The FTC's Legal Authority to Ban Noncompetes

On April 23, the Federal Trade Commission—the nation's competition regulator—exercised authority granted by Congress to adopt a rule banning noncompete clauses. The rule will promote and protect free and fair competition by ensuring employers can compete to hire the best worker for the job and that workers can choose the job that's best for them—including by being free to start their own competing business. By promoting competition, the rule will boost dynamism and innovation in the economy, lower prices, and raise wages.

The rule is scheduled to take effect on September 4, yet some are jumping to predict a court will enjoin it, prohibiting the rule from going into effect. However, as scholars steeped in the issues know, the FTC's authority to issue the rule is settled law. The plain text of the Federal Trade Commission Act (the "FTC Act" or the "Act") grants the Commission the authority to promulgate this rule. Section 5 of the Act declares "unfair methods of competition" to be unlawful and "empower[s] and direct[s]" the FTC to prevent their use. Noncompetes directly and indirectly restrain workers from working for competitors or starting competing businesses, and likewise cut off competition among employers for workers' labor services. Foreclosing competition is in their name. Even before the rule issued, the FTC has successfully brought enforcement actions against companies on the basis that their noncompetes are unfair methods of competition,[1] and no one disputes that the FTC can use case-by-case enforcement to stop noncompetes.

Just as the FTC can address noncompetes through unfair methods of competition enforcement cases, it has the authority to issue rules declaring noncompetes an unfair method of competition. Section 6(g) of the FTC Act authorizes the FTC to "make rules and regulations for the purpose of carrying out the provisions of" the FTC Act, including its prohibition of unfair methods of competition under Section 5 of the Act. This language means what it says: the FTC can issue substantive rules—meaning rules that have the force of law—to prevent unfair methods of competition. Proceeding by rulemaking rather than case-by-case enforcement is a much more efficient way to address noncompetes. Notice-and-comment rulemaking affords all market participants a much more inclusive opportunity to participate in the process. In fact, over 26,000 commenters did so, with over 25,000 supporting a complete ban on noncompetes.

Moreover, there is nothing novel about the FTC issuing substantive rules under Section 6(g). Indeed, the FTC has issued more than 25 such rules. Many of these rules received significant public attention, like our 1964 rule requiring cigarette warnings in the wake of the Surgeon General's report on the health effects of smoking. For decades, consumers have benefitted from mandatory terms in consumer credit contracts and octane ratings on gas pumps, all thanks to regulations adopted under the same authority underlying the noncompete rule.

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[1] *See* FTC, In the Matter of Anchor Glass Container Corp.; In the Matter of Ardagh Group, et al.; In the Matter of O-I Glass, Inc.; In the Matter of Prudential Security, et al.

Unsurprisingly, the FTC's authority to issue substantive rules has been upheld by courts—by the D.C. Circuit in *National Petroleum Refiners Association v. FTC*[2] and by the Seventh Circuit in *United States v. JS&A Group*.[3] No court has held otherwise. And Congress has affirmed these decisions by passing laws expressly recognizing the FTC's authority to issue substantive rules.

Specifically, when it amended the FTC Act in 1975, Congress expressly preserved the FTC's authority to issue substantive rules under Section 6(g).[4] Congress again evinced its belief that Section 6(g) gives the Commission authority to make rules preventing unfair methods of competition when it amended the FTC Act again in 1980. Those amendments confirmed the FTC's authority to issue substantive rules under Section 6(g),[5] including rules with a "significant impact" or "substantial" effect on the nation's economy.[6]

Some prognosticators assume a court will find the rule violates the Supreme Court's new "major questions" doctrine. But that doctrine is reserved for "extraordinary cases" in which an agency asserts a novel and expansive power of such economic and political significance that greater clarity from Congress than usual is needed to confer such authority.[7] Here, Congress has provided a crystal clear grant of authority, which the FTC has exercised repeatedly and which both Congress and courts have repeatedly reaffirmed. Indeed, bipartisan Members of Congress have applauded the FTC's exercise of its rulemaking authority to ban noncompetes.[8] Put simply, addressing noncompetes is at the core of our Congressional mandate to prevent unfair methods of competition.

Nor is the rule impermissibly retroactive. It applies purely prospectively, requiring only that employers not enter new noncompetes after September 4 and that for workers other than senior executives, employers not sue (or threaten to sue) their workers for a purported violation of any noncompete after September 4. Existing noncompetes for senior executives remain enforceable even after the effective date, and for all workers any causes of action that arose from alleged breach of a noncompete before September 4 is unaffected. As courts have explained, "A rule that

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[2] 482 F.2d 672, 698 (D.C. Cir. 1973) (holding "that under the terms of its governing statute…and under Section 6(g)…the Federal Trade Commission is authorized to promulgate rules defining the meaning of the statutory standards of the illegality the Commission is empowered to prevent").
[3] 716 F.2d 451, 454 (7th Cir. 1983).
[4] 15 U.S.C. 57a(a)(2) (preserving the "authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce").
[5] 15 U.S.C. 57b-3(a)(1) (defining "rule" as "any rule promulgated by the Commission under section 6 or section 18," and *excluding* from the definition of "rule" "interpretive rules, rules involving Commission management or personnel, general statements of policy, or rules relating to Commission organization, procedure, or practice," thereby demonstrating Congress's understanding that the FTC maintained authority to issue substantive rules).
[6] *Id.* (defining "rule" as regulations that "have an annual effect on the national economy of $100,000,000 or more," "cause a substantial change in the cost or price of goods or services," or "have a significant impact upon" persons and consumers).
[7] *W. Va. v. EPA*, 597 U.S. 697, 721 (2022)
[8] Young, Colleagues Applaud FTC Proposed Rule to Ban Non-Compete Agreements Across Economy - Senator Young (senate.gov); https://x.com/ChrisMurphyCT/status/1783175390313205826; https://x.com/mattgaetz/status/1783149296625365069.

'alter[s]' the past legal consequences of 'past action' is retroactive," while a rule that "'alter[s] only the 'future effect' of past actions, in contrast, is not."[9] Here, no penalties attach to persons who entered noncompetes before September 4.

Finally, contrary to claims by some, the FTC's rulemaking authority does not violate the non-delegation doctrine, which requires rulemaking to be guided by "an intelligible principle."[10] In *A.L.A. Schechter Poultry Corp. v. United States*, the Supreme Court specifically explained that Congress had permissibly delegated to the FTC the authority to determine whether a practice is an unfair method of competition.[11]

With the noncompete rule, the FTC is doing precisely what the FTC Act directs us to do: taking action to protect competition based on the best evidence available. The Court's antitrust precedents teach us that "the unrestrained interaction of competitive forces" tends to yield lower prices, better wages and working conditions, and higher quality products.[12] Over the past decade, a significant body of evidence has established that noncompetes cause harm by suppressing competition in labor, product, and service markets. Noncompetes obstruct competitive forces, to the detriment of consumers, workers, and rival businesses. As the nation's regulator entrusted to protect competition, addressing this problem—and ensuring that the American people can enjoy the benefits of free and fair markets—is at the heart of our mandate.

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[9] *Burwell*, 155 F. Supp. 3d at 44 (quoting *Ne. Hosp. Corp. v. Sebelius*, 657 F.3d 1, 14 (D.C.Cir.2011)); *see also DIRECTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C.Cir.1997).
[10] *Mistretta v. United States*, 488 U.S. 361, 372 (1989).
[11] 295 U.S. 495, 532-33 (1935).
[12] *See, e.g.*, *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).