To: Federal Trade Commission
From: Brian Barakat, Chairman, Restrictive Covenant Task Force, Business Law Section of the Florida Bar
Re: Non-Compete Clause Rulemaking, Matter No. P201200
Date: April 15, 2023

Background

The Business Law Section of the Florida Bar ("BLS" or the "Section"), an organization within The Florida Bar ("The Florida Bar" or the "Bar"), submits the following comments regarding Non-Compete Clause Rulemaking, Matter No. P201200 (proposed new subchapter J, consisting of part 910, to chapter 1 in title 16 of the Code of Federal Regulations) (the "Proposed FTC Rule" or the "Rule") addressing noncompetition agreements.[1]

The Section consists of almost six thousand members of The Florida Bar, whose lawyers often represent parties in business litigation, including disputes involving contracts, business torts, intellectual property, and debtor-creditor transactions in state and federal courts throughout Florida. Using its expertise in business law, the Section assists the Florida legislature in drafting laws of interest to the public and the business community, and from time to time provides comments to proposed rules changes and submits amicus briefs on significant legal issues. The Section likewise serves the Bar by producing sophisticated CLE (continuing legal education) programs on the panoply of issues faced by business law practitioners. Due to the diversity of its members' practices, the Section seeks only to provide a comment on the Proposed FTC Rule as an honest broker of the majority of the practices and views of its members.

[1] This comment is submitted strictly on behalf of the Business Law Section of the Florida Bar and does not represent a position of The Florida Bar itself.

The law involving noncompetition agreements and restrictive covenants has long been a significant area of interest to the BLS. In 1996, the BLS proposed a comprehensive statutory amendment addressing noncompetition agreements and restrictive covenants that included a core requirement that a party plead and prove that it had a legitimate business interest in enforcement of such an agreement aside from simply precluding or limiting competition. *See* John A. Grant & Thomas T. Steele, *Restrictive Covenants: Florida Returns to the Original "Unfair Competition Approach for the 21st Century*, 70 Fla.B.J. 53 (Nov. 1996).[2] This statute was enacted by the Florida legislation as section 542.335, Florida Statutes (1996).

Over the years since the statute's enactment, however, it became clear that many employers were imposing broad noncompetition agreements to preclude competition among lower wage and other employees in instances where legitimate business interests in enforcement of such agreements were often marginal and where the employees had little or no bargaining power and the agreements were not subject to negotiation. Moreover, Florida courts had often also seemed to apply the statute in a manner that favored enforcement of restrictive covenants and declined or failed to consider the interests or circumstances favoring the employees in particular cases. Indeed, by 2011, one notable empirical study concluded that Florida was the jurisdiction with the strongest enforcement laws and attendant policy regarding noncompetition agreements in the nation. *See* Norman D. Bashira, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy*, 13 U.Pa.J.Bus.L. 751, 778 (2011).[3]

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[2] This article was published on behalf of the BLS shortly after the statute was enacted. *Id*. at n. 1.

[3] The fact that Florida would ultimately arguably become the most pro-enforcement jurisdiction in the country regarding employee covenants not to compete was certainly not intended or foreseen by the BLS at the time the statute was enacted. *See* Grant & Steele, *supra*, *Restrictive Covenants*, at 56 (describing it as a "balanced statute that does not unnecessarily impede competition, the ability of competitors to hire experienced workers, or the efforts of employees to secure better-paying positions").

In 2018, the BLS empaneled a Task Force consisting of more than 50 practitioners, including transactional attorneys and litigators, to consider whether the Florida statutory regime governing noncompete agreements should be amended to address these developments. This group has studied restrictive covenants and potential amendments to this statute for four years, driven initially by judicial trends edging away from enforcement of restrictive covenants with respect to low wage employees. To that end, the Task Force conducted a survey of all 50 states with particular attention to those states who have, in recent years, provided additional protections to employees.

In undertaking its analysis, the Task Force focused on statutory provisions applicable to enforcement of restrictive covenants against former employees, agents, and independent contractors, which the Task Force believed had proven to be problematic. The Task Force concluded that, particularly with regard to lower wage employees, these contractual restrictive covenants were not truly negotiated between parties of equal bargaining positions. Moreover, the Task Force recognized that (a) freedom of mobility of employees in our economy and (b) their ability to earn a living in their chosen occupations or professions are important social concerns as are the protection of employers against unfair competition.

