

1 FTC PUBLIC FORUM

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5 FEDERAL TRADE COMMISSION

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PUBLIC FORUM

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OFFICE OF POLICY AND PLANNING

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2 CHAIRPERSON KHAN: Hello,
3 everybody. Welcome. My name is Lina Khan, and
4 I'm chair of the Federal Trade Commission.
5 Thank you so much for joining today's public
6 forum.

7 As you all know, last month the
8 Federal Trade Commission proposed a new rule
9 that would ban employers from imposing
10 noncompete clauses on their workers. Today,
11 we'll be holding a public forum to hear
12 directly from workers, business owners,
13 investors, and others to learn more about their
14 experiences with these contractual terms.

15 Noncompetes were long assumed to
16 apply mainly to high-level executives with
17 access to sensitive corporate information, but
18 their use has significantly expanded in the
19 past few decades, now binding about one in five
20 American workers across income and job levels.

21 By design, noncompetes close off a
22 worker's most natural alternative employment
23 options, which are jobs in the same
24 professional field or geographic area.

25 Noncompetes can hinder a worker's ability to

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2 pursue better opportunities, even harming those
3 who are not personally bound by one. Notably,
4 the FTC has estimated that the proposed rule
5 could increase workers' earnings by \$250
6 billion to \$296 billion per year.

7 Noncompetes also keep people locked
8 into jobs that might not be the best job for
9 them. Research shows that our whole economy is
10 more productive when workers can match better
11 with jobs and companies that can match better
12 with workers in turn. A recent poll suggests
13 that noncompetes can prevent this from
14 happening. According to the poll, two in five
15 Americans would be more likely to search for a
16 new job if employers were prohibited from using
17 noncompetes.

18 In the aggregate, we see evidence
19 that noncompetes are stifling innovation,
20 entrepreneurship, and new business formation.
21 Locking workers into jobs can prevent employers
22 from hiring qualified workers, enabling
23 dominant firms to close off the market to new
24 rivals and undermining healthy competition.

25 The Commission's proposal

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2 preliminarily binds that noncompetes are an
3 unfair method of competition and violate
4 Section 5 of the FTC Act. Because employers
5 often try to use noncompetes even when they're
6 unenforceable, the rule would require companies
7 to proactively notify workers that are
8 currently subject to noncompetes and let them
9 know that those restrictions are now void.

10 This proposal draws on deep
11 expertise that the FTC has been building
12 through pursuing enforcement actions, studying
13 empirical evidence, and reviewing comments from
14 the public.

15 Today's forum and the public
16 comment period are critical to our efforts.
17 The proposed rule that we've put out is just a
18 proposal, and before we can finalize the rule,
19 we need to closely review the public input and
20 comments that we receive to make sure any final
21 proposal reflects what we've received in the
22 record. So what we hear from you-all both
23 today as well as through any written comments
24 in the public docket really matters.

25 Our proposal lays out some specific

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2 questions that we're especially eager to
3 receive feedback on, as well as some
4 alternative proposals that we're considering.
5 I'm thrilled that we've already received an
6 outpouring of public comments and encourage
7 those who haven't yet submitted one to consider
8 doing so.

9 Today we're going to continue
10 building on this public record by convening a
11 panel of market participants. We will also
12 hear from my colleagues, Commissioner Slaughter
13 and Commissioner Bedoya, whose expertise and
14 leadership on this issue have been instrumental
15 in developing this proposal.

16 The forum will also include remarks
17 from members of the public who have signed up
18 to provide comments. I understand we've really
19 received a lot of interest for people to come
20 speak, and we couldn't accommodate everybody;
21 but as I mentioned, our public docket remains
22 open, so anybody who couldn't join us
23 virtually, please do consider submitting a
24 written comment.

25 I'm so grateful to the FTC staff

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2 for their thorough work on this, and I'm also
3 appreciative of the scholars, advocates, and
4 journalists whose work really shed light on the
5 prevalence of use of noncompetes across the
6 economy and really helped drive forward this
7 proposal.

8 I'll now turn it over to Marie Choi
9 from the FTC's Office of General Counsel to
10 provide a brief overview of the rulemaking
11 process before we start with today's panel.

12 Marie, over to you.

13 MS. CHOI: Thank you, Chair Khan.

14 Good afternoon, everyone.

15 I'll be speaking briefly about
16 public comments. I'll first explain how the
17 public comment process works by giving you some
18 context about how it fits into the greater
19 rulemaking process, then I'll explain how
20 public comments inform the agency's
21 deliberations. So first let's talk about the
22 rulemaking process.

23 For the potential rule to ban
24 noncompete clauses there are three main steps.
25 The first step is to issue a notice of proposed

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2 rulemaking or NPRM. That has already been
3 done. The NPRM was first published in the
4 Federal Register on January 19th, 2023.

5 The second step is the public
6 comment period, which is where we are now. The
7 easiest way to file comments is online at
8 regulations.gov, and you can also read comments
9 submitted by other people there.

10 The comment period will close on
11 March 20th, and all comments must be received
12 on or before that date. The FTC will read and
13 consider all comments submitted during the
14 comment period before deciding what to do next.

15 If FTC decides to move forward with
16 the rule, the third and last step will be to
17 publish a final rule notice in the Federal
18 Register. The FTC's decision will be based on
19 the rulemaking record, which consists not only
20 of comments but also studies and other
21 information collected by the agency as it
22 developed the rule.

23 Now I'm going to explain how
24 comments inform the agency's deliberations.
25 Public comments are an important part of the

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2 rulemaking process. They give all people an
3 opportunity to have a say in the FTC's proposed
4 rule. This is a great way for the FTC to hear
5 directly from you and anyone else who would be
6 affected by the proposed rule.

7 Everyone is welcome to comment:
8 individuals, workers, employers, small
9 businesses, large businesses, trade
10 associations, researchers, academics, and so
11 on.

12 Having many comments from a diverse
13 group of people and businesses will help the
14 agency make a more informed decision. Over
15 5,000 people have already commented on the
16 NPRM, and more comments are coming in every
17 day.

18 Your comments may provide a
19 viewpoint that the FTC wasn't aware of or give
20 additional insight on the impact of a proposed
21 rule or any of the alternatives that were
22 proposed. Your comments will help the FTC
23 decide whether it will proceed with the
24 proposed ban on noncompetes as written, whether
25 it will make any changes, whether it will

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2 proceed with one of the alternatives proposed
3 in the NPRM, or whether it will even proceed
4 with issuing a rule at all.

5 The FTC is seeking comment on many
6 different aspects of the NPRM, from the factual
7 background to the evidence about the effects of
8 noncompete clauses on competition, to the FTC's
9 preliminary determination that noncompete
10 clauses are an unfair method of competition.

11 The FTC is also seeking comment on
12 the text of the proposed rule, the different
13 alternatives that are presented, and the FTC's
14 analysis of cost and benefits.

15 Now I have a slideshow that I'm
16 going to -- that will show you how to submit a
17 comment on [regulations.gov](https://www.regulations.gov).

18 If you go to [regulations.gov](https://www.regulations.gov), you
19 will see a search bar, and if you enter
20 noncompete clauses rule, NPRM, or FTC-2023-0007
21 into the search bar, the noncompete rule should
22 be on the top of the search results.

23 To submit a comment, you can click
24 directly on "comment" from the search results,
25 or you can click on the link which will take

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2 you to the proposed rule page, and from there
3 you can submit a comment.

4 This is what the comment page looks
5 like. And as you can see here, if you scroll
6 down, the comment page allows you to attach
7 files. And it's particularly helpful when
8 comments include supporting material such as
9 empirical data, findings, or analysis of
10 published reports or studies, so we encourage
11 you to attach these materials to your comments
12 if you have them.

13 Finally, I want to note that
14 today's session is being recorded and
15 transcribed, and the transcript will become
16 part of the rulemaking record.

17 Next, I want to introduce the head
18 of the FTC's office of policy planning,
19 Elizabeth Wilkins. She's going to provide some
20 further details about the Commission's proposed
21 rule, and after that she's going to kick off
22 today's panel discussion.

23 MS. WILKINS: Thanks so much,
24 Marie. That was a great overview of the
25 rulemaking process. And I just want to

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2 reiterate one more time, we are ready and eager
3 and interested to understand the public's
4 comments on our proposed rule, so thanks so
5 much, Marie, for breaking it down for folks and
6 making it clear how people can participate in
7 our rulemaking process.

8 Today we've got a panel of folks
9 who have personal experience with noncompetes,
10 and we'll hear a little bit about what that
11 experience is and have that discussion before
12 opening up for public comment. But before we
13 get into that, I would like to take a moment to
14 explain, hopefully in relatively plain terms,
15 exactly what the text of the proposed rule is
16 and how it would function, before we get into a
17 discussion.

18 So first I'll talk about the
19 proposed rule itself, including how noncompetes
20 are defined in the rule and who qualifies as a
21 worker, and then I'll talk about some of the
22 exceptions, and also, finally, what employers
23 would have to do to comply if the rule was
24 finalized as it's been proposed.

25 So as Chair Khan explained, the

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2 proposed rule would prohibit noncompete clauses
3 between employers and workers. What that means
4 is under the proposed rule, employers would not
5 be able to enter into a noncompete clause with
6 a worker, enforce a noncompete clause, continue
7 to require workers to sign existing or template
8 employment contracts that contain such clauses,
9 or tell a worker that that worker is bound by a
10 noncompete.

11 Under the proposed rule, "worker"
12 is defined relatively broadly as any person who
13 works. That includes employees, but it also
14 includes independent contractors, externs,
15 interns, volunteers, apprentices, and business
16 owners who provide a service to a client or
17 customer.

18 In addition, under the proposed
19 rule, a noncompete clause is defined broadly as
20 well, to include any agreement that prevents
21 the worker from working somewhere else or
22 starting another business after the term of
23 their employment ends.

24 It's important to note that this is
25 a functional definition. It means any

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2 agreement that functionally keeps a worker from
3 looking for or accepting -- or from accepting
4 another job or operating another business after
5 they leave their current job. This may
6 include, for example, a different kind of
7 agreement -- like a nondisclosure agreement or
8 a training repayment agreement -- that is so
9 broad that it functionally blocks a worker from
10 working anywhere else in their field.

11 That said, the proposed rule does
12 not cover over types of agreements that don't
13 prevent a worker from taking another job, like
14 a run-of-the-mill nondisclosure agreement.

15 In terms of exceptions, as we said,
16 this is a -- this is a proposal for a broad
17 prohibition, but an important exception is that
18 the rule does not cover noncompetes that are
19 used in the sale of a business or noncompetes
20 that are between franchisors and their
21 franchisees.

22 Finally, in terms of compliance,
23 the proposed rule says that employers could
24 comply with it by removing noncompetes from
25 their employment agreements and providing

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2 affirmative notice to their workers, and it
3 includes a sample notice.

4 That is a quick overview of exactly
5 what the proposed rule would and wouldn't do,
6 and that's the proposal that we'll be
7 discussing today, as Chair Khan introduced.
8 We've asked a number of questions about the
9 scope of the rule, about our background and our
10 justifications for the proposed rule, and today
11 we'll hear from people who have direct
12 experience with these types of clauses to
13 understand a little bit better how they
14 function, what their effects are, what they're
15 used for, and so on.

16 So without further introduction,
17 we'll jump right in to our first speaker. Our
18 first speaker is Steve Cox. He's president of
19 Steam Logistics in Chattanooga, Tennessee.

20 Steve, take it away.

21 MR. COX: Thank you very much.

22 As she said, my name is Steve Cox,
23 and I'm president of Steam Logistics. Steam
24 Logistics is a third-party logistics company
25 based in Chattanooga, Tennessee.

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2 Noncompete agreements are pretty
3 rampant in the logistics industry. Many of
4 them -- many are from the largest companies in
5 the industry, and they have them kind of as a
6 means to bully young people who are financially
7 unable to defend themselves; and they bully
8 people into sitting out of our industry for a
9 period of time after their employment ends with
10 that company.

11 And that ending can be for any
12 reason: quitting, being fired, even a company
13 layoff. And I guess imagine not being able to
14 work in your industry because your company laid
15 you off; and no fault of your own, you can't
16 make a living.

17 Many of these agreements are signed
18 by young people who are fresh out of college,
19 signed as a part of their employee setup packet
20 at the time when they start with a company, and
21 most have no idea what they're really signing
22 and what it means for them. I remember signing
23 my employee packet in -- when I was 22 years
24 old. I certainly didn't read it.

25 Oftentimes, they're not allowed to

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2 even take the document home and read it. And
3 even if they did, many wouldn't -- few would be
4 able to afford an attorney to review and kind
5 of explain the noncompete to them.

6 And I think one of the most
7 peculiar things about noncompetes in logistics
8 is the fact that I haven't come across a single
9 company who has a noncompete who is proud of
10 having the noncompete. They tend to operate in
11 the shadows. It's something that they would
12 rather avoid talking about publicly. I think
13 they just want to use it to bully their young
14 people into not working for another logistics
15 company and stop them from looking for a better
16 opportunity, frankly, that pays more and is a
17 better fit for their talents.

18 So this is pretty much -- it says
19 so much about the practice, in my opinion, that
20 nobody in the freight industry really likes
21 them.

22 So 18 months ago we started a
23 campaign to end noncompetes. We went on
24 LinkedIn and stated that we would post any
25 noncompete enforcement case that any of the

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2 logistics companies brought against us, and
3 that was 18 months ago. Not a single company
4 has sued us over the noncompete agreements that
5 we are currently violating. We're violating
6 around 100 noncompete agreements at this
7 moment.

8 So we found out that shining a
9 white hot spotlight on you enforcing a very
10 unpopular practice isn't something that anyone
11 has actually wanted; so honestly just saying --
12 you know, my point in saying that is the court
13 of public opinion has really spoken, and it has
14 spoken very loudly.

15 In logistics, we have had 132
16 companies join us at -- in noncompetes.com.
17 It's a site that we spun up about a year and a
18 half ago, and this just shows how much support
19 there is out there in this cause in the
20 business commune.

21 When a company or lobbyist tells
22 you that they need a noncompetition agreement
23 to protect their company, that's absolutely
24 false. They can protect their interests with
25 nondisclosures, nonsolicitation agreements.

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2 That covers their intellectual property, their
3 customers, and recruiting their employees. So
4 noncompete agreements just simply restrict the
5 movement of people in the industry, and it's
6 very unnecessary.

7 We think the practice results in a
8 lot of waste in our industry. The industry
9 suffers because experienced talent must sit out
10 once their employment ends. That means these
11 talented individuals end up having to start
12 over in another industry, and they're replaced
13 in our industry by new, inexperienced college
14 graduates who are expensive so train; and that
15 cycle just kind of continues to repeat itself,
16 and it's super inefficient.

17 Wages suffer. When valuable talent
18 has to leave the industry because of a
19 noncompete, they end up going to another
20 industry where their experience is less
21 valuable, and that certainly compresses wages
22 for them.

23 Also, companies are not really
24 forced to improve the experience for their
25 workers. If there's no noncompete, companies

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2 would be under a lot more pressure to improve
3 the experience for their workers. Workers
4 would be free to move to companies who have a
5 better experience and offer a better quality of
6 life.

7 So in the end, for us, we just
8 believe it's -- the only thing that a
9 noncompete agreement does is restrict the
10 movement of the workforce unnecessarily; and
11 obviously, we're very against them. We've come
12 out publicly doing that.

13 So thank you very much for the
14 opportunity to speak.

15 MS. WILKINS: Thanks so much,
16 Steve. Really appreciate it.

17 Next we'll hear from Johnna
18 Torson. She served as chief HR officer and
19 also a member of the senior management team for
20 close to 30 years at Pitney Bowes before her
21 recent retirement.

22 Johnna.

23 MS. TORSONE: Thank you.

24 Good afternoon, and thanks to the
25 FTC for the opportunity to address the

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2 Commission. As you've noted, I had many years
3 as a CHRO; and also, previous to that, I was an
4 employment lawyer for 15 years.

5 So in these -- both of these
6 experiences I had, you know, an extensive
7 experience with the administration of
8 noncompete agreements and was subject to one
9 myself; but my participation today is -- is on
10 behalf of the Human Resources Policy
11 Association, a membership organization
12 representing the chief human resources officers
13 of more than 400 of the largest corporations
14 doing business in the United States and
15 globally.

16 The association and I believe that
17 noncompetes, when used responsibly and are
18 reasonable in scope and duration, can help
19 companies protect vital investments and their
20 employees while ensuring the security of
21 research and development, trade secrets,
22 critical strategic plans, and institutional
23 knowledge. As such, we oppose this blanket
24 restriction on the use of noncompetes.

25 According to a recent survey by the

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2 HR policy association, large companies
3 typically subject executives and equity
4 recipients to noncompete for up to one year
5 after departing from a company. In addition,
6 it was found that any noncompete negotiations
7 and violations are infrequent.

