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To: Chair Lina Khan, Federal Trade Commission
Members of the Federal Trade Commission
Sarah Mackey, Acting Dir., Office of Policy Planning

I write in response to the Federal Trade Commission's (FTC) proposed rulemaking regarding "the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility . . ." and its request for comment. I have practiced law for more than 16 years and have handled matters involving restrictive covenants during my entire career. I regularly counsel clients on implementing restrictive covenant programs or revising agreements to ensure that they comply with the law and meet the needs of the client. I have also represented clients in enforcing restrictive covenants across the country. I have come to two conclusions:

1. Restrictive covenants of all kinds, including non-compete agreements, serve an important purpose in protecting a company's business interests.

2. States, and not the federal government, are best suited to regulate restrictive covenants.

Presently, no rule regarding restrictive covenants has been proposed by the FTC. I encourage the FTC to forgo any rulemaking, as restrictive covenants have historically been regulated at the state level and no federal intervention is necessary.

A. Restrictive Covenants Are Useful Tools to Protect a Company's Customer Relationships, Confidential Information and Trade Secrets, and Investment in Employees.

Companies across industries use restrictive covenants to protect their business interests. Restrictive covenants can take multiple forms: non-compete agreements that prevent employees from working for a competitor; non-solicitation agreements that prevent former employees from soliciting customers or employees; and nonuse and nondisclosure agreements that prevent the misuse or disclosure of confidential information. Each of these restrictions has a place in a company's toolkit for protecting its business assets.

There seems to be little dispute that companies have an interest in protecting confidential and trade secret information. That interest goes beyond protecting a secret formula (think the formula for Coca-Cola), but includes pricing and other financial information, strategies for marketing and expansion, and internal analysis of strengths and weaknesses of a business and its competitors. Companies also have an interest in protecting customer relationships that are often developed over time and at great expense and in protecting their investment in training

employees. Restrictive covenants of all forms provide valuable protection against employees using a company's confidential and trade secret information or soliciting customers, even unwittingly.

Often those opposed to restrictive covenants focus on abuses. This is no surprise – overreach by a company creates better headlines. There is little justification for sandwich makers, janitors, or dog groomers being subject to non-compete agreements. But those are exceptions, and these exceptions should not be used to create a problem where none exists. In my experience, most companies thoughtfully tailor their restrictive covenant programs to protect the interest that may be at risk by a particular employee joining a competitor. There is no empirical evidence that restrictive covenant agreements are being implemented or enforced more than they were in the past. Rather, it may seem that way to employees because they are paying more attention to agreements they are asked to sign, and that is a positive development.

B. The States are Best Suited to Regulate Restrictive Covenants.

The use of restrictive covenants is, and historically has been, regulated by state law. California, North Dakota, and Oklahoma have chosen to outlaw non-compete agreements, and the District of Columbia will join them next Spring. The other 47 states typically permit non-compete agreements, but with varying restrictions. In general, most states will only enforce a restrictive covenant agreement to the extent it is reasonable, protects a legitimate interest of the employer, and does not unfairly restrict the former employee from making a living. The arguments for federal regulation of restrictive covenants stem the theory that absent such rulemaking, employers will impermissibly enforce restrictive covenants against employees who have little bargaining power. But the recent actions of state Attorneys General against Jimmy John's and WeWork show that the states can regulate such overuse themselves, if courts do not rule those restrictions unenforceable first.

Another theory is that the use of restrictive covenants hinders compensation and innovation. But there is no empirical evidence that supports that theory. In fact, there has been plenty of innovation and increases in compensation in states that enforce reasonable restrictive covenants. A study from the Federal Reserve Bank of Philadelphia found that after analyzing data from Michigan both before and after it permitted non-compete enforcement in 1985:

> we find no evidence that increased enforcement negatively affected the aggregate startup entry rate or the overall job creation rate of new firms. If anything, increased enforcement appears to have had positive effects on the job creation rate of startups in Michigan. In a standard DID analysis, we find that a doubling in enforcement led to a 6 percent to 8 percent increase in the startup job creation rate in Michigan and to essentially no change the startup entry rate. We also find evidence that enforcing non-competes positively affected the number of high-tech establishments and the level of high-tech employment in Michigan.

Do Non-Compete Covenants Influence State Startup Activity? Evidence From The Michigan Experiment, Gerald A. Carlino, Federal Reserve Bank of Philadelphia July 2021, at 28.

Despite the argument that California's ban on restrictive covenants has spurred its technology sector, it is important to acknowledge that similar growth has not been seen in Oklahoma or North Dakota, which also ban non-compete agreements. Notably, at the December 6, 2021 Workshop, both practicing attorneys opposed federal rulemaking regarding non-compete agreements, arguing the issue was better left where it has been for hundreds of years – with the states.

C. Conclusion.

Restrictive covenants play an important role in protecting customer relationships and confidential information. Their use is not unfettered. Rather, states have regulated restrictive covenants for hundreds of years to ensure that only reasonable restrictions are enforced. There is no evidence to support changing the current state regulatory scheme for restrictive covenants and implementing federal rulemaking. I encourage the FTC to leave this matter to the states.

Very truly yours,

Timothy J. Lowe