Comments to the Proposed FTC Rule

I. Introduction

The evaluation of rules outlining the enforceability of restrictive covenants has evolved to consider a myriad of public policies. Legislators and courts have balanced public policies in favor of an individual's right to earn a living, with freedom of contract, freedom of trade, the protection of intellectual property, and the need to promote competition. The Proposed Rule appears to elevate competition over the other legitimate public policy considerations.

The BLS takes no position as to whether the FTC has the authority to adopt the Rule.[4] As the FTC recognized, 47 states and the District of Columbia allow enforcement of noncompetition agreements involving employees.[5] Only three states- California, North Dakota, and Oklahoma- broadly preclude noncompetition agreements in the employment context.[6] Moreover, all of these state bans have been in effect since the 19th century.[7] Regardless, however, of whether the FTC has the power to override and preempt the myriad of state statutes and judicial decisions throughout this nation that allow enforcement of employee noncompetition agreements under some variation of the rule of reason, these circumstances alone should give the FTC pause to consider whether

[4] *See* West Virginia v. EPA, 142 S.Ct. 2587, 2608 (2022), (holding that under the "major questions doctrine" administrative agencies must be able to demonstrate "clear congressional authorization" when they claim the power to make decisions of vast "economic and political significance." As Commissioner Christine S. Wilson further noted in her Dissenting Statement (hereafter "Dissenting Statement"), at 9-13, there is not only doubtful authority for the rule under the FTC Act but the rule may also be subject to challenge under the non-delegation doctrine.

[5] Notice of Proposed Rulemaking for Non-Compete Rule (hereafter "NPRM"), Part II,C., at 49. Moreover, the American Law Institute, the leading independent organization in the United States producing scholarly work to clarify, modernize, and improve the law, in its Restatement of the Laws of Employment, provides for enforcement of noncompetition agreements, pursuant to a "rule of reason," as follows:

> § 8.06. Enforcement of Restrictive Covenants in Employment Agreements
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> Except as otherwise provided by other law or applicable professional rules, a covenant in an agreement between an employer and a former employee restricting the former employee's working activities is enforceable only if it is reasonably tailored in scope, geography, and time to further a protectable interest of the employer, as defined in § 8.07, unless:
> (a) the employer discharges the employee on a basis that makes enforcement of the covenant inequitable;
> (b) the employer acted in bad faith in requiring or invoking the covenant;
> (c) the employer materially breached the underlying employment agreement; or
> (d) in the geographic region covered by the restriction, a great public need for the special skills and services of the former employee outweighs any legitimate interest of the employer in enforcing the covenant.

ALI, *Restatement of Laws of Employment* § 8.06 (2015).

[6] *See* Cal. Bus. & Prof. Code § 16600; N.D.C.C. § 9-08-06; 20 Title O.S. 2001 § 219A; Notice of Proposed Rulemaking for Non-Compete Rule (hereafter "NPRM"), Part IV.B.2.c., at 100.

[7] As the FTC points out, the last state to enact a ban on employee noncompetition agreements was Oklahoma in 1890. *Id*.

the circumstances truly justify the imposition of an almost complete nationwide ban on employee noncompetition agreements.[8]

For the reasons stated below, the BLS submits that any rule that the FTC enacts, *at a minimum*, should not preclude enforcement of covenants not to compete as to executives, given that, as the FTC recognizes, such employees generally have much greater bargaining power than lower ranking employees in determining whether to enter into a noncompetition agreement and generally could cause greater harm to a business by violating a noncompetition agreement. Moreover, noncompetition agreements should not be precluded if they are reasonably necessary to protect a business's trade secrets. In these circumstances, existing state laws permitting enforcement of noncompetition agreements should not be invalidated or preempted, and state legislatures and courts should retain the power to regulate and allow enforcement of noncompetition agreements. The BLS also submits that the FTC's proposal to also ban "functional equivalents" of noncompetition agreements is too broad, and further urges that any rule adopted by the FTC should operate only prospectively and should not retroactively invalidate or "rescind" any noncompetition agreements entered prior to the effective date of the Rule. A retroactive application will likely have a jarring effect on Florida's economy. Such impact would likely be softened by a phased implementation approach if changes are made.