8 This mirrors -- this mirrors my
9 experience as well, so I strongly urge the FTC
10 to consider issuing a final rule that
11 recognizes the distinction of the use of
12 noncompetes at the senior level. A blanket,
13 one-size-fits-all regulation prohibiting such
14 agreements across the board, including senior
15 officers and employees with access to trade
16 secrets and intellectual property, would have a
17 detrimental effect on the ability of companies
18 to implement leadership structures, invest in
19 new technologies, and retain key executives.

20 So thank you again for the
21 opportunity to speak before the Commission.

22 MS. WILKINS: Thank you so much,
23 Johnna.

24 Next we'll have Dr. Sameer Baig.
25 He is a hematologist and oncologist in Palm

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Coast, Florida.

DR. BAIG: Good afternoon. Thank you -- thank you for having me.

MS. WILKINS: Oh, Mr. Baig, I think -- there we go, got your video.

DR. BAIG: Sorry about that.

You know, it's difficult to discuss the various problems of our medical system in isolation, as each exacerbates and potentiates the effects of the others; however, of all these problems, the greatest is a noncompete clause.

The physician shortage is largely a manufactured crisis. It's a byproduct of noncompete agreements which are now ubiquitous in medicine. Every doctor today has to sign a noncompete. Noncompetes, particularly in medicine, are an instrument that solely serves the interests of the corporations while harming Americans.

Noncompete agreements allow healthcare corporations to create oligopolies by carving out territories, not much different than drug cartels. The motive is purely to

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2 ensure egregious profiteering by stifling
3 competition and controlling access to
4 healthcare.

5 For the first time in our history,
6 most American doctors are now employed; almost
7 75 percent. The safety net of independent
8 physicians is gone. The majority of doctors
9 now work for staffing firms that are owned and
10 operated by Wall Street private equity firms.
11 Consequently, the magnitude of the effect of
12 noncompetes has never been greater than it is
13 today.

14 Noncompetes completely suppress
15 competition, decrease access to physicians, and
16 have led to worse patient outcomes. That means
17 more avoidable suffering, more avoidable death,
18 and exponentially higher healthcare costs.

19 Noncompetes allow corporations to
20 create toxic and exploitative work conditions
21 for doctors, and even more importantly,
22 interfere with our medical decisionmaking.
23 This, in turn, creates a physician burnout,
24 which is now reported by more than 60 percent
25 of American doctors.

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2 A direct consequence of this is
3 that physicians have to leave their jobs, and
4 many are leaving medical practice entirely.
5 When doctors have to leave their jobs,
6 noncompetes block them from serving in their
7 own communities. This creates what are known
8 as medical deserts, a term used to describe
9 regions in this country where there are few or
10 no doctors at all.

11 What happens to these patients?
12 When doctors are being eliminated from the
13 community, the remaining doctors have to absorb
14 these populations. It's no wonder that it
15 takes months to see any physician at all today.

16 Noncompetes silence physicians from
17 whistleblowing. When corporations can threaten
18 physicians and their families with economic
19 warfare, all whistleblower protections mean
20 absolutely nothing. How do we expect doctors
21 to speak out about corporate practices that are
22 fraudulent or endanger human lives all in the
23 name of profit? We must decide if we want Wall
24 Street muzzling our doctors via force of
25 noncompete agreements.

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2 The results of noncompetes in
3 healthcare are being borne out right in front
4 of our eyes. How do we have a shortage of
5 physicians and less access to medical
6 healthcare but the highest healthcare
7 expenditure of any country only to get the
8 worst patient outcomes of any advanced nation,
9 yet somehow these corporations are making
10 record profits year after year? How does this
11 add up?

12 The formula is straightforward.
13 Monopolize and control the labor market with
14 tools like noncompete clauses, cut corners,
15 raise prices. Medical care suffers, but the
16 quarterly profit is up. And any other scenario
17 simply does not compute.

18 Noncompetes particularly in
19 medicine are immoral, unnecessary, and a clear
20 and present danger to the country. Medicine
21 cannot be treated just like any other business.
22 It's different. It's special. And access to
23 it must be protected by banning noncompete
24 agreements entirely.

25 To all those who are listening, I

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2 will conclude by saying this: You will all
3 someday be on the receiving end of the
4 healthcare system. Take heed to what you've
5 created.

6 Thank you for your time.

7 MS. WILKINS: Thank you, Dr. Baig.

8 Now we'll hear from Ross Baird, who
9 is the founder and CEO of Blueprint Local.

10 MR. BAIRD: Thanks, everybody.

11 Thanks to Chair Khan and the entire group for
12 having me around.

13 So I'm coming from a position of an
14 investor lens; you know, how do we get capital
15 into companies to grow, create jobs, grow our
16 economy, we've -- through different companies
17 involved, and we've invested over \$200 million
18 in over 100 companies and real estate projects;
19 and we've really focused on places, projects,
20 entrepreneurs that are typically overlooked by
21 mainstream capital.

22 And being able to start a new thing
23 coming out of a big successful thing is
24 absolutely critical to the dynamism of our
25 country. So a couple of facts.

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2 Nearly 100 percent of net new jobs
3 come from new businesses, according to The
4 Kauffman Foundation. And if you look at census
5 data, we're in a -- we're in a startup or new
6 business slump. There has been an uptick over
7 the last couple of years, but business
8 formation is around a 50-year low; and a large
9 part of that is businesses are not able to
10 access capital or the talent to grow.

11 Historically, the demise of large
12 companies and the creation of smaller companies
13 has been a natural part of our economic growth.
14 Half the S&P turns over every 20 years. But
15 we're seeing two different stories in the
16 country.

17 In our successful vibrant startup
18 ecosystems, we're seeing people leave
19 successful companies and start the next
20 generation of competitors, the entire economic
21 engine that Silicon Valley was founded on,
22 original companies like Fairchild Semiconductor
23 and HP, having children and grandchildren.

24 Here -- and I live in the Northern
25 Virginia area where you've got several

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2 generations coming out of AmeriCall Online,
3 which was, in the '90s, the most valuable
4 company in the country. And Steve Case, AOL's
5 founder, who is now a successful startup
6 investor, says successful companies like AOL
7 and HP have children and grandchildren, but you
8 need to have the people working for these
9 companies be able to compete in the next
10 generation.

11 If I look at where startup activity
12 is highest, states like California, Colorado,
13 Washington, Massachusetts, I think it's no
14 coincidence that noncompetes are lax, or in the
15 case of California, for example, not enforced
16 at all.

17 We need -- I heard Steve Cox talk
18 about Chattanooga. Chattanooga is an emerging
19 logistics hub. People call it freight alley.
20 And a lot of people leaving large,
21 billion-dollar logistics companies, starting
22 the next generation has been a driver of that,
23 whether it's freight in Chattanooga or
24 healthcare in Nashville or Minneapolis or
25 energy in Houston, our cities' economies

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2 require you being ex-Google or ex-HP or ex-AOL.

3 In a lot of places, we're not
4 seeing that. Investors looking at new
5 companies look for logos, look for track
6 record, look for experience; and when there
7 isn't the ability to start these next
8 generation of companies, new jobs, access to
9 capital is extremely limited.

10 So I just finally say, you know,
11 there are ecosystems like in California and
12 Washington where noncompetes have effectively
13 not been enforced for decades, and it's created
14 the next generation of dynamic companies; and I
15 think extending that right to anybody in
16 America who wants to start and grow a company
17 will cause more capital to flow, more jobs to
18 be created and ultimately be -- be a huge net
19 benefit for our society.

20 MS. WILKINS: Thank you so much,
21 Ross.

22 Our next speaker is going to be
23 Emily Glendinning. She's the vice president
24 and associate general counsel for employment
25 and the chief privacy officer for BAE Systems.

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2 Emily.

3 MS. GLENDINNING: Thank you so much
4 for inviting me. I'm Emily Glendinning, an
5 employment lawyer for BAE Systems. We're a
6 defense company here in Washington, D.C.

7 I previously worked for the law
8 firms Hogan Lovells and Wiley Rein,
9 representing companies on employment matters,
10 including drafting and enforcing noncompetes.
11 My remarks represent my views, not necessarily
12 those of BAE Systems.

13 Noncompetes protect companies'
14 confidential information and investment in
15 certain employees. Under current state laws,
16 noncompetes are only enforceable if they
17 protect a legitimate interest for a reasonable
18 period in a reasonable geographic area.
19 Employers cannot lawfully use noncompetes to
20 prevent someone from quitting, working in their
21 field, or simply working for a competitor in
22 any capacity.

23 The question before us is about
24 reasonable, enforceable noncompetes. Should
25 the FTC implement a nationwide ban on

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2 reasonable noncompetes that are enforceable
3 today in almost every state? The answer is no.

4 Noncompetes provide vital and
5 unique protections for companies, and the
6 evidence does not support this sweeping rule.

7 The FTC suggests companies don't
8 need noncompetes because nondisclosure
9 agreements and trade secret laws provide the
10 same protection, but noncompetes developed
11 because they provide a different kind of
12 protection.

13 If you've shared your most
14 confidential information with your employee,
15 how do you protect it when she's working for
16 your competitor? You could have her sign a
17 nondisclosure agreement or threaten trade
18 secret litigation, but because you can't
19 monitor her conduct anymore, you can't know
20 what she's disclosing. Even if she wants to
21 comply, she cannot excise your confidential
22 information from her brain. She knows what
23 avenues your competitor should follow and what
24 blind alleys it should avoid.

25 Noncompetes solved that problem.

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2 47 states have recognized the crucial
3 protections they provide that nondisclosure
4 agreements and trade secret laws don't.

5 Courts have said that if you as an
6 employer can show a legitimate, protectable
7 interest, your employee cannot do competitive
8 work for a competitor for a reasonable period.

9 Case law is full of examples where
10 the employer has not met that test. This is
11 and should be a highly fact-specific inquiry.
12 A noncompete may be enforceable for
13 higher-level employees but not lower-level
14 employees, or it may be enforceable for six
15 months but not for a year. There are too many
16 variables for a blanket ban to make sense.

17 I do think we think we should
18 address abuses. Every employment lawyer I know
19 agrees with President Biden that fast-food
20 workers should not have noncompetes. But this
21 rule would prohibit a CEO from negotiating a
22 noncompete. It would prohibit Jeff Bezos from
23 having a noncompete because he owns less than
24 25 percent of Amazon.

25 If the FTC is going to go down this

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2 path, it should tailor the rule to address real
3 harms. It should consider common sense for
4 forums, like prohibiting noncompetes for
5 lower-wage or nonexempt workers. I think it's
6 reasonable, too, to require employers to give
7 notice of a noncompete at the time a job offer
8 is made, not after the employee has started
9 work.

10 States are taking the lead on these
11 very issues. No state has banned noncompetes
12 since 1890, but in the past decade alone 27
13 states have changed their noncompete laws.
14 Some require companies to give -- to give
15 applicants notice of a noncompete, and many
16 have prohibited them for lower-wage workers.
17 Congress, however, has considered and declined
18 to take action on a nationwide noncompete rule.

19 The academic evidence on
20 noncompetes is limited and mixed, and experts
21 disagree on their effect on competition in the
22 market; but they do agree on the need for more
23 research. In the FTC's own 2020 workshop,
24 expert after expert said more empirical
25 evidence is necessary. They discussed

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2 common-sense reforms, but even the most zealous
3 advocate of curtailing noncompetes did not
4 argue for a nationwide ban with retroactive
5 effect.

6 Whether the FTC has the authority
7 to make this rule is a different discussion.
8 Today's discussion is about whether it should
9 make this rule, and the answer is no.
10 Noncompetes serve an important purpose that the
11 states recognize. The evidence is not clear or
12 convincing enough to support upending this
13 developing body of law and invalidating private
14 contracts.

15 As the FTC continues the rulemaking
16 process, it should focus on the common-sense
17 reforms we already see in the States.

18 MS. WILKINS: Thank you so much,
19 Emily.

20 Finally, we'll hear from Kevin
21 Borowske. He is a residential caretaker in
22 Minneapolis, Minnesota.

23 MR. BOROWSKE: Thank you,
24 Elizabeth.

25 Commissioners, my name is Kevin

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2 Borowske. For most of the last decade, my wife
3 and I have been caretakers in a condo in
4 Downtown Minneapolis, working for First Service
5 Residential. My wife and I live in the
6 building and do work to make sure everything is
7 running okay and clean and comfortable for the
8 residents. As caretakers, we respond to
9 resident emergencies around the clock, maintain
10 the building pool, clean the hallways and other
11 common areas.

12 You may have seen my story in the
13 news about my public push to form a union. Two
14 years ago, I led a class action lawsuit against
15 my employer for wage theft, and we won a
16 \$225,000 settlement for 100 workers. Since
17 then, I have been a vocal supporter of the
18 ongoing union organizing effort. I believe
19 that First Service fired me and my wife because
20 of my organizing work.

21 The firing is especially striking
22 because First Service never previously
23 disciplined myself or my wife. In addition to
24 firing me and my wife, First Service has forced
25 us to leave our home. We are fighting this

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2 apparent retaliation, but I'm here today to
3 talk about the salt in the wound that came with
4 this already frustrating and scary event.

5 Caretakers and desk employees at my
6 company had been forced to sign noncompete
7 agreements before we were hired. This
8 agreement prohibits us from doing similar work
9 in Minnesota for a year after leaving the
10 company.

11 The company reminded us of this,
12 firing and forcing us from our home of many
13 years. In their emails to us, they wrote, "At
14 the start of your employment you may have
15 signed a confidential noncompete document. The
16 provisions of this agreement survive your
17 employment ending date, so please be aware of
18 the items, processes, and contact information
19 that you should continue to hold confidential."

20 In other words, First Service fired
21 us, forced us from our home, and told us that
22 we cannot earn a living in our field for the
23 next year in Minnesota.

24 First Service Residential is the
25 largest property management company in North

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2 America. They have operations in 24 states.
3 It also has subsidiaries or affiliates, such as
4 Planned Companies, Paul Davis Painting,
5 CertaPro Painters. The company employs
6 hundreds in Minnesota and thousands nationwide.

7 The fact that so many workers sign
8 these noncompete agreements would be laughable
9 if it wasn't so common. It forces workers to
10 stay at companies instead of taking better
11 offers and holds down people's chances to make
12 a living when they leave. It means if you are
13 like myself and my wife and have done something
14 for a decade and you leave your company for
15 whatever reason, you can't do the work you're
16 most skilled at.

17 It's another way corporations are rigging the
18 system to make sure workers can't seek out
19 better pay and conditions.

20 I'm happy to say that after my
21 story was in multiple media outlets, my company
22 reached out to let me know they were revoking
23 the noncompete agreement for me, but it
24 shouldn't take a situation like mine and
25 considerable media attention to address this

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2 issue.

3 We know that First Service's
4 affiliate company, Planned Companies, which
5 provides building services in New York and New
6 Jersey, still includes no-hire agreements with
7 its clients, which denies workers their right
8 to seek the best possible job. Planned
9 Companies' anticompetitive contracts are the
10 subject of an FTC complaint filed by our sister
11 local union, SEIU Local 32 BJ.

12 I am thankful you are taking on the
13 issues at the national level. Finalize and
14 implement the rule now so employees can move
15 freely in the labor market. Do it now so
16 employees don't have to hire attorneys just to
17 change jobs.

18 Thank you for being a leader and
19 standing up for workers and their families.

20 MS. WILKINS: Thank you so much,
21 Kevin. And thank you to all our panelists for
22 coming to talk today about your experiences
23 about the effects of -- of these clauses. We
24 have a few minutes for a couple questions from
25 me, and conversation; and I would like to start

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2 with this one.

3 This is a question that I think is
4 primarily for Dr. Baig and for Kevin, but I
5 really welcome anyone else who would like to --
6 to jump in.

7 Our proposal, as the chair noted at
8 the top, preliminarily finds significant
9 impacts for workers' wages for noncompetes,
10 that they may depress wages by, you know, \$250-
11 to \$300 billion per year. We also talk about
12 -- and Kevin, you just mentioned -- they may
13 really have an impact on working conditions as
14 well.

15 I wonder -- and you both touched on this a
16 little bit, but I wonder if each of you could
17 -- could speak from your personal experience or
18 your understanding of what this looks like from
19 the worker's perspective: What kinds of
20 impacts can noncompetes have on working
21 conditions, if you can comment on that?

22 Maybe I'll -- I'll go to -- let's
23 see. Let's go to Dr. Baig first to give Kevin
24 a break, we'll go to Kevin, and anybody else
25 who wants to jump in, feel free.

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DR. BAIG: Sure.

So, I mean, the noncompetes, you know, completely --

MS. WILKINS: Oh, Dr. Baig, can we get -- somehow your video went off again. There we go. Thank you.

DR. BAIG: Sorry.

