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April 18, 2023

Lina M. Khan, Chair
Federal Trade Commission (FTC)
Office of the Secretary
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex C)
Washington, DC 20580

Non-Compete Clause Rulemaking, Matter No. P201200, 16 CFR Part 910, RIN 3084-AB74

Dear Commissioner Khan:

On behalf of our 40,000 members, the Academy of General Dentistry (AGD) is pleased to offer comments on the Federal Trade Commission's proposed rule to ban noncompete clauses. AGD dentists provide a full range of dental care to patients across all demographic and socio-economic sectors throughout the country.

In the course of ordinary business and in the natural evolution of a career span, dentists care for our nation's dental needs and may hold varying positions such as associate, owner, partner, employee, and franchisee. Dentists will not have a unified opinion on the FTC's non-compete proposed rule. AGD endeavors to represent as many of our members as possible.

Dental practice owners rely on the sanctity of legal arrangements and agreements that protect their real estate, intellectual property, good will and financial security.

Noncomplete clauses are fundamental business tools that are not unique to the dental practice. Modifications to existing laws and regulations, especially those with such far-reaching implications, require thoughtful and deliberative consideration. Proposed changes to the noncompete rule by the FTC is a departure from hundreds of years of legal precedent in the U.S and represents remarkable broad authority over legal arrangements by a governmental agency. Additionally, the proposed ruling neither clarifies the need for such changes, nor does it cite a controlling statute stipulating authority for abrogating existing law. Therefore, the AGD requests an immediate reconsideration and withdrawal of the proposed rule to ban noncompete clauses at this time.

AGD COMMENT RATIONALE ON PROPOSED BAN OF THE NONCOMPETE CLAUSE:

Justification and Data for the Proposed Rule

The Commission has not documented a longstanding history of malfeasance or a lengthy series of problematic noncompete cases in the proposed rule. No cases were brought by the FTC to assert that noncompete clauses harm competition until January 4, 2023, the day before the Commission released the noncompete proposed rule.

The consent agreements allege that noncompete provisions represent an unfair method of competition.¹ Even though the Commission successfully completed consent agreements, three cases do not establish a long-standing pattern of harm to the American public. Data and a long line of precedents are lacking to justify initiating this broad and sweeping non-compete proposed rule.

Congressional Authorization

The source of Congressional authority is not cited in the proposed rule. Previously, Commission leadership testified before Congress that the Commission lacks substantive rulemaking authority regarding the issue of competition.^{2, 3}

Furthermore, the proposed rule may be challenged under the doctrine that Congress cannot delegate legislative authority to any other branch of government or to independent agencies. Justices have raised this issue in recent cases.⁴

Analysts, commentators, and legal experts anticipate substantial litigation as a result of this published proposal and the rule may not prevail in the series of challenges it is expected to encounter.

Scope of Proposed Rule

Traditionally, noncompete agreements have been the domain of state law. States are often cited as laboratories of democracy as state legislatures act autonomously and not always in concert with the federal government or each other. As such, every state has the authority to handle noncompete arrangements differently.

The scope of the FTC's proposed rule would invalidate state laws and contracts in 47 states. As specified in the text of the proposed rule, this applies to paid and unpaid employees and independent contractors.

Different states will enact state laws in accordance with the needs of their constituents. Some states are largely urban. On the other hand, for states with sizable rural areas, less competition would be expected for new business entrants.

"Major Questions" Doctrine

The subject content of the proposed rule appears to be a "*major question*" given that its scope would affect one in five employed persons. In a number of decisions, the U.S. Supreme Court has asserted that any agency seeking to expand its authority in a particular area must have clear Congressional justification stipulated in the law and not be based on the simple general delegation of authority. In short, authority must be explicit and well defined from Congress. The Court has rejected claims of regulatory authority "under the major questions doctrine when 1) the underlying claim of authority

¹ FTC Cracks Down on Companies That Impose Harmful Restrictions on Thousands of Workers. January 4, 2023. <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers>

² National I Petroleum Refiners Association v. FTC, 482 F.2d 672, 696 nn. 38, 39 (D.C. Cir. 1973).

³ Noah Joshua Phillips, *Against Antitrust Regulation*, American Enterprise Institute Report 3, <https://www.aei.org/research-products/report/against-antitrust-regulation/> (Oct. 13, 2022)

⁴ Gundy v. United States, 139 S. Ct. 2116, 2131 (2019), Paul v. United States, 140S. Ct. 342 (2019).

concerns an issue of “vast economic and political significance, and 2) Congress has not clearly empowered the agency.”⁵

Exceptions

The FTC proposes to create a limited exception to the ban on noncompete clauses for the seller and buyer of a business. The owner, member, or partner holding a minimum of 25% ownership in a business entity would be allowed to enforce a noncompete clause on a buyer for his share of the business. Further, the proposed rule states that regardless of the exception, noncompete clauses are subject to federal anti-trust law in addition to other applicable laws. Noncompete agreements help protect the value of the business acquired by the buyer.

Nonprofit entities vs. for profit entities would likely be treated in this rule differently. This principle would seem to exacerbate unfair means of competition that the FTC is seeking to modify. Moreover, according to the proposed rule, franchises are not addressed in this rule. Regulations are in effect for franchisees and franchisors disclosure obligations.⁶ Additionally, 16 CFR 436(q) addresses renewal, termination, transfer, and dispute resolution for franchise arrangements.⁷ Nonetheless, the FTC is seeking comments on whether franchise agreements should be added to this rule. It is unclear what the FTC may seek to alter in current franchise agreements. Consequently, the FTC has an obligation to make clear its proposed actions prior to any rule being finalized.

The AGD appreciates the opportunity to provide comments as it relates to the FTC’s proposed changes to the existing noncompete clause. Again, the AGD requests an immediate reconsideration and withdrawal of the proposed rule to ban noncompete clauses at this time.

We welcome the opportunity to engage with FTC officials at any time throughout the year. Please contact Daniel J. Buksa, JD, CAE, Associate Executive Director, Public Affairs, by phone at (312) 440-4328 or via email at daniel.buksa@agd.org if you have questions or would like to discuss our comments in greater detail.

Sincerely,



Hans P. Guter, DDS, FAGD
AGD President

⁵ Congressional Research Service, *The Supreme Court’s “Major Questions” Doctrine: Background and Recent Developments.* May 17, 2022. <https://crsreports.congress.gov/product/pdf/LSB/LSB10745>

⁶ Code of Federal Regulations <https://www.ecfr.gov/current/title-16/chapter-I/subchapter-D/part-436>, 16 CFR 436(i)

⁷ Code of Federal Regulations <https://www.ecfr.gov/current/title-16/chapter-I/subchapter-D/part-436>, 16 CFR 436(q)



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