II. *The Proposed FTC Rule Should Not Preclude Enforcement of Noncompetition Agreements Against Executives*

Relying on less than a handful of academic studies, the FTC preliminarily concludes that noncompetition agreements involving executives, like those involving lower paid employees,

[8] In her dissenting statement to the proposed rule, Commissioner Christine Wilson noted that "[t]he proposed Non-Compete Clause Rule represents a radical departure from hundreds of years of legal precedent that employs a fact-specific inquiry into whether a non-compete clause is unreasonable in duration and scope, given the business justification for the restriction." Dissenting Statement, at 1.

negatively affect competition because they block workers from switching jobs to better paid and more productive one, depress wages, and restrict the start-up of new businesses that may lead to development of innovative products and services.[9] As Commissioner Wilson commented in her Dissenting Statement ("Wilson's Dissenting Statement"), such studies "are scant, contain mixed results, and provide insufficient support for the proposed rule."[10] Indeed, noncompete agreements for executives, unlike many such agreements involving low ranking employees, are unlikely to result from unequal bargaining power or to be exploitative or coercive because executives are sophisticated, highly compensated, and enjoy much greater economic resources and freedom. Also, the studies appear to indicate the noncompete agreements with executives result in higher compensation and more economic stability.

The Shi and Garmaise studies cited by the FTC are largely theoretical mathematical analyses of general economic conditions that rely upon little actual empirical data regarding noncompetition agreements involving executive or managerial employees.[11] Even so, both authors recognize that there are beneficial effects in management stability and greater investment by businesses through noncompetition agreements with executives, but they conclude that these benefits are outweighed by perceived detrimental economic effects in restricting employee

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[9] *Id.,* Part IV.A..1.a.ii., at 77-78, 80.

[10] Wilson's Dissenting Statement, at 1.

[11] Liyan Shi, Optimal Regulation of Noncompete Contracts, https://static1.squarespace.com/static/59e19b282278e7ca5b9ff84f/t/626658ffb73adb2959bd4371/1650874624095/noncompete_shi.pdf; Mark J. Garmaise, *Ties that Truly Bind: Noncompetition Agreements*, *Executive Compensation, and Firm Investment*, 27 J.L., Econ., and Org. 376, 377, 414 (2011). Interestingly, the Shi article, published last year, concedes that there is a lack of empirical data bearing upon the question, noting:

> While many theoretical inquiries investigate similar issues … it is not well understood how employers design noncompete contracts and, if workers willingly enter these contracts, whether there are social gains from intervening in them. Further, the lack of comprehensive contract data poses a challenge to quantitative assessment.

Id., at 1.

mobility.[12] These studies also find that executives and managerial employees with noncompetes do negotiate higher initial compensation, but the subsequent increases in their compensation during their employment is less than their counterparts without noncompetes.[13]

Kini, William, and Yin, also cited by the FTC, using data from an extensive hand-collected database on CEOs, reach somewhat different conclusions. They found that CEO compensation was broadly higher among those with noncompetition agreements throughout their employment and that CEOs with noncompetition agreements were more likely to be fired for poor performance (thus presumably increasing efficiency of the business).[14] Based on their research, the authors conclude that noncompetition agreements among senior executives are products of negotiation between the parties and serve a business valuable purpose:

> an NCA [noncompetition agreement] is the outcome of a bargaining game between the CEO and the firm. Specifically, the CEO is more likely to have an NCA if the CEO's skills are easily transferable to other firms in the industry, the firm has more intangible assets, and the firm operates in an industry with high litigation risk. These results are consistent with the idea that the propensity for an NCA is higher if the potential economic damage to the firm arising from the CEO joining a competitor is larger. Further, the CEO is less likely to have an NCA if the CEO faces greater job risk, the CEO has specialized industry experience, and when the firm faces more in-state competition. These results are consistent with the notion that the CEO is less likely to sign an NCA if the personal costs to the CEO from having an NCA are higher. Finally, the CEO is more likely to have an NCA if the state-level NCA enforcement regime is more stringent.[15]

Finally, a study performed by Norman D. Bishara, Kenneth J. Martin and Randall S. Thomas,[16] found that noncompetition agreements with executives facilitate investment in human

[12] Shi, at 28; Garmaise, at 378, 400, 412.
[13] Shi, at 17; 29; Garmaise at 378, 385, 402.
[14] Omesh Kini, Ryan Williams, & Sirui Yin, *CEO Noncompete Agreements, Job Risk, and Compensation*, 34 Rev. Fin. Stud. 4701 (2021), at 6, 23, 25-26
[15] *Id.* at 27.
[16] Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Post Employment Covenants*, 68 Vand. L. Rev. 1, 3 (Jan. 2015).