So noncompetes, you have -- they create a very perverse power dynamic. You know, I personally know in every hospital that I've worked in, and colleagues, friends, physicians that are managing way too many patients. Hospitals are not wanting to hire additional personnel, and that -- you know, we saw that in the pandemic.

And, you know, the -- especially in the pandemic, people were seeing too many patients under very poor conditions, and they had little to no recourse because protesting would probably get them fired or remediated of some -- remediation of some kind.

And where are you going to go? I mean, these noncompetes don't just ban you from that hospital or city, sometimes the entire

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2 region or the state, you know, depending on
3 your specialty; and so it really creates a
4 safety concern not only for, obviously, the
5 patients, but also the wellbeing of doctors.

6 I personally know a physician who
7 committed suicide, you know, and this was not
8 at some, you know, smaller hospital. This was
9 at a prestigious institution, and it shook
10 everyone that knew her. And I have no doubt
11 that it was the working conditions that she was
12 under. You know?

13 So I think it has a real impact on
14 safety of the workers and, you know, by nature
15 of what we do, safety for patients.

16 MS. WILKINS: Kevin, do you want
17 to -- first of all, thank you for those
18 comments, Dr. Baig.

19 Kevin, would you like to add
20 anything? Oh, you're muted.

21 MR. BOROWSKE: Yes. Thank you,
22 Elizabeth.

23 So I'm just going to speak from my
24 own personal experience, but it's certainly
25 relative -- relative to here.

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2 So my wife and I worked for First
3 Service for nearly a decade. So we got hired
4 at a -- at a very -- at a certain rate, I would
5 say maybe the going rate for our type of work.

6 Well, year after year, as we were
7 performing our -- our job and doing a good job,
8 the company would give us -- and fortunately, I
9 mean, I appreciate them giving us raises each
10 year, but they were rather insignificant; and
11 as we now know, especially the last few years,
12 inflation has gone up a lot.

13 Well, our wages didn't -- didn't
14 match inflation, so year after year we were
15 falling behind, and we weren't free to go and
16 seek other employment in the same field. So
17 for us, last year, we had to suffer through
18 while -- caretakers, new caretakers that were
19 hired last year, all started at a higher hourly
20 rate than my wife and I were getting after
21 nearly a decade.

22 That's my story.

23 MS. WILKINS: Thank you. I
24 appreciate that as well. I really appreciate
25 that.

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2 Slightly a different -- well, first
3 of all, before I go on, does anybody else want
4 to jump in on that, before I go to the next
5 question?

6 Sort of a -- sort of switching
7 gears a little bit, and I'll say maybe this
8 question is a little bit more for Johnna, Ross,
9 and Emily; but again, everybody is welcome to
10 jump in.

11 In our proposal, we -- the
12 Commission talks about the reasons for using --
13 some of the reasons for using noncompetes,
14 which folks have noted, including confidential
15 information. It also talks about some of the
16 ways in which it's actually really important,
17 in particular, for knowledged workers to be
18 able to change jobs because that's one of the
19 ways that we spur innovation.

20 And so I wonder whether -- whether
21 any of the three of you have more to say about
22 whether banning noncompetes even at the kind of
23 higher-income scale would, in fact, be positive
24 for, you know, sort of reasonable knowledge
25 exchange and innovation and, you know, what

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2 alternatives employers could or couldn't use
3 that would be consistent with allowing that
4 kind of beneficial knowledge transfer.

5 MS. GLENDINNING: Well, I can take
6 a first stab at this.

7 I think, as I said in my remarks,
8 you know, noncompetes really need to protect
9 the intellectual property asset that the
10 company has, and I think it's important to
11 think about that confidential knowledge as a
12 really important asset that the company has
13 invested in.

14 They've invested in training for
15 the employees. They've invested in giving the
16 employee the confidential information. And
17 that is something that a company needs to
18 protect just like it needs to protect its
19 physical assets.

20 And so thinking about things like
21 nondisclosure agreements or trade secret
22 litigation is part of the portfolio about how a
23 company wants to protect those assets, but I
24 don't think it covers the waterfront because of
25 those situations where an employee can't help

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2 but use or rely on that confidential
3 information in that next job with the
4 competitor.

5 So, you know, you wouldn't expect
6 your chief scientist, if they went to a
7 competitor, to rerun all of the failed
8 experiments they did with you just so they
9 weren't using your confidential information,
10 and I think it's those narrow situations that
11 noncompetes are really most useful.

12 MS. TORSONE: Yeah. And if I could
13 just add, I mean, we're really talking about
14 that exception at the senior level. With
15 senior executives and employees with this kind
16 of institutional critical, strategic, and
17 product-related insights, they -- they
18 shouldn't be carried over immediately to a
19 competitor for the reasons that I -- I
20 completely agree with what Emily just said.

21 Noncompetes provide a cooling-off
22 period, a reasonable cooling-off period to
23 protect these investments, to allow the
24 executives' information about the company's
25 sharing strategy and customers to -- to

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2 diminish, you know, to expire.

3 Without these protections, the
4 constant churn of talent will negatively impact
5 a company's ability to serve its customers, its
6 employees, and prevent competitive information
7 from being used against it.

8 And it's not -- you know, I
9 understand the broad discussion that's been had
10 here, but from our perspective at HRP, we're
11 looking for that -- you know, really focused on
12 that group of people that -- who, by the way,
13 are very sophisticated, have resources
14 available to them, are perfectly capable of
15 negotiating, you know, they're not -- you're
16 not looking at that imbalance in power; and
17 so -- and to request them to have a reasonable,
18 you know, limit on going immediately and using
19 knowledge that is difficult to fence off, as
20 Emily said, seems to me to be, you know, a --
21 an unreasonable approach, so...

22 MR. BAIRD: I think when it comes
23 to innovation -- and I certainly respect and
24 appreciate the arguments being made.

25 I think when it comes to

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2 innovation, this is really a policy choice.
3 Are we trying to optimize for companies
4 protecting their existing positions, or are we
5 trying to optimize for the mobility and success
6 of the average worker? Because they're
7 sometimes at odds.

8 And I think, you know, noncompetes
9 in highly skilled areas -- you know, pro sports
10 teams pay silly amounts of money so that you
11 don't leave and go compete against them in a
12 division rival. Wall Street banks have things
13 called gardening leave, where they'll
14 essentially pay you to do nothing for 12 months
15 after you leave so you don't take your
16 contacts while they're fresh and good.

17 Workers are compensated for the
18 kills and knowledge that they have, but things
19 like restaurants saying you can't work at the
20 chain restaurant across the street or Nike
21 saying you can't work for Adidas have created
22 labor shortages and is a massive problem.

23 And there's a think tank, Right to
24 Start, led by -- led by a guy named Victor
25 Hwang that did a survey, and 80 percent of

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2 Americans disagree with noncompetes, and I
3 think the average American feels -- and I think
4 we've heard some great stories here -- feels
5 that you should be prioritized over protecting
6 the position of your employer.

7 And it's a difficult policy choice,
8 and I certainly understand arguments across the
9 table; but I think -- I think that this
10 proposed rule does put the interests of the
11 worker and the next generation ahead, which
12 is -- which is the right balance, in my
13 opinion.

14 MS. WILKINS: I want to -- Steve,
15 we're -- you're the one person I haven't called
16 on yet, and I'll bring you into this
17 conversation because you also talked about
18 alternatives. We've been talking about trade
19 secrets law, nondisclosure agreements.

20 One of the things that you talked
21 about in your remarks was the things that
22 employers can do to -- the other things that
23 employers can do to induce their -- their
24 workers to stay.

25 You don't use noncompetes. Can you

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2 talk a little bit about how you think about --
3 and it sounds like some of your competitors do.

4 Are there things that you think
5 about that are alternatives to noncompetes for
6 your workers that you -- to retain them when
7 you want to?

8 MR. COX: Well, certainly.

9 You know, for us it's compensation.
10 And I think Ross mentioned that, about pro
11 sports teams, and we're obviously not a pro
12 sports teams; but, you know, if we're
13 compensating our people correctly and we have
14 the culture for them to want to stay here --
15 and I think we carefully cultivate that because
16 we -- we refuse to have a noncompete, so that's
17 something we closely pay attention to and do
18 everything we can to -- to have an environment
19 where people are excited and want to stay here.

20 And, you know, we have a
21 non-solicitation agreement, and we -- and we
22 sometimes have to enforce that.

23 But yeah, it's all about creating
24 an environment for our people to be excited to
25 stay here. I know that's fairly broad, but...

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MS. WILKINS: I appreciate that.

I'll check in to see if anybody else wants to jump in with anything else on this topic.

MS. GLENDINNING: Well, if I could just follow up on one thing that Steve said.

I appreciate, Steve, when you talk about, you know, compensation and you want to make the workplace a good place for your employees.

I think this rule goes too far in prohibiting private parties, employers and employees, from bargaining over a noncompete which may be in both of their interests.

You may have a worker who is delighted to accept the equity branch or the additional consideration or to take the job in the first place, fully agreeing to a noncompete with eyes wide open; and I -- as I said before, I think we should absolutely address abuse cases, but I don't think we should cut off that avenue where an employer and employee can come to a mutually bargained for good solution for them.

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2 MS. WILKINS: Thank you all for
3 that.

4 MS. TORSONE: And the other thing,
5 I -- I would add to that that at the senior
6 level very often you have -- you know, you will
7 have a transition and you'll have a severance
8 and transition agreement; and if there's a
9 noncompete, very often -- not very often, but
10 in few experiences where this became an issue
11 at the senior level, if they went to -- they
12 would come and say -- have a discussion and
13 say, well, you know, is this -- what do you
14 consider this to be within this -- you know,
15 this ban?

16 And unless you were really going --
17 we were concerned that you were going to really
18 harm the company, you work these things out at
19 the senior -- senior level.

20 So I understand and I agree in
21 terms of the -- I understand that the -- nobody
22 thinks that we should have these -- we
23 shouldn't protect against abuses, but that's
24 not what we're talking about at HRP. We're
25 asking for this -- you know, for this

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2 exception, which I think is -- is, again, a
3 reasonable one.

4 MS. WILKINS: Oh, Kevin, go ahead.

5 MR. BOROWSKE: Yes, I'd just like
6 -- like to add, just kind of bringing it back,
7 and I think this noncompete for -- I mean, I
8 understand at higher levels. I'm just not
9 going to respond to that.

10 But there's literally, you know,
11 millions of people that have these noncompetes
12 that are just not necessary, and they're just
13 holding us back, like my example. If my
14 employer wanted to keep me and retain me, he
15 should have paid me rather than holding up the
16 piece of paper saying, "Guess what? You can't
17 go unless you want to leave your business."

18 In fact, for me, our building is
19 shared with the hotel. The hotel offered me
20 their chief engineering job last December. I
21 couldn't take it because of the noncompete.

22 Just wanted to share that.

23 MS. WILKINS: Thank you. Thank
24 you, Kevin.

25 Oh, Dr. Baig?

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2 DR. BAIG: You know, I think Kevin
3 makes a good point.

4 You know, you want to keep your
5 people? Pay them. You know, keep -- create an
6 environment that is -- is, you know, nice to be
7 around. You know, don't create toxic
8 environments.

9 And I wholeheartedly disagree with
10 noncompetes on any level. I think, you know,
11 even at an executive level, if somebody wants
12 to leave, who are you to tell them that, you
13 know, "You're too smart. You can't go to this
14 company for a period of two years and use your
15 brain"?

16 You know, find a way to keep them.
17 The people at the top are making plenty of
18 money. These companies have plenty of
19 resources. They have non-solicitation
20 agreements, they have nondisclosure agreements,
21 they have patents, and they have an army of
22 lawyers.

23 You know, so I'm sure -- just, you
24 know, someone else mentioned that you can come
25 to some sort of arrangement if you're leaving.

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2 Yeah, you can do that without the noncompete
3 too. You can just have, you know, like an --
4 make an agreement to that, hey, we're going to
5 set some terms that, you know, when you leave
6 the company, we're going to decide, like, you
7 know, all these -- all these, like, you know,
8 terms at the end -- or conclusion of your work
9 here. You don't necessarily need the
10 noncompete there.

11 MS. WILKINS: I think, Dr. Baig,
12 you went a little bit to what may be the final
13 question that I'll put to the panel. We'll
14 see.

15 I think we've been talking -- well,
16 the proposal sort of recognizes that there are
17 different categories of workers, and so we may
18 want to think about the dynamics differently.

19 We, in the proposal, concluded that
20 a ban was appropriate even though some of these
21 dynamics are different at different levels of
22 the workforce. We've been talking about sort
23 of low-wage workers a lot, we've been talking
24 about senior -- senior executives and the
25 dynamics there.

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2 There is a category of sort of
3 high-wage workers who one might think they
4 might be better able to read their employment
5 contracts and understand what's going on, but
6 they're not the senior executives that kind of
7 have a lawyer, you know, bargaining on their
8 behalf.

9 And I'm looking at you, Mr. Baig,
10 you're -- Dr. Baig. You're a doctor. You
11 talked a little bit about to what degree folks
12 know, you know, what they're getting into.

13 This is I guess -- and I don't want
14 to mischaracterize anybody's -- anybody's
15 comments here so feel free to push back if I've
16 misrepresented, but I'd be interested in
17 hearing both from -- from Dr. Baig and from --
18 from you, Emily, a little bit on this category
19 of not necessarily senior executives, but they
20 could be knowledge workers, they could be
21 higher-wage workers where there are some
22 tensions around kind of -- maybe they have
23 trade secrets or confidential information, but
24 maybe they still don't have a lawyer to -- to
25 bargain for them, or they may not fully

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2 understand what they're getting into.

3 How should we think about the
4 dynamics there about this proposed ban and
5 alternatives?

6 DR. BAIG: You know, I think aside
7 from being, you know, part of the 1 percent,
8 nobody can afford prolonged, protracted
9 litigation in the United States. You know, I'm
10 triple specialized in internal medicine,
11 hematology, and oncology. I still cannot
12 understand my employment contract without an
13 attorney.

14 And I think even at, you know,
15 higher education levels, to -- to say, "Well,
16 you're smart enough. You can understand this
17 legalese," that's not fair. You know, that's
18 kind of where I stand with that.

19 What was the second part of your
20 question?

21 MS. WILKINS: It was just the -- it
22 was sort of the -- to hear from both of you or
23 anybody else on the panel about the balance of
24 these concerns, that if these -- some workers
25 who we are most worried about their

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2 confidential information but also still don't
3 have kind of the ability to hire a lawyer, how
4 should we think about the trade-offs there.

5 So I don't know -- I think you
6 fully answered it, potentially.

7 MS. GLENDINNING: I think from my
8 perspective, it's incumbent on companies to
9 really stay focused on their protectable
10 interest, and that protectable interest in the
11 form of confidential information, trade
12 secrets, can exist at different levels in the
13 company.

14 It's most likely concentrated in
15 the higher-wage workers, but we may have people
16 who we call executives who don't really have
17 that kind of information that we're concerned
18 about when they leave. We may have mid-level
19 workers with access to highly sensitive
20 technical information, and a noncompete would
21 be appropriate for them.

22 So I think it does make sense to
23 think about the -- the kind of wage scale of
24 the workers, but not with a bright-line rule
25 for executives.

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2 I think staying laser focused on
3 can you articulate a protectable interest is
4 really where we need to be and, frankly, where
5 the states are and have been for quite some
6 time.

7 I think too, you know, we trust
8 people to enter into all kinds of contracts all
9 the time; and, you know, a mortgage agreement
10 may be confusing for someone, but that doesn't
11 mean we ban mortgage agreements.

12 So I think we can focus on
13 providing information, providing education, but
14 I think to say no one can have a noncompete
15 because there may be some workers who are
16 confused by them, to me is just too draconian a
17 response.

18 MS. WILKINS: Does anybody else
19 want to jump in here on this point?

20 MR. BAIRD: Yeah, I might -- I
21 might just say -- and I -- and I'm interested
22 in -- you know, I would be interested in the
23 FTC's findings of -- for example, Washington
24 has a blanket ban on noncompetes under a salary
25 level and different wages above a certain

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2 level, and I would be interested in looking at
3 pros and cons of that.

4 I mean, I think the stories of home
5 health aides and restaurant workers being sued
6 by their employers is absolutely ridiculous,
7 and -- and I think most Americans agree with
8 that.

9 I think when you get into sensitive
10 and confidential information, I would think
11 that nondisclosure agreements, non-solicitation
12 agreements, cooling-off periods are ways that
13 are probably more pro worker, more pro
14 employee; and I would say if you look at
15 industries like banking and life sciences,
16 typically employees who have better access to
17 lawyers or are more sophisticated with
18 contracts tend to not, themselves, have
19 noncompetes, and I might -- I might let that
20 speak for itself.

