in the area in question here.

Furthermore, it is unlikely that the current Supreme Court would uphold the findings of *National Petroleum Refiners*. Statutory interpretation methods have changed significantly enough to suggest a reversal.¹²

Randolph J. May and Andrew K. Magloughlin explain the significance of the Court’s evolution on the major questions doctrine:

⁹ Maureen K. Ohlhausen and Ben Rossen, “Dead End Road: National Petroleum Refiners Association and FTC ‘Unfair Methods of Competition’ Rulemaking,” Truth on the Market (blog), July 13, 2022, <https://truthonthemarket.com/2022/07/13/dead-end-road-national-petroleum-refiners-association-and-ftc-unfair-methods-of-competition-rulemaking/>.

¹⁰ Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding the Notice of Proposed Rulemaking to Restrict Employers’ Use of Proposed Rulemaking to Restrict Employers’ Use of Noncompete Clauses, FTC File No. P201200, January 5, 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/statement-of-chair-lina-m-khan-joined-by-commrs-slaughter-and-bedoya-on-noncompete-nprm.pdf.

¹¹ Richard J. Pierce Jr., “Can the FTC Use Rulemaking to Change Antitrust Law?” Truth on the Market (blog), April 28, 2022, <https://truthonthemarket.com/2022/04/28/can-the-ftc-use-rulemaking-to-change-antitrust-law/>.

¹² Randolph J. May and Andrew K. Magloughlin, “The Major Questions Doctrine Slams the Door Shut on UMC Rulemaking,” Truth on the Market (blog), April 28, 2022, <https://truthonthemarket.com/2022/04/28/the-major-questions-doctrine-slams-the-door-shut-on-umc-rulemaking/>.

Under current jurisprudence, the Supreme Court’s application of the major questions doctrine most likely would slam the door shut on the FTC’s supposed authority to issue UMC rules. The major questions doctrine is a canon of statutory interpretation that the Court developed as an exception or limitation to application of *Chevron* deference, even if the Court appears to now apply it independently of *Chevron*. It applies to judicial review of agency interpretations of statutory authority to issue substantive rules. Put simply, the major questions doctrine is a linguistic canon that requires “Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance,” or put more colloquially, that prevents Congress from “hiding elephants in mouseholes.”¹³

An estimated 30 million Americans have signed non-compete clauses. A rule covering all of them is an excellent example of how unfair methods of competition rulemaking is indeed an elephant.¹⁴

If Congress had intended the FTC Act to delegate to the agency the power to make legislative rules, that would be unconstitutional as a violation of the separation of powers.

Even if Congress intentionally delegated the power to promulgate substantive rules with the force of law under Section 6(g) of the Federal Trade Commission Act, such a delegation would be unconstitutional.

The recent resurgence of the “non-delegation doctrine” sheds doubt on the constitutional viability of substantive rulemaking to define “unfair methods of competition” under Sections 5 and 6(g) of the FTC Act. In *Gundy v. United States*, the U.S. Supreme Court highlighted the limits of Congress’ ability to delegate “unfettered legislative-like” powers to executive agencies.¹⁵ The nondelegation doctrine requires Congress to outline “intelligible principles” when delegating legislative authority to the executive branch.¹⁶

The non-delegation doctrine is currently dormant, but there is reason to believe that the current U.S. Supreme Court is interested in reviving it. Such an expansive and overarching rule like the one proposed by the FTC banning non-compete agreements in employment contracts could persuade the Court to revive the nondelegation doctrine.

It is beyond the scope of congressional authority to create, out of whole cloth, a second, unelected legislative body. Article I, Section I of the Constitution says, “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”¹⁷ The Library of Congress’ annotated Constitution helpfully

¹³ Ibid.

¹⁴ Federal Trade Commission, “Non-Compete Clause Rule,” Notice of Proposed Rulemaking, 88 Fed. Reg. 3482 (January 19, 2023), <https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule>.

¹⁵ *Gundy v. United States*, 139 S. Ct. 2116 (2019).

¹⁶ Maureen K. Ohlhausen and James Rill, “Pushing the Limits? A Primer on FTC Competition Rulemaking,” U.S. Chamber of Commerce white paper, August 12, 2021, https://www.uschamber.com/sites/default/files/ftc_rulemaking_white_paper_aug12.pdf.

¹⁷ U.S. Constitution article I, § 1.

explains that, “(h)istorical sources from the decades leading up to the ratification of the Constitution suggest that the Legislative Vesting Clause would have been understood to,” among other things, “limit the extent to which the other branches of government could exercise legislative power,” citing Baron Charles de Montesquieu’s *Spirit of Laws* (1748), John Locke’s *Two Treatises of Government* (1690), David Hume’s *Of the Original Contract* (1752), Marchamont Nedham’s *The Excellence of a Free State* (1656) and William Blackstone’s *Commentaries on the Laws of England* (1765) for context leading up to the ratification of the document.¹⁸

More recently, former FTC Commission Noah Joshua Phillips wrote last year, “delegating to the commission plenary power over virtually all US economic activity would violate the separation of powers embedded in the US Constitution.” He continued, “So few people grabbing so much power to govern so many with so little check on it flies in the face of the limited, divided, and democratic structure of the United States government.”¹⁹ The idea that Congress could delegate such broad powers to the FTC contradicts the fundamental structure, stated goals, and animating spirit of the U.S. Constitution itself.

Conclusion

Since its creation in 1914, the FTC has only twice before alleged the legal authority to engage in unfair methods of competition rulemaking. For more than fifty years, the FTC claimed it lacked such authority.²⁰ It defies explanation that such authority has spontaneously appeared with no new congressional action, like a regulatory immaculate conception. The FTC has never had, and does not now possess, the constitutional or congressional authority to promulgate unfair methods of competition rules. If the agency attempts to do so, the courts will surely strike down those rules.

Respectfully,

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¹⁸ “ArtI.S1.1 Overview of Legislative Vesting Clause,” Constitution Annotated, Congress.gov, accessed April 17, 2023, https://constitution.congress.gov/browse/essay/artI-S1-1/ALDE_00001311/.

¹⁹ Noah Joshua Phillips, “Against Antitrust Regulation,” American Enterprise Institute, October 2022, https://www.ftc.gov/system/files/ftc_gov/pdf/against-antitrust-regulation.pdf.

²⁰ Jennifer Cascone Fauver, “A Chair with No Legs? Legal Constraints on the Competition Rulemaking Authority of Lina Khan’s FTC,” *William & Mary Business Law Review*, Vol. 14, Issue 2, p. 302, (2023), <https://scholarship.law.wm.edu/wmblr/vol14/iss2/2>.