capital that can lead to more stable executive leadership and increase firm profits. Based on this and other evidence, these authors conclude:

> there is value to allowing CNCs between executives and firms, despite the remaining fairness concerns with enforcing noncompetes for average employees with less bargaining power. Specifically, this research tends to support the recent state laws that treat employees with high-level supervisory or other management roles as a unique category of employees under [covenants not to compete] policy.[17]

In short, the studies relied upon by the FTC in its NPRM actually provide substantial support for noncompetition agreements against executives in some instances, but, regardless, are insufficient to support a ban on noncompetition agreements involving executives. The circumstances, competitive effects, and business justifications for noncompetition covenants involving executives are fundamentally different than those involving lower ranking employees. As Commissioner Wilson observed in the Wilson Dissenting Report, the FTC itself acknowledges, at least implicitly, the relevance of circumstances surrounding adoption of noncompete clauses by proposing an exception to the ban for provisions associated to the sale of the business, by distinguishing situations in which executives are subject to noncompete provisions, and by asking for comments regarding possible tailored alternatives to the ban for different categories of employees, including executives. *See* Wilson Dissenting Report, at 2.

For the reasons stated, the BLS submits that, at a minimum, the FTC should exempt executives from the ban on noncompete agreements. For purposes of defining the term

[17] *Id*., at 50-51.

"executive," the BLS believes that the standard for "executive employees" under 29 CFR 541.100 provides a clear and workable standard.[18]

III. The Proposed FTC Rule Should Not Preclude Enforcement of Noncompetition Agreements Protecting Trade Secrets and Confidential Business Information

Testing restrictive covenants based on the protection of a legitimate business interest represents 700 years of legal evaluation of competing public policies. The Rule's blanket prohibition elevates a single public policy concern over all others. This should be reconsidered in favor of a more balanced approach. Over time, the evaluation of the fairness and enforceability of restrictive covenants has forced courts and legislatures to confront a variety of economic, political, and social concerns.[19] In 1414, English courts rejected contractual restraints on trade.[20] Since then, courts have identified public policy considerations including, *inter alia*, freedom of contract, the

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[18] § 541.100 General rule for executive employees.

(a) The term "employee employed in a bona fide executive capacity" in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary basis pursuant to § 541.600 at a rate of not less than $684 per week (or $455 per week if employed in the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands by employers other than the Federal government, or $380 per week if employed in American Samoa by employers other than the Federal government), exclusive of board, lodging or other facilities;

(2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(3) Who customarily and regularly directs the work of two or more other employees; and

(4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

(b) The phrase "salary basis" is defined at § 541.602; "board, lodging or other facilities" is defined at § 541.606; "primary duty" is defined at § 541.700; and "customarily and regularly" is defined at § 541.701.

[19] James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1890-1918*, 50 Ohio State L. J. 257 (1989).
[20] Dyer's Case, Y.B. 2 Hen. V, fol. 5b, pl. 26 (1414).

right to work, free trade, protection of proprietary rights, protection of individual liberty, free competition, and a business's right to protect its interests. In the late 19th century, courts settled upon a test which purported to balance these countervailing policies and promote fair competition.

These courts, and eventually many state legislatures, asserted that a business could legitimately restrain trade when it could articulate a legitimate business.[21] Legitimate business interests include: trade secrets, confidential business information which does not rise to the level of trade secrets, substantial relationships with specific customers, good will, specialized training, and referral sources.[22] The United States is an increasingly knowledge based economy.[23] Trade secrets and confidential business information represents data, typically stored digitally. Data is easy to copy and convey, and very difficult to track. If we recognize a business' interest in protecting its data the law must provide some effective mechanism to protect such interest.

The FTC Proposed Rule does not provide any analysis which leads to protection. To the contrary, to the extent that a non-disclosure would amount to a restraint on competition, the Proposed Rule allows for that to be deemed a *de facto* non-compete and, therefore, disallowed. The FTC Proposed Rule does not allow a tribunal to evaluate what might be a very legitimate business interest protected by a small restraint. Instead, it reacts to the abuse of restrictive covenants and the failure of courts to engage in a robust analysis. The BLS offers that a better approach would be to provide the courts with guidance as to how to evaluate each case's facts in light of the legitimate business interest approach, which takes into consideration a broader array of accepted public policy considerations.