21 I certainly understand and respect
22 the very, very sensitive concerns around trade
23 secrets and confidential information. I just
24 might look to the noncompete as a last resort
25 versus a first one because of the chilling

FTC PUBLIC FORUM

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2 effect it has on the rest of the economy.

3 MS. WILKINS: Any other folks that
4 want to jump in on this before we close?

5 Well, if not, I have to say, I -- I
6 just want to thank our panelists again for
7 coming on to chat. All of you have, as we said
8 before, firsthand experience. We've heard some
9 pretty personal stories, which I -- I just want
10 to say thank you for sharing. We've heard some
11 really interesting and well thought-out
12 perspectives on the importance, the effects,
13 the uses, the alternatives to noncompetes, and
14 this is the kind of information that the FTC
15 really wants and needs to consider seriously
16 how -- how to think about a final rule as we go
17 forward.

18 So thank you all very much for
19 taking some time out of your busy days to
20 participate in this, and -- and talk with us.

21 I'm now going to turn things over
22 to Commissioner Slaughter to give us a little
23 bit of a -- a reaction.

24 MS. SLAUGHTER: Thank you so much
25 -- sorry. There's my camera.

FTC PUBLIC FORUM

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Thank you so much, Elizabeth.

And let me start by thanking the chair for organizing this panel and to Marie for the great presentation up top and to all the staff who put this forum together.

To all of our panelists and the members of the public from whom we will hear next, I really thank you for being here today. Your participation in the FTC's rulemaking process is welcome and valued as we consider this rule about the rampant use of noncompete restrictions that limit the job mobility of workers.

The effects of noncompetes on your professional and personal lives about which we have just heard have been profound and deeply felt. For the individuals who are bound by a noncompete to an employer, it's a matter of their livelihood.

For Mr. Borowske, being subject to a noncompete meant not only being able to -- not be able to get a job in his field, it also affected his ability to find a new home.

Noncompetes may force workers to

FTC PUBLIC FORUM

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2 stay in exploitive and dangerous working
3 conditions; and as we heard from Dr. Baig, this
4 can endanger both healthcare workers and
5 patients.

6 Employers and business owners also
7 have strong views on noncompetes. On the one
8 hand,
9 Ms. Torsone and Ms. Glendinning shared their
10 views about how firms use noncompetes
11 particularly at the most senior levels out of
12 deep concern over trade secrets, critical
13 strategy, or confidential plans; on the other
14 hand, Mr. Cox spoke about how he thinks free
15 movement of employees within his industry is
16 good for his business and that it incentivizes
17 employers to provide great work environments.

18 Mr. Baird spoke about how new
19 business formation and spinouts from larger
20 firms are prevented by noncompetes.
21 Noncompetes can prevent start-ups from hiring
22 the workers they need, which in turn limits
23 business dynamism and investment.

24 I really appreciate the breadth of
25 perspectives we heard on this panel; and as

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2 Elizabeth noted, that information is really
3 important in our record in making sure that
4 the -- any rule, if we end up promulgating a
5 final rule, really reflects the best empirical
6 evidence, market realities, and information
7 from the public.

8 Since the issuance of the NPRM, the
9 FTC has received thousands of comments, and
10 more and more stories have come to light about
11 how there are noncompetes in nearly every
12 industry you can imagine. A sampling from the
13 record thus far of occupations with noncompetes
14 includes veterinarians; pharmacists;
15 programmers; hair stylists; music teachers;
16 call center tech support providers; senior
17 caregivers; journalists; STEM professionals;
18 house cleaners; many different retail and
19 service industry workers; and numerous types of
20 healthcare workers, from nurse practitioners to
21 pediatricians, to primary care physicians, to
22 oncologists and radiologists.

23 I look forward to learning the full
24 catalog of occupations affected by noncompetes
25 when the record is complete; and as we examine

FTC PUBLIC FORUM

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2 the complete record, I look forward to seeing
3 any additional -- any additional submissions we
4 get containing economic evidence.

5 The NPRM contains extensive
6 discussion of many economic studies, but to the
7 extent that there's more we should consider, I
8 welcome those submissions.

9 One of the great privileges of
10 working at the Federal Trade Commission is the
11 opportunity and responsibility we have to help
12 real people in their everyday lives. We offer
13 that help not only when we challenge massive
14 mergers, but also when we tackle the myriad
15 smaller ways in which people are denied agency
16 and autonomy.

17 When we fight fraud, manipulative
18 business opportunities, anticompetitive
19 schemes, and bogus fees, we help restore
20 meaningful choice and dignity to consumers and
21 workers. These principles are the bedrock of a
22 democratic society, but too often they're
23 denied to Americans who are not rich and
24 powerful.

25 A careful examination of the

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2 rampant use of noncompetes that restrict the
3 job mobility of workers advances our mission by
4 ensuring that workers have the chance to
5 compete to earn a fair wage and
6 family-supporting benefits.

7 I'm now going to turn the mic over
8 to Peter Kaplan to facilitate the public
9 speaking portion of the meeting.

10 Peter?

11 MR. KAPLAN: Thank you,
12 Commissioner Slaughter.

13 Before we begin, I want to remind
14 our next speakers that the FTC is recording
15 this event, which may be maintained, used, and
16 disclosed to the extent authorized or required
17 by applicable law, regulation, or order, and it
18 may be made available in part in the public
19 record and in accordance with the Commission's
20 rules.

21 Now, each speaker will have two
22 minutes to address Chair Khan and her fellow
23 commissioners. I also want to note that we
24 have had a very large number of people sign up
25 to speak today, and we're going to do our best

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2 to get to as many folks as possible within the
3 time that we have. So let's get started right
4 away. Our first speaker today is Erin Witte.

5 Erin?

6 MS. WITTE: Thank you.

7 My name is Erin Witte. I'm the
8 director of consumer protection at The Consumer
9 Federation of America. We're a national
10 advocacy organization that fights for a fairer
11 marketplace for consumers.

12 Thank you to Chair Khan, the
13 commissioners, Ms. Wilkins, and the entire
14 Federal Trade Commission for starting this
15 conversation by publishing the rule proposal
16 and facilitating this discussion here today.

17 We strongly support the efforts of
18 the FTC to level the playing field for workers.
19 Like so many other contracts of adhesion, these
20 noncompete provisions are often not the result
21 of a negotiated agreement. They're often
22 designed to be difficult to understand, they're
23 hidden in complex contracts, and they have
24 expanded far beyond their original purpose. At
25 their core, they fly in the face of the very

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2 laws which are critical to promote economic
3 growth in this country.

4 The FTC's rulemaking should not be
5 viewed as a radical departure from its
6 authority. It is, in fact, the next logical
7 step to meaningfully address these problematic
8 provisions.

9 States are increasingly passing
10 legislation to scale noncompetes back.
11 Research and evidence continue to show that
12 these provisions stifle economic growth, and
13 there's no question that the federal agency
14 which is tasked with prohibiting unfair methods
15 of competition can and should pass a final rule
16 prohibiting noncompetes. Thank you.

17 MR. KAPLAN: Thanks, Erin.

18 Our next speaker is Bilal Sayyed.

19 Bilal?

20 MR. SAYYED: Thank you.

21 the Commission's proposal to ban
22 most labor noncompete agreements faces many
23 legal hurdles and raises complex federal state
24 issues. I note that if the agency has the
25 power it claims, it should put the force of

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2 rule behind its multi-decade campaign to limit
3 unnecessary occupational licensing.

4 the Commission's attempt to couch
5 the current proposal as a response to
6 anticompetitive effects of noncompete
7 agreements fails. The NPRM does not identify
8 an anticompetitive effect of such agreements
9 sufficient to support a near-total ban on their
10 adoption or enforcement.

11 The thousands of comments received
12 to date identify the complexity of the issue,
13 even as they themselves do not provide a basis
14 for the proposed rule. What they do suggest
15 often is on opportunistic behavior. Employers
16 may obtain employee agreement to a noncompete
17 covenant after an employee has made some
18 hard-to-reverse commitment to its prospective
19 or actual new employer; and also, employees may
20 wish to be excused from a noncompete agreement
21 after recognizing its potential effect on their
22 future job prospects, perhaps even if the
23 covenant was entered into willingly.

24 Such opportunistic behavior can be
25 ameliorated through a Mag-Moss enacted rule,

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2 requiring disclosures of post-employment
3 constraints in conjunction with an offer of
4 employment, including a statement of the
5 relevant state law governing enforceability of
6 such contracts, and reference to FTC-generated
7 frequently asked questions on enforceability of
8 such agreements, alternatives to a noncompete,
9 and some general principles the employee should
10 consider prior to agreeing with such contracts;
11 perhaps, too, a rule identifying as an unfair
12 practice the enforcement of such an agreement
13 when an employee is terminated for reasons
14 other than cause, and also identifying as
15 unfair attempts to enforce agreements of the
16 type found unenforceable by the highest state
17 court.

18 Finally, given the complexity of
19 this issue, the Commission should extend the
20 comment period an additional 90 to 120 days.
21 Thank you.

22 MR. KAPLAN: Thank you, Bilal.

23 Our next speaker is Sean Heather.

24 Sean? Sean, are you there?

25 MR. HEATHER: Is that unmuted now?

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Thank you.

The U.S. Chamber of Commerce is strongly opposed to this rulemaking, and I want to make three points.

First, this rule is blatantly unlawful, because the FTC lacks the authority to write a UMC rule. The discussion that kicked off today's session avoided this fundamental question. Nobody was invited to discuss whether the agency has congressional authority to write any UMC rule, let alone this rule, and the Chamber is far alone from this opinion.

In fact, Senator Chris Murphy, a Democrat, recently introduced legislation in Congress to address noncompetes. He said, I quote, we would like to give them the clear statutory authority. Also worth noting, his legislation grants authority in the UDAC context, not UMC.

Second, on the policy question of noncompetes, let us be clear: The Chamber supports enforcement against abuse of uses of noncompetes; however, the debate is not about

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2 burger flippers or sandwich artists. The
3 question is about whether a blanket ban makes
4 any sense, and blanket bans rarely do.

5 Businesses use noncompetes in many
6 different ways: to protect intellectual
7 property, as part of compensation packages, and
8 to support investment in skilled training for
9 the workforce.

10 In these instances, the employee is
11 rewarded with additional compensation and
12 training in exchange for not leaving -- leaving
13 the business for a defined period of time. A
14 blanket ban would take money out of the pockets
15 of these workers. It would cause their wages
16 to fall, not rise.

17 Finally, the FTC, for two
18 has been ^{years,} planning to attempt to make a UMC
19 rulemaking, and nobody is surprised that the
20 FTC has decided to try to do it on the issue of
21 noncompetes. The only surprise, it has taken
22 you this long to move ahead; so my question is:
23 Why rush now?

24 The Chamber is part of 100
25 different trade associations collectively

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2 representing millions of businesses that wrote
3 a letter more than two weeks ago asking for an
4 extension on the comment deadline. The FTC
5 routinely extends comment periods for proposed
6 rules that are far less consequential than
7 this.

8 My request is the FTC not only
9 extend the comment period, but make that clear
10 to the public before the end of the month.
11 Thank you.

12 MR. KAPLAN: Thank you, Sean.

13 Our next speaker is Leeann Goheen.

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15 MS. GOHEEN: Hi, everyone.

16 My name is Leeann Goheen, and I'm
17 the senior director of government affairs for
18 NATSO, that's the national association
19 representing travel centers and truck stops;
20 and SIGMA, the national association
21 representing independent fuel marketers.

22 Our associations will submit
23 comments in the proposal, but due to the
24 meaningful impact of the proposal and the
25 information required from our members to

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2 respond sufficiently, we urge the Commission to
3 delay the comment deadline for 60 days.

4 This blanket ban for noncompete
5 clauses is too broad; therefore, our
6 associations oppose the proposal as it is
7 drafted. There are certain circumstances where
8 noncompete clauses are necessary in an
9 employment agreement.

10 Generally, those are for more
11 higher-level executives that are privy to very
12 sensitive business information. We are
13 especially concerned that businesses who employ
14 workers that oversee mergers and acquisitions
15 or other departments with trade secrets or
16 certain intellectual property be able to
17 implement a noncompete clause.

18 We do believe there is a way for
19 the Commission to amend its proposal to both
20 protect the workers about which it is primarily
21 concerned while also safeguarding the
22 confidential business information that
23 executives and workers with certain duties
24 maintain in their position.

25 Our industry would support limiting

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2 noncompete clauses to executives or employees
3 in certain sensitive functions similar to the
4 duties test that the Department of Labor
5 utilizes for overtime regulations.

6 We are also concerned about the
7 retroactive nature of the proposal. Employment
8 agreements that include a noncompete clause are
9 signed in exchange for higher compensation.

10 The proposal would effectively delete certain
11 provisions of employment contracts while
12 leaving intact others that were negotiated in
13 exchange. All of these contracts would need to
14 be reopened and reexamined. It would be a
15 total mess, and it's not necessary. We urge
16 the FTC to make this rulemaking prospective
17 rather than retroactive.

18 Appreciate your time today. We
19 look forward to working with the Commission on
20 this proposal.

21 Thank you, Leeann.

22 Our next speaker is Berin Szoka.

23 Berin?

24 MR. SZOKA: This proceeding
25 presumes that Section 6(g) of the FTC Act

FTC PUBLIC FORUM

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2 authorizes rules defining unfair methods of
3 competition. The DC circuit said so in 1973,
4 and the Supreme Court has said so to seemingly
5 similar statutes.

6 Like 6(g) the Communications Act
7 says the FCC may make rules and regulations for
8 the purpose of carrying out the provisions of
9 the act, but there's a key difference: That
10 act also authorized heavy sanctions for
11 violations of FCC rules. The original FTC Act
12 authorized no sanctions whatsoever, only
13 injunctive relief.

14 In the progressive era, as scholars
15 Tom Merrill and Katherine Watts note, if a
16 statute prescribed a sanction, then the
17 authority to make rules and regulations
18 included the authority to adopt legislative
19 rules having the force of law. If the statute
20 did not include a sanction, such authority
21 encompassed only interpretive or procedural
22 rules.

23 The Supreme Court's 1911 Grimaud
24 decision said just that. The FTC Act can only
25 be understood in this context. If 6(g) had

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2 authorized substantive rulemakings, the act
3 would have marked the constitutional
4 revolution. It would have handed unprecedented
5 legislative power to assess fairness to an
6 unprecedented lead, insulated independent
7 executive officers without safeguards for
8 rulemaking or procedures for judicial
9 supervision.

10 Congress would have created an
11 unaccountable mini legislature without anyone
12 noticing for decades; but Congress, as the
13 Supreme Court reminds us, does not alter the
14 fundamental details of a regulatory scheme in
15 vague terms or ancillary provisions. It does
16 not hide elephants in mouse holes. 6(g) is a
17 mouse hole. Just one half of a one-sentence
18 subsection on additional powers.

19 The FTC reads 6(g) as a mighty
20 elephant, the power to legislate fairness
21 across most of the economy, but the Supreme
22 Court has said agencies cannot decide major
23 questions of vast economic and political
24 significance without clear congressional
25 authorization. 6(g) provides no such clear

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2 statement. Even if it did, the FTC's reading
3 would violate the Nondelegation Doctrine as
4 understood as understood in 1914 and as the
5 Supreme Court understands it today.

6 Simply put, natural petroleum
7 refiners, the case in which this entire
8 rulemaking rests, is a pile of sand. The
9 Commission should end this rulemaking and leave
10 the major question of noncompetes to Congress.

11 MR. KAPLAN: Thank you, Berin.

12 Our next speaker is Littler

13 Mendelson

MR. PARETTI:

14 Good afternoon.

15 My name is Jim Paretti. I'm a
16 shareholder in the work- -- law firm Littler
17 Mendelson and a member of the firm's workplace
18 policy institute. In the very short time I
19 have, I would like to make a number of points.

20 First, the premise that there's
21 widespread use and abuse of noncompete
22 agreements with low-wage workers is faulty. We
23 counsel a huge number of America's largest
24 employers, and I can attest this is simply not
25 the case.

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2 Second, we ask that the Commission
3 promptly act on the pending request for an
4 extension to the comment period. An extension
5 that comes at the eleventh hour is just not
6 very helpful.

7 Third, we firmly believe that this
8 is a matter of law. The Commission lacks the
9 authority to issue any substantive regulation
10 concerning unfair methods of competition.

11 Fourth, the Commission's proposal
12 makes no distinction between the cashier in the
13 burger place that President Biden said he
14 sought to protect in his State of the Union
15 Address, and highly paid executives whose
16 noncompetes have been negotiated and bargained
17 for, often with the considerations -- stock
18 options, signing bonus -- already transferred
19 to the employee. Stripping away the benefit of
20 what an employer has bargained for and paid for
21 is unconstitutional.

22 Fifth, the proposed rule does not
23 take into fact the consideration that
24 restricted covenants help small, startup
25 businesses from large, predatory competitors

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2 who can afford to pay over market simply to buy
3 away their key talent.

4 Sixth, despite purporting to
5 propound a bright-line rule, the proposal's
6 treatment of nondisclosure or nonsolicitation
7 agreements via a functional test is vague,
8 unclear, and offers no useful guidance to
9 employers.

10 Seventh, the proposed rule's 25
11 percent ownership requirements for the sale of
12 business exception is far too high and will
13 impede commercial transactions if buyers cannot
14 protect their purchases.

15 Eighth, trade secret law does not
16 sufficiently protect an employer because it's
17 an after-the-fact remedy that can often only be
18 proven after the harm caused by disclosure of a
19 trade secret is already done, and even then at
20 an extraordinarily high cost.

21 Finally, there's just no evidence
22 that state legislatures and state courts are
23 not appropriately safeguarding workers' rights,
24 enforcing reasonable noncompetition agreements,
25 and balancing the rights of workers with the

FTC PUBLIC FORUM

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2 rights of employers to bargain and enter
3 agreements freely.

4 We firmly believe the Commission
5 should abandon this effort and leave it to the
6 regulation of the states, as it has for
7 hundreds of years. Thank you.

8 MR. KAPLAN: Thank you, Mr.
9 Paretti. Thank you very much.

10 Our next speaker is Leanna Wade

11 MS. WADE: Good afternoon.

12 My name is Leanna Wade, and I am
13 representing ACT|The App Association, the
14 leading trade association for small business
15 technology developers.

16 App Association members are
17 innovators across consumer and enterprise
18 brackets. Today the ecosystem we represent,
19 which we call the app economy, is responsible
20 for over 5 million American jobs and serves as
21 a key driver of the internet of things
22 revolution.

23 Our community relies on legal and
24 regulatory consistency to continue to provide
25 high-value services and products to Americans

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2 from all walks; therefore, we appreciate the
3 opportunity to share our perspective with the
4 Federal Trade Commission on its proposed
5 noncompete rule.

6 Noncompete clauses are routinely
7 utilized within our community to preserve key
8 interests like trade secrets and other
9 intellectual property, strategies, and
10 information used to expand our members'
11 businesses. More broadly, noncompete clauses
12 have become a commonplace strategy for
13 businesses of all types and sizes, and the
14 FTC's proposal is estimated to impact 99
15 percent of the American workforce, making it a
16 vast economic and political significance.

17 We urge the FTC to be mindful of
18 the scope of its authority for issuing such
19 rules. For example, it is not clear that
20 Congress has granted the FTC authority to issue
21 competition regulation rules addressing
22 contractual relationships between employers,
23 employees, and contractors alike.

24 We believe it is critical that such
25 questions be publicly vetted and answered

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2 before the FTC moves forward. Already roughly
3 20 percent of startups fail in the first year.
4 We urge the FTC to consider the potential
5 impact of this rule; and if it does move
6 forward, we ask the FTC to do all it can to
7 support the small business technology developer
8 community.

9 We value the opportunity to speak
10 today because our community is fast-moving and
11 competitive, and our members have limited
12 resources to alter widely accepted business
13 practices such as the use of reasonable
14 noncompete clauses.

15 Again, The App Association
16 appreciates the opportunity to share our
17 perspective on this matter, and we look forward
18 to working with the FTC to promote a
19 competitive pro-innovation marketplace that
20 enables small businesses.

21 MR. KAPLAN: Thanks, Leanna.

22 Our next speaker is Edwin Egee,
23 Egee.

24 Edwin?

25 MR. EGEE: Thank you so much.

FTC PUBLIC FORUM

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2 On behalf of the National Retail
3 Federation, I want to thank you for the
4 opportunity to testify today. My name is Edwin
5 Egee. I am vice president for workforce
6 development and government relations at
7 National Retail Federation.

8 As NRF will explain in our
9 forthcoming comment, the FTC's action to ban
10 employers from utilizing noncompete agreements
11 is beyond the scope of its authority. Even if
12 the FTC did have the authority to impose such a
13 broad prohibition, the decision to do so would
14 harm employers, employees, and the broader
15 American economy.

16 FTC's authority to regulate in this
17 space is questionable at best, as you all know.
18 Commissioner Wilson articulated this well in
19 her dissent. Moreover, the major questions
20 doctrine articulated by the Supreme Court in
21 West Virginia versus EPA is applicable to this
22 rule.

23 The FTC lacks clear congressional
24 authorization to undertake such a rulemaking.
25 To paraphrase Justice Scalia, the FTC majority,

FTC PUBLIC FORUM

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2 promulgating this rule locates the proverbial
3 elephant in the mouse hole.

4 On the merits of this rule, NRF
5 opposes the ban to -- on inclusion of
6 noncompete agreements in employment contracts
7 with employees. Federal and state laws have
8 long recognized that noncompete agreements
9 serve a legitimate purpose in our economy.

10 These agreements allow retailers
11 and other employers to protect trade secrets,
12 customer relationships, and confidential
13 information. They are particularly necessary
14 and appropriate when NRF members enter into
15 employment contracts with higher-level
16 executives. This rule makes no distinction, of
17 course, between high-level -- high-level,
18 highly compensated employees, and other -- and
19 other workers.

20 For well over a century, noncompete
21 clauses have been popularly regulated by the
22 states. The FTC, however, explicitly states
23 that the new federal rule -- regulation would
24 supersede any contradictory state law. It
25 would, as Commissioner Wilson noted, prohibit

FTC PUBLIC FORUM

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2 conduct that 40 states' legislation --
3 legislatures have already chosen to allow.

4 Although legislators in several
5 states have proposed banning virtually all
6 noncompete agreements, every state that has
7 considered such a ban has ended up doing
8 nothing or enacting compromise or middle-ground
9 legislation.

10 The retroactive nature of this rule
11 requiring rescission of any agreements
12 currently in existence is problematic as well.
13 This aspect of the rule is concerning for my
14 members. Many of our members have reached
15 extensive agreements with former executives
16 that include noncompete agreements.

17 MR. KAPLAN: Thank you, Ed. Can
18 you wrap up? You're at two minutes.

19 MR. EGEE: The FTC's attempt to
20 force retailers and other employers to go back
21 and rescind these contracts is unacceptable.

22 Allow me to reiterate the request
23 of NRF and basically the entire business
24 community. We ask for an extension of the
25 comment period. Certainly given the complexity

FTC PUBLIC FORUM

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2 of this rule and legal questions around it,
3 that warrants a longer time period for the
4 regulated community to provide qualitative
5 input. Thank you.

6 MR. KAPLAN: Thank you, Ed.

7 Our next speaker is Brynne O'Neal.

8 Brynne?

9 MS. O'NEAL: Thank you.

10 I'm here for National Nurses
11 United, the largest union of registered nurses
12 in the country. We strongly support the FTC's
13 proposal to ban noncompete clauses.

14 In the proposed rule, the FTC
15 recognizes that training repayment agreement
16 provisions, or TRAPs, can function as de facto
17 noncompete clauses in some circumstances. We
18 urge the FTC to go further and ban TRAPs
19 completely in the final rule.

20 The current proposal puts an
21 unreasonable burden on workers to show that
22 their particular TRAP functions as a noncompete
23 clause, and it leaves ample room for employers
24 to use TRAPs to skirt the noncompete ban.

25 TRAPs lock nurses into unsafe jobs.

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2 Under TRAPs, nurses are required to work for
3 their employer for a number of years or else
4 pay a substantial penalty for the cost of
5 employer-required training, typically thousands
6 of dollars. These programs do not provide
7 nurses with any new qualifications; rather,
8 employees are simply passing on to nurses the
9 cost of basic on-the-job training required for
10 any RN position at any hospital.

11 Under TRAPs, nurses can't leave
12 their jobs without a devastating financial
13 penalty, and the debt hanging over them means
14 that nurses have a harder time advocating for
15 safe conditions for themselves and their
16 patients. The FTC should not put the burden on
17 workers to demonstrate that a particular TRAP
18 is invalid.

19 For classic noncompete clauses, the
20 FTC appropriately recognizes that most
21 employees have no choice but to rely on what
22 their employer says about their legal
23 obligations. Litigation is expensive and
24 daunting. Therefore, the proposed rule
25 prevents employers from putting noncompete

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2 clauses in contracts and requires them to
3 inform employees that existing noncompete
4 clauses are invalid so employees know their
5 rights and it's clear to everyone what the
6 rules are.

7 The FTC should take the same
8 approach to TRAPs, instead of requiring
9 employees to have to prove that a given TRAP is
10 too costly. Thank you.

11 MR. KAPLAN: Thank you, Brynne.

12 Our next speaker is Ben Nussdorf.

13 Ben?

14 MR. NUSSDORF: Thank you, Mr.
15 Kaplan.

16 My name is Ben Nussdorf. I'm the
17 general counsel of the National Propane Gas
18 Association. Thank you for the opportunity to
19 comment.

20 I wanted to echo and support the
21 comments of the National Retail Federation, the
22 U.S. Chamber of Commerce, Littler Mendelson,
23 and others in opposing this rule and seeking an
24 extension of the comment period.

25 This rule represents an overreach

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2 on behalf of the FTC, which is questionably
3 legal and questionably under its scope of
4 authority. There are legitimate reasons for
5 noncompetes. Many of them exist within our
6 industry, and the protection of that
7 intellectual property and trade secrets is
8 incredibly important to the employers that we
9 represent.

10 We wanted to thank the FTC for
11 giving this opportunity to comment but believe
12 that meaningful opportunity to comment on such
13 a complex, wide-ranging and overreaching rule
14 would require an extension by the comment -- of
15 the comment period.

16 Thank you again.

17 MR. KAPLAN: Thank you, Ben.

18 Our next speaker is Beth Milito.

19 MS. MILITO: Thank you.

20 My name is Beth Milito, and I thank
21 you for allowing me to speak today on behalf of
22 the National Federation of Independent
23 Business. NFIB is a nonprofit association
24 representing about 300,000 small and
25 independent businesses across the country.

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2 We believe there are appropriate
3 situations for employers and workers to enter
4 contracts that include noncompete clauses. The
5 NFIB members who use noncompetes do so in
6 limited situations and not in a broad manner as
7 claimed by many on today's call. In those
8 limited situations, noncompete clauses protect
9 intellectual property or other confidential
10 information that could cause economic and
11 sometimes reputational harm to business.

12 Furthermore, noncompete agreements
13 help encourage businesses to invest in their
14 employees for specialized training that if put
15 to work for a competitor business could
16 disadvantage the company that provided the
17 training.

18 As summarized by an NFIB member
19 recently, quote, You can't build a business,
20 teach people your secrets to success, and then
21 have them used against you next week."

22 NFIB is also frustrated with the
23 FTC's intrusion into an area of policy that
24 should be left to the states, and we believe
25 this proposal seeks to unilaterally and

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2 illegally reinterpret the section of the
3 Federal Trade Commission Act on unfair methods
4 of competition.

5 In her dissenting statement in
6 response to the proposal, Commissioner Wilson
7 pointed out the weaknesses in the FTC's
8 proposal, noting, in short, today's proposed
9 rule will lead to protracted litigation in
10 which the Commission is unlikely to prevail.

11 NFIB agrees with Commissioner
12 Wilson's prediction. We will be filing public
13 comments, providing the Commission with more on
14 a small business perspective, detailing why
15 this proposal is so harmful to small employers,
16 employer retention, compensation, and
17 investment.

18 Relatedly, we hope that the
19 Commission will grant our request to extend the
20 comment time. NFIB continues to hear from
21 members and wants to ensure the Commission
22 hears from as many small business owners as
23 possible.

24 Thank you for the opportunity to
25 speak today.

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MR. KAPLAN: Thank you, Beth.

Our next speaker is John Kates.

John? John?

I'm not sure. Do we have John there? Is he muted? Okay. Let's move on.

Our next speaker -- maybe we can come back and get back to John later.

Our next speaker is Wes Bissett.

Wes?

MR. BISSETT: Thank you very much.

My name is Wes Bissett. I'm senior counsel of the Independent Insurance Agents and Brokers of America. We're the largest and oldest association of insurance producers in the country.

The value of insurance agencies is rooted in the goodwill they develop in their communities and the relationships and the confidential knowledge about their customers that they've built over many years, and our members fear that the Commission's proposal will erode that value.

As an initial matter, we believe this is a subject matter and significant change

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2 in policy that should best be left to elected
3 policymakers, but we're especially concerned by
4 the expedited manner in which this is being
5 considered and strongly urge the FTC to extend
6 the comment period by 60 days.

7 I'm going to briefly touch on four
8 additional issues, in case you do elect to move
9 forward.

10 First, our members are very
11 concerned by the narrow scope of the limited
12 exemption that would permit the use of
13 noncompete agreements in the context of
14 business sales. That exception is limited to
15 cases where the seller has at least a 25
16 percent ownership stake in the business. In
17 our view, this exemption is unnecessary, it's
18 unduly restrictive, and should be removed.

19 We note that the three states that
20 generally prohibit noncompete agreements do not
21 ban their use in business sales like that, nor
22 do they include ownership interest threshold
23 tests like this one.

24 Second, we appreciate that the --
25 that the proposal is not intended to apply to

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2 other types of employment agreements like
3 nonsolicitation and no business agreements; we
4 worry, however, that those legitimate types of
5 agreements will be in jeopardy of being
6 considered de facto noncompetes, and employers
7 and the members we represent want certainty
8 that they can utilize these other forms of
9 agreements to protect their legitimate
10 interests.

11 Third, we urge the Commission to
12 include an exemption based on worker earnings
13 along the lines of alternatives two and four;
14 and as discussed earlier in the -- in the forum
15 today, a broad universe of states have started
16 to do similar things in their state laws.

17 And then, finally, any final rule
18 should apply prospectively and not affect any
19 noncompetes currently in place. Altering terms
20 after the fact distorts contracts and the
21 equilibrium that was achieved at the time they
22 were entered into.

23 Thanks very much.

24 MR. KAPLAN: Thank you, Wes.

25 Our next speaker is Alex Harman.

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Alex?

MR. HARMAN: My name is Alex Harman. I'm the director of government affairs, antimonopoly and competition laws via the Economic Security Project, where we advocate for ideas to build economic power for all Americans.

We believe that every American should have the freedom and stability required to thrive, and we strongly support the pending proposal banning noncompete clauses, which will unleash the U.S. labor market and put money back in the pockets of workers.

Today we want to highlight three strengths of the proposed rule. In addition, we urge the Commission to strengthen the rule and want to share three critical concerns.

First, we strongly support a total ban that does not make false or arbitrary distinctions between industries or income level. Noncompetes are an abuse of power that are designed to trap workers, drive down wages, and prevent competition. In fact, banning noncompetes could increase worker pay up to

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2 \$300 billion a year and would require -- reduce
3 racial and gender wage gaps by 3.6 to 9.1
4 percent.

5 We are heartened by the inclusion
6 in the rule of -- in the ban on training
7 repayment agreements, or TRAPs, where companies
8 are required to pay for training -- require
9 employees to pay for training they received if
10 they leave a job before a certain time period.

11 We also strongly support making the
12 rule retroactive. The absence of this feature
13 would result in the 30 million U.S. workers
14 subject to noncompetes receiving no relief.

15 We believe that the rule could
16 still be strengthened in several key ways. The
17 final should ban contracts that are
18 functionally equivalent to noncompete clauses.
19 While the rule does include TRAPs, this should
20 not be limited to reasonable repayments because
21 for some low-income workers even relatively
22 small amounts of money could have the effect of
23 locking them into jobs they need to leave, and
24 determining what is a reasonable TRAP is not
25 easy.

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2 Secondly, we believe that the rule
3 should prohibit vertical no-poach agreements.
4 Workers may be aware when they are subject to a
5 noncompete agreement, but vertical no-poach
6 agreements are often invisible, and yet prevent
7 them from moving to a store or location that
8 could offer more opportunity for a better job.

9 Finally, we encourage the
10 Commission not to extend the comment period.
11 For over four years, the Commission has heard
12 from numerous groups and individuals on the
13 issue of noncompetes. There has been multiple
14 time, and the evidentiary record is now clear:
15 Noncompetes should be banned. Do not make
16 workers wait any longer for this important
17 rule.

18 Thank you.

19 MR. KAPLAN: Thank you, Alex.

20 Our next speaker is Jennifer Han.

21 Jennifer?

22 MS. HAN: Hi, good afternoon.

23 I am Jennifer Han, chief counsel
24 and head of global regulatory affairs at
25 Managed Funds Association.

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2 So at MFA we represent the global
3 alternative asset management industry, so this
4 includes hedge funds, crossover funds, and
5 credit funds. Our members collectively manage
6 nearly \$2 trillion. The beneficiaries of these
7 funds are pensions, foundations, and
8 endowments, and the investment returns help
9 secure retirements, fund medical research, and
10 provide scholarships, among other things.