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[21] *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282–83 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136 (1899).
[22] Fla. Stat. 542.335(1)(b), *White v. Mederi Caretenders Visiting Servs. of Se. Fla., LLC*, 226 So. 3d 774, 776 (Fla. 2017)
[23] *Covenants Not To Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment*, 27 Berkeley J. Emp. & Lab. L. 287, 301.

a. The use of non-disclosure agreements to illustrate *de facto* non-competes.

The Rule provides a functional test for whether a contractual term is a non-compete clause. The effect of the test is to prohibit *de facto* non-competes and prevent employers from usurping the prohibition on non-competes by having other agreements operate in a manner that results in prohibiting employees from seeking or accepting employment with a person or operating a business.

While the concept of prohibiting *de facto* non-competes under the Rule is not within itself objectionable, the example of non-disclosure agreements used in 910.01(b)(2) to illustrate this principle should be removed. *See* Proposed FTC Rule § 910.01(b)(2). The FTC relies upon the case *Brown v. TGS Mgmt. Co.*[24] to justify the inclusion of non-disclosure agreements as possible *de facto* non-competes. However, the use of this case to justify the possibility that a non-disclosure could be a non-compete is not well grounded. The definition of "confidential information" in the agreement at issue in *Brown v. TGS Mgmt. Co.*, as interpreted by the court, was so broad that it included public information. As such, the agreement would not be enforceable as a non-disclosure agreement, setting aside the issue of a *de facto* non-compete as the court concluded.

The old adage is that bad facts make bad law, and one non-disclosure agreement with a fatally flawed definition of confidential information, in a state that has the broadest prohibitions on non-competes, should not be the basis for the possibility that non-disclosure agreements can functionally operate as non-competes. Respectfully, the use of non-disclosure agreements as an example of the functionality test for *de facto* non-competes should be removed. Keeping this example will only produce more litigation around non-disclosures and not serve any furtherance of the Rule's objectives.

[24] *Brown v. TGS Mgmt. Co.*, LLC, 57 Cal. App. 5th 303 (Cal. Ct. App. 2020).

IV. Prospective Application

The Proposed FTC Rule establishes an effective date of 60 days, and a compliance date of 180 days, after publication of a final rule in the *Federal Register*. *See* Proposed FTC Rule § 910.2(a). In order for employers to comply with the Proposed FTC Rule, starting on the compliance date, employers would be prohibited from maintaining a *pre-existing* non-compete clause (*i.e.,* non-compete clauses that the employer entered into with a worker *prior to* the compliance date). *Id*. In other words, the Proposed FTC Rule would retroactively invalidate or rescind any non-competition agreements entered into prior to the effective date of the Rule.

Retroactive legislation is uncommon and "[t]hroughout history, courts and legal commentators have looked with disapproval and extreme caution at the retroactive application of laws." *Raphael v. Shecter*, 18 So.3d 1152, 1155 (Fla. 4th DCA 2009). Historically, the Supreme Court has disfavored retroactive statutes because "[r]etrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 533, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (quoting 2 J. Story, Commentaries on the Constitution § 1398 (5th ed. 1891)). Although retroactive legislation is not expressly prohibited in Florida, the Florida Constitution limits the legislature's ability to enact retroactive laws through its due process clause. The due process clause prohibits the state from depriving a person of their property without due process of the law. Art. 1, § 9, Fla. Const. Here, an employer's interest in a pre-existing noncompetition agreement is a type of property subject to the protections of the due process clause.

In addition, both the Florida and the United States Constitutions prohibit the impairment of a contract. *See* Art. 1, § 10, cl. 1, U.S. Const.; Art. I, §10, Fla. Const. Indeed, it is a longstanding principle and pillar of Florida law that contracts are protected from unconstitutional impairment and the Florida Supreme Court has affirmed that "[t]he right to contract is one of the most