11 We're very concerned with this
12 overly broad ban on noncompetes. Any
13 restrictions on the use of noncompetes should
14 be carefully tailored to consider promoting
15 research, investment, and U.S. competitiveness.

16 Noncompetes in the alternative
17 asset management space are essential to
18 protecting intellectual property and investor
19 assets, rather than stifle innovation,
20 investment, and competition. They're a
21 critical component in helping our members
22 prevent the divulgement of proprietary trading
23 strategies and investment positions, protecting
24 proprietary algorithms developed and used by
25 asset managers to conduct business and trades,

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and they protect relationship assets as well.

So in our industry, the use of noncompete agreements typically entails garden leave, where employers compensate workers during the post-employment period until the expiration of their noncompete agreement. This approach will allow -- this approach allows firms to protect their proprietary information while giving employees financial stability as they transition to new employment.

So we encourage the FTC to tailor the proposed rule to allow for exceptions from a noncompete prohibition where there's significant intellectual property at stake, the business and investors would be harmed, the noncompete agreement is limited in time, and the employee will be paid out.

We've seen the economic impact on a small scale, as firms that engage in certain investment strategies refrain from conducting business in jurisdictions where noncompete agreements are outlawed. So if the final rule does not enable alternative asset managers to protect sensitive --

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2 MR. KAPLAN: Thanks, Jennifer. Can
3 you wrap up? We're at two minutes.

4 MS. HAN: Yeah.

5 -- intellectual property, it's
6 going to hurt competitiveness of our sector,
7 the U.S. final sector broadly, and also harm
8 institutional investors.

9 Thank you, and we would support
10 extending the comment deadline.

11 MR. KAPLAN: Thanks, Jennifer.

12 Our next speaker is Evan Armstrong.

13 Evan?

14 MR. ARMSTRONG: Thank you for
15 allowing us to speak today.

16 My name is Evan Armstrong. I'm
17 vice president of workforce policy for the
18 Retail Industry Leaders Association. We
19 represent the largest, most innovative
20 retailers in the country.

21 We will be submitting substantive
22 comments to the FTC that will detail the
23 industry's perspective on the important issue
24 here; and on that front, we encourage the FTC,
25 like many others, to extend the comment

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2 deadline by 60 days so that we have more time
3 to provide those fulsome detailed comments to
4 you-all. However, I'm happy to share some
5 high-level thoughts today; and again, thank you
6 for the opportunity.

7 The retail industry, by its nature,
8 is highly competitive. Our members believe
9 that open and free markets allow for fair
10 competition that benefits customers, employees,
11 and shareholders alike, while driving
12 creativity and innovation.

13 With that in mind, we agree that
14 abusive or coercive noncompetes should not be
15 applied broadly across the economy to all
16 workers, including, especially, to retail
17 associates; however, we do support the ability
18 to selectively use narrowly tailored noncompete
19 clauses to protect trade secrets and other
20 confidential business information.

21 As I mentioned, RILA is in the
22 process of collecting quantitative data from
23 our members to provide in our comments; but
24 anecdotally, leading retailers narrowly use
25 noncompetes for high-level executives or in

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2 situations where there is a business necessity.

3 Using tailored noncompetes in these
4 instances is a win/win for all, impacting an
5 employee's benefit from receiving long-term
6 investments and compensation while the
7 companies can protect trade secrets and other
8 confidential information.

9 While RILA believes a discussion
10 about the scope of noncompetes is a worthy one,
11 we think -- we believe that the proposed rule
12 is fatally flawed because the FTC lacks the
13 constitutional and statutory authority to issue
14 such a rule, and in attempting to do so, the
15 agency is improperly usurping the rule of
16 Congress.

17 Congress expressly gave the FTC
18 authority to issue rules to protect consumers,
19 such as to prevent fraud and false advertising;
20 in contrast, Congress never granted the FTC the
21 authority to issue wide-ranging rules
22 regulating competition such as contractual
23 relationships between employers and employees.

24 MR. KAPLAN: Thanks, Evan. Can you
25 wrap up, please? Thank you. Okay.

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2 Our next speaker is Courtney Van
3 Cott.

4 Courtney?

5 MS. VAN COTT: Hi.

6 At 25 years old, I started getting
7 demand letters requesting I pay hundreds of
8 thousands of dollars in penalties because I
9 allegedly violated a noncompete. I reluctantly
10 signed this noncompete when it was presented to
11 me with the condition that I would be
12 terminated if I didn't sign it, and that was
13 extremely distressing.

14 While most employers use these
15 clauses exclusively for their deterrent value
16 with no intent to litigate, I was sued in 2019
17 and have been in litigation for almost four
18 years because my previous employer has decided
19 to test the validity of this contract. The
20 plaintiff and his attorney are adamant that
21 this is not a noncompete, so they can get away
22 with a more oppressive, broad, and overreaching
23 contract.

24 This clause has no geographical
25 scope; attempts to protect potential, not

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2 actual business; an exorbitant penalty; and an
3 unreasonable time limit.

4 As someone who was only a couple
5 years into starting their career, I was and
6 have been unable to afford full-time legal
7 representation, leaving me to work as a legal
8 assistant in addition to my full-time job while
9 still trying to be present for my family and
10 daughter.

11 The reason employers use these
12 noncompetes is to trap workers, not to actually
13 protect themselves. They know that employees
14 will be more willing to stay in a hostile work
15 environment, accept lower wages, and will be
16 hesitant to find a new job due to the fear of
17 having to navigate the court system.

18 While it's considered unethical for
19 attorneys as a profession to be bound by
20 noncompetes, they're more than happy to bill
21 hours to write them for their clients'
22 businesses or attempt to enforce them. These
23 contracts are often non-negotiable, and some
24 employees are unaware they're even signing
25 them.

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2 The FTC's proposed rule banning
3 noncompetes is so crucial because the situation
4 I'm in would never happen again. Thank you.

5 MR. KAPLAN: Thanks, Courtney.
6 Thanks for sharing that.

7 Our next speaker is Daniel Kalish.

8 Daniel?

9 MR. KALISH: Hi.

10 My name is Dan Kalish, and I am the
11 owner and founder of a law firm called HKM
12 Employment Attorneys. We represent individuals
13 against noncompetes; and we operate in about 30
14 states, making us one of the largest, if not
15 the largest, law firm that represents
16 employees.

17 Several employees, countless
18 employees, will contact us, and they will ask,
19 number one, if I go to this new company, will
20 it violate my noncompete; and then number two,
21 is the noncompete enforceable.

22 We advise them on that, but at the
23 end of the day we also tell them that it really
24 often doesn't matter if the noncompete is
25 enforceable or not, because really what they

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2 need to avoid is getting sued. And the reason
3 why is that if an employee gets sued, they're
4 often going against a very large company, and
5 these are even high wage earners.

6 They have to go through discovery,
7 a temporary restraining order. After that
8 occurs, they have to go through additional
9 discovery; and on top of that, they have to go
10 through a preliminary injunction, and often all
11 the way through a trial.

12 And what we end up telling the
13 employees is that if they get sued, they will
14 likely, even if they win, have to pay roughly
15 \$100- to \$150,000 in attorney fees. As a
16 result, for many of our clients, even if they
17 win in court by showing that they did not
18 actually or were not going to a competitor or
19 showing that the noncompete is unenforceable,
20 it will bankrupt them.

21 Let me -- let me repeat that
22 because I think that's important. Even for our
23 employees who win a lawsuit against an invalid
24 noncompete, it will bankrupt them.

25 As a result, most of our employees

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2 that we advise make the correct decision in
3 this case, which is not to go to the new
4 company that they want to, it's not to
5 challenge the noncompete. They either decide
6 to stay at the company, even though they don't
7 want to, or they decide to leave the field
8 altogether.

9 MR. KAPLAN: Dan, can you wrap up?
10 I'm sorry. You're at two minutes

11 MR. Kalish: Yes.

12 As a result of that, we believe
13 it's incredibly important for the FTC to pass
14 this proposal. On behalf of employees
15 nationwide we support the FTC's proposal.
16 Thank you.

17 MR. KAPLAN: Thank you, Daniel.

18 Our next speaker is Paul Diaz.

19 Paul?

20 MR. DIAZ: Hi, good afternoon.

21 My name is Paul Diaz. I'm a U.S.
22 Marine Corps veteran and the leading advocate
23 for ending the noncompete in the veterinary
24 industry.

25 I'm speaking to you today on behalf

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2 of more than 6,000 people who have signed my
3 petition on behalf of veterinarians who have
4 been, will be, or are currently negatively
5 impacted by a noncompete, and on behalf of pet
6 owners whose access to care is limited by the
7 predatory use of noncompetes in this industry.

8 The veterinary industry is one
9 where a majority of the revenue is generated by
10 a single job-class education. By establishing
11 control over the veterinarian with a
12 noncompete, employees establish control over a
13 portion of the industry's revenue.

14 A noncompete agreement enables
15 employers to control how and where a
16 veterinarian uses their medical license, it
17 restricts their ability to earn, it prevents
18 them from obtaining new, higher-paying
19 career-advancing opportunities, and the most
20 egregious impact is when a veterinarian has to
21 choose between uprooting their family and
22 leaving their community or not practicing at
23 all because relocating is not an option; and
24 let's not forget the mental health damage
25 inflicted upon a veterinarian who is stuck in a

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toxic work environment.

By requiring a noncompete, employers are saying they would rather see a veterinarian not work than to see them generating revenue from someone else. Veterinarians have been conditioned to believe a noncompete is a standard part of becoming a veterinarian for decades.

The American Medical Association took a stand against noncompetes for human healthcare doctors in 2016. The American Bar Association did the same for lawyers in 2017. As of today, of the American Veterinary Medical Association, an organization that is supposed to advocate for veterinarians, has remained silent on this topic. Their silence is why veterinarians need our help and is one of the reasons I decided to take up this effort.

I applaud the FTC for this proposed rule. Employers have trademarks, NDAs, copyrights, patents, confidentiality agreements, nonsolicits, and various other legal tools to protect their intellectual property and investments. The noncompete is

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2 about control, not protection.

3 While you get -- while you work to
4 get this rule passed, I will continue to
5 educate and empower veterinarians to take back
6 control over their career --

7 MR. KAPLAN: Paul, can you wrap up?
8 It's you're over two minutes. Thank you.

9 MR. DIAZ: Thank you.

10 MR. KAPLAN: All right. Thanks,
11 Paul.

12 Our next speaker is Jennifer
13 Massengale. Jennifer?

14 MS. MASSENGALE: Hello. Thank you
15 for hearing my comments.

16 I'm just a regular breast
17 radiologist, physician. I have experienced
18 issues with extreme noncompetes multiple times
19 in my career. I finished my training in 2008,
20 and in 2013 I was under a restricted noncompete
21 covenant. I had to move my family out of state
22 just to practice medicine.

23 Again in 2019, my company, my
24 radiology group of 20 physicians -- I was an
25 employed physician -- wanted to sell to a

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2 company named MEDNAX. They wanted me to sign a
3 36-page restricted contract. They couldn't
4 even tell me which facilities or affiliates I
5 was going to be restricted from. They covered
6 40 states, and even South America.

7 These noncompetes do not apply to
8 physicians like me. I do not have trade
9 secrets to pass on. I wasn't trained for that.
10 And this has really significantly impacted my
11 livelihood of practicing medicine and, you
12 know, required me to uproot my family, three
13 children, and husband two times to move out of
14 state in order to support my family and to gain
15 employment.

16 So I am full -- fully supportive of
17 banning these noncompetes in these types of
18 situations. Thank you.

19 MR. KAPLAN: Thanks, Jennifer.

20 Our next speaker is Jonathan Jones.
21 Jonathan?

22 MR. JONES: Hi. Thank you.

23 I'm speaking in favor of this
24 proposal to ban noncompetes. I'm an emergency
25 physician in Jackson, Mississippi, and I'm

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2 president of the American Academy of Emergency
3 Medicine. We represent over 8,000 emergency
4 physicians.

5 Following up the talk from a
6 radiologist, noncompetes serve to intimidate
7 physicians, specifically to intimidate
8 physicians not to speak up about potentially
9 dangerous practices to patients.

10 Likewise, they serve to limit
11 access to patient care, which, as was mentioned
12 by Dr. Baig earlier, is a major problem in this
13 country, and I don't think we need to do
14 anything to further impact patient care.

15 A specific reason that noncompetes
16 are not indicated in hospital-based physician
17 contracts, such as emergency medicine,
18 radiology, anesthesiology, and pathology, is
19 that we do not have our own patients, we do not
20 have patient lists, and we do not have trade
21 secrets.

22 As a matter of fact, all of the
23 training we receive is actually funded by the
24 federal government in the form of residency
25 training. We have no other secrets other than

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2 what was provided to us during medical school
3 and residency.

4 Signing on with a hospital that has
5 a noncompete only limits the doctor's ability
6 to provide the best patient care and to speak
7 up about unsafe practices.

8 So again, on behalf of the American
9 Academy of Emergency Medicine, we fully support
10 this proposal. Thank you.

11 MR. KAPLAN: Thank you, Jonathan.

12 Our next speaker is Eden Danielle
13 Sullivan.

14 Ms. Sullivan, are you muted? Eden?
15 Okay. Well, maybe we can come back to her.

16 Let's move on. Our next speaker is
17 Fred Brown.

18 Fred?

19 Okay. We don't -- I guess maybe we
20 don't have Fred either.

21 Fred, are you there?

22 Okay. Let's move on. Our next
23 speaker is Kathleen Tenover.

24 Kathleen, are you there

25 MS. TENOVER: I am here, thank

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2 you.

3 MR. KAPLAN: Great

4 MS. TENOEVER: And thank you for
5 hosting today's forum.

6 I represent the Federation of
7 American Hospitals. We represent 1,000
8 taxpaying hospitals and health systems across
9 46 states, D.C., and Puerto Rico.

10 First, we reiterate what others
11 have said already, that we don't believe the
12 Commission has the authority to issue the
13 proposed rule.

14 Also, given that the rule would
15 finalize what have been decades of settled law
16 and common practice, we urge the Commission to
17 extend the comment period by 60 days and
18 announce the extension by the end of next week.

19 Regarding specific provisions of
20 the proposed rule, the Commission, by its own
21 admission, does not have the authority to apply
22 the rule to, quote, Entities not organized to
23 carry on business for their own profit."

24 Taken on its face, that language
25 would mean that the noncompete ban would apply

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2 to some 20 percent of hospitals across the
3 country. That is taxpaying hospitals, but the
4 ban would not apply to 80 percent of hospitals
5 in this country that are tax exempt.

6 This uneven playing field between
7 taxpaying and tax-exempt hospitals is
8 illogical, and it also would create significant
9 unintended distortions in the competitive
10 playing field. It would also create
11 fundamentally different rules of the game for
12 different entities in the same industry based
13 solely on tax status.

14 For hospitals, this will come at a
15 time of increasing competition for a shrinking
16 pool of skilled professionals as hospitals
17 across the board are coping with workforce
18 challenges.

19 Tax-exempt systems would be free
20 under the proposed rule, if finalized, to
21 recruit physicians, nurses, technicians, and
22 senior executives from their taxpaying
23 competitors without restriction, while the
24 taxpaying systems would be unable to compete in
25 kind.

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2 This uneven playing field would
3 also create an incentive for hospitals not
4 covered by the noncompete ban to engage more
5 aggressively in noncompetes at all levels of
6 service, since their competitors, taxpaying
7 hospitals, are not able to do so, which is
8 exactly what the proposed rule intends to
9 prevent.

10 We will provide extensive comments
11 on this issue and many others in our -- when we
12 submit comments to the proposed rule, and we
13 appreciate the Commission's time and
14 consideration of these comments. Thanks again
15 for offering this opportunity today.

16 MR. KAPLAN: Thanks, Kathleen.

17 Our next speaker is Alex Hendrie.

18 Alex?

19 MR. HENDRIE: Thank you.

20 I'm here representing the National
21 Association of Wholesaler-Distributors. We are
22 an industry that has 6 million employees across
23 the country and over \$7 trillion in our annual
24 sales volume.

25 Our members are over -- over 80

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2 percent of our members, based on our survey,
3 use noncompetes, and they use them in a very
4 narrow way. They use it primarily for highly
5 paid senior management with knowledge of
6 company strategy, and they also use it for
7 their sales staff, which interact with the
8 customer base and the sales staff and the
9 know-how.

10 They are -- our employees are
11 highly compensated. The average nonsupervisory
12 wage is \$21 an hour. And we use them very
13 narrowly for one or two years, limited to
14 specific geographies and limited to specific
15 products.

16 We have concerns with the proposal.
17 In many states where noncompetes are banned,
18 our members have problems with recruitment and
19 retention, and they have problems with
20 proprietary information.

21 I would conclude, briefly, with
22 echoing the concerns of the retroactivity of
23 the proposal, and also associate myself with
24 the comments made about extending the comment
25 period. Thank you.