sacrosanct rights guaranteed by our fundamental law. It is expressly guaranteed by article I, section 10 of the Florida Constitution." *Chiles v. United Faculty of Fla.*, 615 So. 2d 671, 673 (Fla. 1993); *see also In re Advisory Opinion to the Governor*, 509 So. 2d 292, 314 (Fla. 1987) ("It is . . . indisputable . . . that rights existing under a valid contract enjoy protection under the Florida Constitution."). To be considered impairment of a contract, "... a law must 'have the effect of rewriting antecedent contracts' in a manner that 'chang[es] the substantive rights of the parties to existing contracts.'" *Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So. 3d 1181, 1191 (Fla. 2017) (citation omitted). However, "[t]otal destruction of contractual expectations is not necessary for a finding of substantial impairment." *U.S. Fid. & Guar. Co. v. Dep't of Ins.*, 453 So. 2d 1355, 1360 (Fla. 1984). Instead, "[a]ny legislative action which diminishes the value of a contract is repugnant to and inhibited by the Constitution." *In re Advisory Opinion*, 509 So. 2d at 314. As an example, "[a] statute which retroactively turns otherwise profitable contracts into losing propositions is clearly such a prohibited enactment." *Id.* at 314-15.

The Proposed FTC Rule diminishes the employer's interest in a noncompetition agreement because the Rule would "make worse" the employer's rights emanating from the contract. Specifically, the Rule proposes to rescind or invalidate the prior existing noncompetition agreement between the employer and the employee and the benefits the employer enjoys (and paid for) when entering into that voluntary contract with its worker. Thus, the Proposed FTC Rule has depreciated and diminished the value of the noncompetition agreement. What is more, the Proposed FTC Rule creates confusion and question as to what happens with the consideration paid by the parties to the contract - do they return it? Can they return it? How would the Proposed FTC Rule be enforced?

If the Proposed FTC Rule is considered an impairment of contract, it must then be considered "whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the State's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective." *Searcy*, 209 So. 3d at 1192 (quoting *Pomponio*, 378 So. 2d at 780). The Proposed FTC Rule seeks to prohibit employers from maintaining and entering into noncompetition agreements because it is its position that noncompete clauses: (1) significantly reduce workers' wages, (2) stifle new businesses and new ideas, and (3) can exploit workers and hinder economic liberty.[25] The Section proposes that, should the FTC publish the Rule as drafted, exclusively prospective application of the Rule will still accomplish the FTC's cited objectives for proposing it, without rescinding already existing contracts between parties that entered into noncompetition agreements (and have a forum to pursue redress should there be any dispute as to the agreement). Retroactive application will only serve to impair constitutionally protected contracts and upset previously made economic decisions and create more litigation surrounding their enforcement.

Moreover, prospective application should be phased in over time to avoid creating sudden and disruptive changes to the economic expectations of businesses. This is particularly important because noncompete agreements play a critical role in protecting a company's intellectual property and trade secrets, and any sudden changes to their use could potentially create unforeseen economic consequences – especially, during a time when banks around the country are failing. By phasing in changes to noncompete laws over time, including prospective application of the Proposed FTC Rule, businesses can better prepare themselves for any new regulations or requirements, which will ultimately help to ensure that they are able to adapt and remain

[25] *See* Federal Trade Commission, FACT SHEET: FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition, https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete_nprm_fact_sheet.pdf.

competitive in the marketplace. Additionally, phasing in changes prospectively allows for a more orderly transition, which can help to prevent unintended negative consequences, such as business closures, layoffs, or legal disputes.

V. Conclusion

In conclusion, it is the Section's position that any rule the FTC publishes modifying or otherwise limiting the use and enforcement of noncompetes across the country should not preclude enforcement of restrictive covenants as to executives because of their increased bargaining power as compared to that of lower ranking employees. In fact, eliminating noncompetes altogether, with high level executives or otherwise, could cause significant harm to a business if the noncompete is reasonably necessary to protect trade secrets.

The Section also argues that the Proposed FTC Rule's total ban on functional equivalents of noncompetes, like nondisclosure agreements, is unnecessarily broad and the FTC's reliance on a single case - *Brown v. TGS Mgmt. Co.* - is misplaced. Using nondisclosure agreements as an example of the functionality test for *de facto* noncompetes will only produce more litigation around nondisclosures and fail to further the FTC's objectives.

Finally, it is the Section's stance that any prohibition or invalidation of noncompetition agreements under the Proposed FTC Rule should operate prospectively to preserve the constitutional right to contract and should be phased in over time so as not to have any suddenly disruptive impact on our businesses.

Respectfully submitted,

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