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MR. KAPLAN: Thanks, Alex.

Our next speaker is Michael Layman.

Michael?

MR. MURTAZA: Thanks, Peter.

This is actually Haider Murtaza on behalf of IFA. Thanks for the opportunity to speak today.

IFA is an organization that represents franchisors, franchisees, and also franchise suppliers. Our membership is also brands ranging from quick-service restaurants all the way to personal services to home healthcare systems, with over 200 business formats.

The FTC's proposed noncompete rule would apply to workers, and the Commission specifically defined that term to exclude the franchisor/franchisee relationship, and we agree. The Commission noted that franchisor/franchisee relationship may be more analogous to the relationship between two businesses than the relationship between an employer and a worker.

the Commission also noted that

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2 there's no evidence to suggest a benefit from
3 applying the proposed rule to the
4 franchisor/franchisee relationship, and we
5 agree with the Commission that there's no need
6 or support for extending this proposed rule to
7 the franchisor/franchisee relationship.

8 I also believe that noncompetition
9 clauses in the franchisor/franchisee
10 relationship protect the franchisor as well as
11 the franchisees that invest in the brand by
12 building and operating a unit and system. And
13 it's not just what we say. Courts reached the
14 same conclusion.

15 The Massachusetts Supreme Judicial
16 Court examined noncompetes in a
17 franchisor/franchisee relationship, and those
18 in a non -- in a traditional employment
19 relationship. In a 2004 case, *Bollinger v.*
20 *Duncan*, the Court upheld enforcement of
21 noncompetes. That Court emphatically found
22 that the noncompete clause challenged by the
23 plaintiff had actually protected the same
24 franchisee and others when they operated under
25 the system. The Court concluded that *Duncan's*

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2 noncompete was in reasonable time and space,
3 needed to protect legitimate business
4 interests, and consistent with public
5 interests.

6 Other courts reached similar
7 results. So who benefits? Reasonable
8 noncompete clauses are important to protect
9 franchisors' goodwill, confidential
10 information, and investment and training in
11 development of franchisees.

12 Noncompete clauses also protect
13 franchisees in the same way, and against having
14 former franchisees unfairly competed with by
15 operating knock-off concepts, as well as
16 trading on a goodwill and knowledge that they
17 developed under their franchise relationships.

18 In a business-to-business
19 arrangement, parties should be free to enter
20 into contracts on fully disclosed and mutually
21 agreeable terms; that is, franchising and
22 noncompete clauses fall in that category.

23 A noncompete in a franchise
24 agreement supports the franchisor and the
25 franchisees in the system against unfair

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2 competition and does not --

3 MR. KAPLAN: Thanks. Can you wrap
4 up? Because you're over two minutes. Thank
5 you

6 MR. MURTAZA: Of course. Thank
7 you.

8 lastly, I would just mention that
9 we agree with everyone else that the commenting
10 deadline should be extended so that we can
11 provide more detailed insight on the impact of
12 this rule. Thank you.

13 MR. KAPLAN: Thanks a lot.
14 Our next speaker is Megan
15 Stochhuasen.

16 Megan?

17 MS. STOCHHAUSEN: Hey, Peter. I'm
18 passing it to my colleague Melissa Cropper.

19 MS. CROPPER: Thank you.

20 This is Melissa Cropper. I'm
21 president of the Ohio Federation of Teachers
22 and the vice president for the American
23 Federation of Teachers, and I'm honored to be
24 here today to share my support for the FTC's
25 proposal for a ban on noncompetes.

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2 We represent charter school
3 teachers and staff in Ohio. Many of our
4 charter school members are subject to
5 noncompete clauses or components of noncompete
6 clauses.

7 Shockingly, teachers can be fined
8 up to \$4,000 for resigning and working in
9 another school. Often charter schools will
10 garnish the last paycheck or the last few
11 paychecks of an employee who has resigned.
12 Salaries at charter schools are typically low,
13 so it's important to note that these fees are
14 applied to teachers who earn salaries as low as
15 \$32,000 annually.

16 Educator contracts with charter
17 schools often include a range of other
18 provisions that would be considered part of a
19 noncompete clause, such as banning teachers who
20 leave their job from teaching at another school
21 outside of their charter network in a certain
22 county, city, or mile radius; being sued in
23 court; having their teacher license contested
24 within the state; or having to pledge to not
25 use any of the teaching materials, lesson

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2 plans, or other resources that they developed
3 while teaching at the charter school.

4 These noncompete provisions are
5 pervasive and hard to remove or contest. In
6 terms of specific feedback to the proposed
7 rule, I appreciate that the rule isn't limited
8 to provisions or agreements specifically
9 designated noncompete clauses. The contractual
10 provisions teachers struggle with, whether
11 there's a fine for resigning, a ban on
12 teaching, or the threat of being sued or losing
13 their teaching license, all work as noncompete
14 clauses.

15 One language arts teacher I work
16 with submitted a letter of resignation in May,
17 letting the charter school she was working for
18 know she would not be returning the following
19 year. She lost her last two paychecks, which
20 put her family under financial pressure all
21 because the former employer had a noncompete
22 clause. Leaving one teaching job for another
23 better teaching position should not cause
24 economic pain for a teacher's family.

25 When she wrote to me describing the

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2 ordeal she said, "It is disgusting that charter
3 schools can basically hold us hostage, force us
4 to sign an intent to return before other
5 schools of public districts have even posted
6 open positions, and then take money that we
7 rightfully earned throughout the school year.
8 It is theft, plain and simple."

9 MR. KAPLAN: Melissa, can you wrap
10 up? Sorry. You're over two minutes

11 MS. CROPPER: Yes.

12 I'll wrap up by saying: By
13 impeding the mobility of teachers and
14 healthcare workers from one job to the next,
15 noncompete agreements undermine worker
16 bargaining power and contribute to conditions
17 that do not serve students or patients.

18 Thank you.

19 MR. KAPLAN: Thanks, Melissa.

20 Our next speaker is Chenai
21 Kirkpatrick

22 MS. KIRKPATRICK: Thank you.

23 Good afternoon. My name is Chenai
24 Kirkpatrick. I serve as the director for
25 global policy and regulatory affairs at SHRM,

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1
2 the Society For Human Resources Management.
3 Thank you for hosting this public forum to
4 examine the proposed ban on noncompete clauses.

5 On behalf of SHRM and our
6 318-plus-thousand members, we appreciate the
7 opportunity to engage with the FTC on this
8 important proposal. More than 95 percent of
9 Fortune 500 companies rely on SHRM to be their
10 go-to resource for all things work and their
11 business partner in creating next-generation
12 workplaces.

13 SHRM believes that the rule as
14 drafted is overly broad and could potentially
15 harm businesses that depend on noncompete
16 agreements to thrive, including emerging
17 technology companies that must safeguard highly
18 specialized capabilities.

19 With an economy that is more
20 knowledge based than ever, there are more and
21 more circumstances where employers need to
22 protect information. We also believe the
23 broadly drafted regulation would jeopardize the
24 ability of HR professionals to require the
25 repayment of education or training benefits,

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2 and it would also endanger the use of
3 nondisclosure and nonsolicitation clauses. A
4 consequence of the proposed rule could be
5 businesses of all sizes not investing in
6 upskilling and reskilling their workforce.

7 SHRM believes the FTC should
8 differentiate between agreements designed to
9 limit labor market mobility and those designed
10 to protect confidential trade secrets or
11 strategic planning.

12 SHRM supports a well-functioning
13 labor market and the ability of workers to
14 secure good-paying jobs, and we believe that
15 this proposed rule will limit the ability of
16 employers to create workplaces where everyone
17 thrives.

18 SHRM looks forward to commenting in
19 detail on the FTC's proposed rule and hopes
20 that the FTC will consider the alternative
21 solutions and broad exceptions in the rule that
22 SHRM will outline in its comments.

23 Thank you for this opportunity, and
24 we look forward to working with the FTC.

25 MR. KAPLAN: Thanks, Chenai.

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2 Our next speaker is Scott
3 Shewcraft.

4 Scott?

5 MR. SHEWCRAFT: Good afternoon. My
6 name is Scott Shewcraft. I'm the vice
7 president of policy at The Economic Innovation
8 Group. We are a public policy organization
9 focused on American dynamism and people in
10 places -- giving them access to the broader
11 prosperity of our -- of our national economy.

12 We are supportive of the -- the
13 FTC's approach of banning all noncompete
14 clauses, and that's in large part because, you
15 know, we -- we believe that the anticompetitive
16 effects, the stymying of entrepreneurship, and
17 the suppression of wages is true irrespective
18 of where you set the dial on income and what
19 kind of worker you're talking about.

20 That said, you know, I want to --
21 we'll be submitting a comment letter more fully
22 discussing all of those points, and I want to
23 take a minute to talk about some of what we've
24 been hearing today and some of the exceptions
25 that might exist.

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2 We are -- we want to urge caution
3 on the income threshold for a test because it
4 seems in all instances to have been arbitrary
5 and not really well targeted, particularly when
6 you take into account huge differences
7 geographically on incomes and where that might
8 be set based on the -- the nature of the work.

9 And in many cases, it's -- it's
10 those knowledged workers at a firm that are
11 most likely to be the entrepreneurs of tomorrow
12 and the innovators that bring, you know,
13 dynamism to their local economy and new jobs.

14 In particular, there's some
15 forthcoming research on the prohibition in
16 Washington state, which is a fairly high-income
17 threshold in the low \$100,000, and it showed no
18 employer -- no change in employer behavior.
19 Nobody raised somebody's wages to move that
20 worker into the threshold -- into the range
21 where a noncompete would be allowed, so that
22 means, you know, it's not that valuable to the
23 employer for that worker, and it wasn't
24 previously priced into their compensation.

25 When we talk about --

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2 MR. KAPLAN: Scott, you're at two
3 minutes. Can you wrap up, please?

4 MR. SHEWCRAFT: Oh, yeah.

5 So we support the complete ban,
6 but -- and discourage any sort of income
7 testing for -- for an exception.

8 MR. KAPLAN: Thank you, Scott.

9 Our next speaker is -- sorry --
10 Rebekah Goshorn Jurata.

11 Rebekah?

12 MS. JURATA: Yes, thank you.

13 Hello. My name is Rebekah Goshorn
14 Jurata from the American Investment Counsel.

15 AIC members provide access to
16 capital, create jobs, strengthen retirement
17 security, drive innovation, and increase
18 economic growth through responsible, long-term
19 investment. Our members support competition by
20 investing in local communities and creating
21 wealth for millions of American public sector
22 workers who are saving for retirement.

23 AIC appreciates the FTC's efforts
24 to please anticompetitive conduct impacting
25 labor markets; however, we are concerned that

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2 the broad drafting of the proposed rule will
3 harm competition by reducing incentives for
4 long-term investment in developing businesses.
5 This will hamper job creation and discourage
6 innovation.

7 Many of the noncompete or de facto
8 noncompete clauses it would bar are critical
9 parts of carefully negotiated agreements
10 between sophisticated actors, including
11 business owners and those working to ensure
12 that American workers and retirees can protect
13 and grow their savings in ways that they
14 demand.

15 Undoing these contractual terms
16 would create negative consequences that would
17 also include violating their existing
18 obligations, and many of which were not
19 included in the noticed proposed rulemaking, or
20 even contemplated.

21 The contracts that we are concerned
22 about are drastically different from those
23 examples of worker exploitation discussed in
24 the proposed rulemaking or highlighted in the
25 recent Commission enforcement actions. We

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2 believe the FTC can write a rule that fulfills
3 its goals of protecting workers while allowing
4 our members to abide by their existing
5 obligations and serve their investors.

6 We look forward to working with
7 you, and we'll submit a comment letter in the
8 coming months. So to that end, we respectfully
9 request the Commission consider the request for
10 extension of the comment period.

11 Thank you, and thank you for your
12 time.

13 MR. KAPLAN: Thanks, Rebekah.

14 Our next speaker is Jason Todd.

15 Jason?

16 MR. TODD: Thank you for the
17 opportunity to participate in today's forum.
18 My name is Jason Todd. I'm vice president of
19 government affairs for the Independent
20 Electrical Contractors.

21 Established in 1957, IEC is a trade
22 association representing over 3,700 members
23 with more than 50 chapters and training centers
24 nationwide. IEC is the nation's premier trade
25 association representing America's independent

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2 electrical and systems contractors.

3 IEC believes the FTC is taking an
4 overly simplified approach to noncompete
5 agreements with this blanket prescription and
6 should abandon the rulemaking process
7 altogether. Instead, IEC urges the Commission
8 to take more time to study the issue by
9 convening roundtables with interested
10 stakeholders to get a better idea of how they
11 are used and their impact on different
12 industries.

13 Specifically, some IEC members may
14 use reasonable noncompete agreements for their
15 high-level executives, and we also use the
16 training repayment agreement provision that's
17 been referenced today for their apprentices,
18 since they will often pay for most if not all
19 their tuition in a registered apprenticeship
20 program, which, after four years, they will
21 graduate into a good-paying profession as a
22 journeyworker electrician with little to no
23 debt.

24 Should the FTC continue with the
25 rulemaking process, IEC believes, as others

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2 have stated, that the comment period for such
3 an impactful rulemaking should be extended
4 immediately for an additional 60 days. This
5 60-day comment period is not nearly enough time
6 for the business community to assess its impact
7 and comment appropriately.

8 And IEC would stress that given the
9 vast majority of its members are small
10 businesses, they are limited in their resources
11 and staff time to devote to surveys and emails
12 to express in further detail just how this rule
13 would impact their operations.

14 Thank you for your time today.

15 MR. KAPLAN: Thanks, Jason.

16 Our next speaker is Najah Farle.

17 Najah?

18 MS. FARLE: Hi. Thank you, members
19 of the FTC and staff and commissioners, for
20 allowing me to speak.

21 My name is Najah Farle. I'm a
22 senior staff attorney at the National
23 Employment Law Project. NELP is a nonprofit,
24 nonpartisan research and advocacy organization
25 specializing in employment policy.

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2 I'm speaking today in favor of the
3 proposed rule, which will significantly limit
4 the use of noncompetes for workers nationally.

5 Employers have taken advantage of
6 the lack of laws and regulations in this area
7 to push these agreements on to unsuspecting
8 workers across all income levels and job
9 titles. I first came to this issue when I was
10 an assistant attorney general at the New York
11 state office of the attorney general working on
12 the infamous Jimmy John's case and afterwards
13 received many complaints across industries
14 throughout the state, including phlebotomists,
15 IT professionals, house cleaners, security
16 guards, bike messengers, school cafeteria
17 works, and others.

18 Since joining NELP, I have
19 continued advocating against these --
20 proliferation of these agreements, having seen
21 firsthand their deleterious effect on workers.
22 Workers are often faced with unenforceable
23 noncompetes in the workplace.

24 Even in California, employers often
25 give unenforceable noncompetes to workers.

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2 That's why California passed their recent law,
3 barring companies from attempting to enforce
4 other state noncompete laws against California
5 workers.

6 Employers often use soft methods
7 such as cease and desist letters or letters to
8 their new employers to chill workers and keep
9 them from moving on to other employment. In
10 this way, potentially unenforceable agreements
11 are enforced through intimidation. That is why
12 banning noncompetes is the only solution.

13 There are a number of other
14 protections available for companies, as
15 discussed by others in this forum, the Defense
16 Against Trade Secrets Act and nondisclosure
17 agreements.

18 NELP also supports the proposed
19 rule because it will ensure that noncompetes
20 will no longer degrade wages and working
21 conditions by eliminating the most effective
22 means workers have to improve their job
23 quality: changing jobs to raise their pay or
24 moving to better conditions.

25 Banning noncompetes for all workers

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2 will reduce labor monopsony and increase worker
3 power. This means that the FTC's proposed ban
4 will lift up workers throughout the country.

5 For these reasons, we therefore
6 urge the FTC to finalize the rule as it is
7 currently written and eliminate unlawful
8 noncompetes.

9 Thank you.

10 MR. KAPLAN: Thank you.

11 Our next speaker is Kevin Johnson.

12 Kevin?

13 MR. JOHNSON: I'm Kevin Johnson
14 from Massachusetts.

15 I would like to ask the corporate
16 executives who are members of the boards or
17 organizations opposed to a blanket noncompete
18 ban whether they really want to oppose a ban on
19 noncompetes that could increase executive
20 earnings by more than 10 percent, regardless of
21 whether or not they've signed a noncompete,
22 according to studies cited in the FTC's NPRM.

23 Do these executives attempt to
24 sacrifice their own income even though their
25 companies don't benefit financially from

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2 noncompetes? According to Mark Garmaise's Ties
3 That Truly Bind study, quote, noncompete --
4 noncompetition agreement enforcement has no
5 significant effect on firm value or
6 profitability, unquote.

7 If these organizations are anything
8 like a similar organization of businesses that
9 initially opposed noncompete reform in
10 Massachusetts, then its opposition may well be
11 driven by an outspoken minority who insist the
12 noncompetes are necessary while most board
13 members don't have a strong conviction and so
14 refrain from the debate.

15 The most outspoken opponents of
16 Massachusetts noncompete reform were certain
17 lawyers, including general counsel of companies
18 that were on the board of the business
19 organization. These lawyers, of course, like
20 all lawyers, are exempt from noncompetes
21 themselves under an ABA rule named Restrictions
22 on Rights to Practice.

23 U.S. Chamber of Commerce boards and
24 89 voting members include 18 with law degrees,
25 as well as quite a few others who aren't likely

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to have personally signed a noncompete.

I encourage board members whose earnings are reduced by noncompetes not to sacrifice their interests for the bulk of minority. Why let those whose freedom and earnings aren't limited by noncompetes constrain your income and your freedom to choose where you work?

Finally, I encourage the FTC to require that job postings include the terms and conditions of employment as an extension of your online advertising disclosure guidelines. Such a rule seems like it has survived court challenges because the prior administration's NLRB ruled that employee handbooks can't be considered confidential information.

Thank you.

MR. KAPLAN: Thanks, Kevin.

Our next speaker is Keith Miller.

Keith?

MR. MILLER: Good afternoon.

My name is Keith Miller of Franchisee Advocacy Consulting and representing the American Association of Franchisees and

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2 Dealers. Thank you, commissioners and staff,
3 for this important forum.

4 Today I want to discuss the need
5 for the rule to expand to franchisees.
6 Franchisors use noncompete agreements to, in a
7 sense, own the franchisee for the long term.
8 I'm guessing few franchisees noticed and paid
9 attention to that small clause when they signed
10 that long agreement. They definitely did not
11 understand the long-term implications of how
12 the noncompete would be used to solidify the
13 power imbalance in their relationship.

14 Franchise agreements are most often
15 5- to 20-year terms. When the term is up, if
16 you wish to renew, you must sign a then-current
17 franchise agreement. This is when the
18 noncompete becomes the gun to the head.

19 New agreements often have new
20 onerous terms included. The franchisee now has
21 a choice to sign this new onerous agreement or
22 walk away from their business and not be able
23 to continue their profession. Franchisors know
24 this and take advantage of it. They know the
25 gun is fully loaded at this point.

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2 My own brand, Subway, has a new
3 agreement that bears little resemblance to my
4 original agreement. In fact, the new agreement
5 would prohibit me, post-term, from leasing,
6 licensing, or otherwise granting access to or
7 the right to use any property I have an
8 ownership in to anyone in a competing business.
9 They even want control of my non-Subway assets
10 after I'm out.

11 Another prime example is BrightStar
12 Home Care. A new agreement now requires, on
13 renewal, a call option that is contained in it.
14 The franchisor can unilaterally decide it wants
15 to buy your franchise back if they still want
16 to enforce the noncompete, effectively
17 restricting those franchisees from any ability
18 to make a living in their profession.

19 I will hope you will consider
20 including the franchisee protections in your
21 final rule. Thank you.

22 MR. KAPLAN: Thanks, Keith.

23 Our next speaker is Robert Purvin.

24 Robert? Robert?

25 MR. PURVIN: Am I muted? Yeah.

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2 Thank you for the opportunity. I
3 am Robert Purvin. I'm the chairman and one of
4 the -- CEO and one of the founders of the
5 American Association of Franchisees and
6 Dealers, and I'm here to echo the comments of
7 our public affairs director, Mr. Miller, who
8 just spoke to you.

9 I do want to thank the FTC for this
10 forum and for engaging in this discussion. I
11 know I've learned a lot from the various
12 comments, and I do think that there is a -- an
13 important concern for folks that need to
14 protect intellectual property assets.

15 However, in the franchising
16 context, I've been involved with this debate
17 for many, many years, I actually published a
18 book in -- 30 years ago where I exposed the
19 fact that franchising falsely represents that
20 there's business ownership when, in fact, most
21 franchisees are middle managers, and the only
22 distinction between what they do or an employee
23 manager of a restaurant or a business is the
24 fact that the franchisee has actually paid for
25 its training, where in most employment contexts

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training is included.

The reason for noncompetes being not enforced in most instances has been the fact of the freedom to work, the right to work, should supersede the concerns of the people we want to protect; but in the franchising context franchisees are not deemed to be employees but they have all the same duties. And, in fact, most franchise agreements are more restrictive than most employment agreements.

So the AFD really wants the FTC to include in its definition of any rule that it promulgates should extend to franchisees. We completely disagree with the position of the International Franchise Association.

And I would like to finally observe that the difference between the AFD's position and the NFIB's position, both organizations supporting small businesses, the AFD's small businesses unanimously support the idea of prohibiting noncompetes and franchise agreements.

MR. KAPLAN: Thanks, Robert

MR. PURVIN: Thank you.

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MR. KAPLAN: Thanks a lot.

Our next speaker is Abby Lawlor.

Abby?

MS. LAWLOR: Good afternoon.

My name is Abby Lawlor, and I'm a legal fellow at Public Rights Project, voicing our strong support for the FTC's rule.

Public Rights Project is a national nonprofit dedicated to closing the gap between the promise of our laws and the lived reality of marginalized communities. We partner with local, state, and federal governments across the country to equitably enforce laws that protect workers and consumers from corporate abuse.

Public Rights Project works directly with workplace enforcement agencies, city and county attorneys, and other local officials charged with protecting the rights of workers to bring cases under minimum wage, paid sick leave, and other labor standards. These enforcement efforts are particularly important for low-wage workers, including black, Latinx, and immigrant workers.

The proposed rule responds to the

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2 effects of noncompete agreements to suppress
3 wages and benefits and the exploitative and
4 coercive nature of noncompetes at the time of a
5 worker's departure from an employer.

6 These aspects of noncompetes burden
7 the work of local labor standards enforcers in
8 two ways: First, by reducing wages and
9 benefits, noncompetes inflate the number of
10 workers who rely on minimum labor standards to
11 set their terms of employment; second, by
12 making it more difficult to leave a job by
13 raising the stakes of potential retaliatory
14 firings, as we heard earlier today, noncompetes
15 stop workers from speaking up about violations
16 of those same minimum standards. This allows
17 violations to go unreported and unaddressed.

18 We strongly support the proposed
19 rule because it will eliminate noncompetes as a
20 barrier which prevents workers from improving
21 their wages and working conditions. I'll
22 briefly highlight three aspects of the rule we
23 believe are particularly helpful.

24 First, the rule requires employers
25 to rescind any existing noncompete agreements

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2 and will, therefore, limit the maintenance of
3 unenforceable noncompetes, which may,
4 nonetheless, keep workers from making
5 complaints.

6 The rule also covers independent
7 contractors and removes misclassification as a
8 potential tool for employers to evade their
9 legal obligations.

10 And lastly, the rule sets a
11 regulatory floor and does not prevent
12 localities from adopting regulations which are
13 even more protective of workers.

14 We appreciate the opportunity to
15 participate in this forum and look forward to
16 submitting our written comments to the
17 Commission. Thank you.

18 MR. KAPLAN: Thanks, Abby.

19 Our next speaker is Shari
20 Overstreet.

21 Shari? Do we have Shari on?

22 Shari, I think you might be muted

23 MS. OVERSTREET: There we go.

24 MR. KAPLAN: Okay, great.

25 MS. OVERSTREET. Okay.

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2 Hi. I'm a certified public
3 accountant, business valuation expert,
4 investment banker, and business owner with
5 almost 40 years of business experience. One
6 half of my career has been spent in serving in
7 various finance and accounting and operational
8 roles and companies, and the other half as a
9 service provider. I'm also currently subject
10 to a noncompete.

11 As part of my current business
12 valuation, I often work with the country's top
13 executives valuating noncompete agreements in
14 the context of an acquisition, which is
15 required for various accounting and tax
16 purposes.

17 Having worked extensively with
18 executives valuing noncompete agreements, I
19 cannot express the importance of having these
20 agreements appropriately in place, particularly
21 when the sale of a business, i.e., change of
22 control, is involved, as often a deal is
23 conditioned upon having them in place.

24 As part of the noncompete valuation
25 process when estimating the value of a

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2 noncompete agreement, business valuers spend
3 time with each executive understanding and
4 documenting their background and history,
5 determining where they might compete, how they
6 might damage their company, and how that
7 estimated damage might be quantified.

8 The executives are asked to
9 qualitatively describe the damage they could
10 inflict on the company if they did not have the
11 noncompete agreement in place and complete. I
12 have hundreds upon hundreds if not thousands of
13 these responses. The responses provide a
14 roadmap as to how they would damage, likely,
15 and often circumvent trade secrets and
16 nondisclosures.

17 This type of competition would
18 result in the unfair reallocation of assets
19 from the buyer to the executive and their
20 future companies. As a result, I believe an
21 appropriate applied noncompete agreement
22 provides a needed time-out so that there's
23 little to no possibility of them having the
24 opportunity to harm the business in the near
25 term.

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2 I will now comment on the limited
3 exception for noncompete agreements associated
4 with the sale or transfer of a business. That
5 proposes there is an ownership threshold of 25
6 percent. I would recommend that no ownership
7 percentage threshold be applied because it will
8 not appropriately address the wide variety of
9 situations where noncompetes will be needed to
10 protect a buyer.

11 In a startup business, and
12 specifically referencing --

13 MR. KAPLAN: Shari, you're over two
14 minutes. Can you just wrap up?

15 MS. OVERSTREET: Yeah. Yeah. So
16 I'll go ahead and just wrap it up.

17 Finally, I've submitted comments,
18 some of my other colleagues have submitted
19 comments; in regards to the threshold in the
20 M&A arena, we are suggesting there are laws and
21 rules and guidelines that are codified in our
22 Internal Revenue Code, such as those used to
23 define highly compensated employees and other
24 guidelines that can be used to decide when a
25 noncompete should or should not be applied, and

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2 we are suggesting leveraging that work that has
3 been in place for decades as opposed to having
4 the 25 percent rule.

5 MR. KAPLAN: Thanks, Shari

6 MS. OVERSTREET: Okay.

7 MR. KAPLAN: Thanks a lot. All
8 right.

9 Our next speaker is Winifred Carson
10 Smith.

11 Winifred?

12 MS. CARSON-SMITH: Good afternoon.

13 My name is Winifred Carson-Smith,
14 and I am an attorney who has worked with and
15 for nurses on the regulation and practice of
16 advanced practice nurses.

17 I am speaking today on behalf of my
18 company, WI Carson Company, and our associated
19 social media platform, Let's Talk Nursing Now,
20 LTNN.

21 As nursing scopes of practice and
22 statutory recognition through its licensure has
23 expanded, so has the use of various business
24 agreements and regulatory mechanisms been
25 altered and expanded to control the amount of

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2 autonomy nurses have to practice or obtain
3 reimbursement.

4 Noncompetes typically are -- are
5 not used to protect the economic welfare of the
6 employer, but instead to compel nurses to stay
7 in employment arrangements. They thwart
8 competition when such are needed in this arena.
9 They are one of many measures used to limit
10 growth of alternative health providers.

11 There's a shortage of primary care
12 providers throughout the country, so we don't
13 understand why these types of agreements or
14 contracts are used in relationships with
15 advanced practice nurses.

16 The rulemaking is a great first
17 step toward addressing the underlying and
18 fairness of business relationships between the
19 two, but there's a need to re-term them. In
20 some states, the terms of the business
21 relationships are embedded in either state
22 statute or regulation, and through those
23 regulatory mechanisms the terms of noncompetes
24 can be legally structured.

25 Two states that are examples here

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2 are Missouri and Tennessee. For instance,
3 Tennessee has five-mile -- has a ten-mile limit
4 for their restriction or two years on their
5 noncompetes. Similarly, Missouri courts have
6 found reasonable a noncompete between a nurse
7 practitioner and a hospital which prevented the
8 NP from engaging in the practicing of nursing
9 within a 50-mile radius.

10 MR. KAPLAN: Sorry, Winifred,
11 you're at two minutes. Can you just find a way
12 to wrap up?

13 MS. CARSON-SMITH: Okay.

14 Well, in short, what I would say is
15 that, first, we are going to submit expanded
16 comments on these particular instances.

17 What is reasonable when there's a
18 shortage of providers is our concern, and we
19 think that this noncompete prohibition is a
20 first step in addressing that issue in the
21 healthcare arena.

22 Thank you for the opportunity to
23 submit comments.

24 MR. KAPLAN: Thank you, Winifred.

25 Our next speaker is Mike Pierce.

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Mike?

MR. PIERCE: Thank you very much.

And thank you, Chair Khan and commissioners.

My name is Mike Pierce. I'm the executive director of the Student Bar Protection Center, a nonprofit organization focused on alleviating the burden of student debt for millions of Americans.

We're here today to talk about a type of what we call shadow student debt, shouldered by working people across the country who participate in training programs offered by employers. Over the last two years, we've investigated how firms ranging from hospitals to roofing contractors harness training debt to stifle competition and trap working people in low-paying and substandard employment conditions.

These training debts are imposed to be so-called training repayment agreement provisions, or TRAPs. We applaud the work that you and your staff have undertaken on this proposed rule. We support a strong rule that would prohibit the use of all noncompete

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2 clauses and functionally similar contracts like
3 TRAPs.

4 TRAPs require workers who receive
5 on-the-job training to pay back the so-called
6 cost of this training to their employer if they
7 leave their job before a fixed amount of time.
8 These terms are often imposed as mandatory --
9 as a mandatory precondition of employment.

10 Through our research, we now
11 estimate that major employers rely upon TRAPs
12 in segments of the U.S. workforce that
13 correctively -- sorry, in segments of the U.S.
14 labor market that collectively employ more than
15 one in three private-sector workers. The costs
16 of these agreements can be exorbitant in
17 relation to the earnings of workings, making
18 departure impossible.

19 Consider the following stories
20 we've heard from workers.

21 A former trucker took advantage of,
22 quote, free training, and was forced to endure
23 poor working conditions and sexual harassment
24 because any attempt to leave her job triggers
25 \$8,000 debt with double-digit interest rates.

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2 A former pet groomer was pressured
3 to enroll in the company's firm-specific
4 grooming training and found themselves locked
5 in a grueling and dangerous position that
6 barely paid above the minimum wage. If they
7 dared to leave, the company threatened to sue
8 for more than \$5,000, along with interest and
9 penalties.

10 The growing use of TRAPs and other
11 stay-or-pay employment terms to block workers
12 from moving for better jobs is a flagrantly
13 unfair method of competition, an effort by
14 employers to hold back workers from pursuing
15 higher wages for better working conditions.

16 As the FTC moves forward with this
17 rulemaking, it's important that a final rule
18 covers functional noncompetes like TRAPs and
19 other forms of employer-driven debt for all
20 workers.

21 Thank you for your time today.

22 MR. KAPLAN: Thanks, Mike.

23 Our next speaker is Art Cormier.

24 Art?

25 MR. CORMIER: Good afternoon.

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2 I'm speaking to you on behalf of
3 the Independent Association of Home Instead
4 Franchisees, whose membership contains a
5 majority of the network's franchisees in the
6 United States.

7 We ask that if the FTC decides to
8 protect employees from noncompetes in the
9 employment context, that it likewise protects
10 franchisees from noncompetes in the franchising
11 context. Although noncompetes are, in theory,
12 there to protect the interest of the franchisor
13 in things like trade secrets and confidential
14 information, in reality they are often used to
15 oppress franchisees by imposing an enormous
16 economic penalty should the franchisee decide
17 to leave the system or should the franchisor
18 terminate the franchise relationship.

19 The mere threat of that voluminous
20 economic penalty has a chilling effect or will
21 likely have a chilling effect in the FTC's
22 ability to get full information from
23 franchisees in this process, but it also has an
24 anticompetitive effect. Like the employee who
25 may be blocked from pursuing better

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2 opportunities because of a noncompete, the
3 franchisee is effectively blocked from pursuing
4 better opportunities, including breaking out on
5 his or her own and experimenting with their own
6 innovative ideas. This suppresses overall
7 innovation and competition in the American
8 economy.

9 With respect to the interests of
10 the franchisor in protecting things like trade
11 secrets and confidential information, we
12 believe these concerns are generally inflated
13 or created to justify the imposition of a
14 noncompete and thereby obtaining the enormous
15 leverage that comes with that; but to the
16 extent such interests do legitimately exist,
17 they are adequately protected by a damages
18 remedy.

19 Moreover, if the noncompete
20 prohibition takes effect without including
21 franchisees, it will put franchisees in an even
22 worse position than they currently are in.

23 Their employees, who often have the
24 same information from the franchisors that the
25 franchisee does, will be able to go out and

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2 innovate and compete, but the franchisees
3 themselves will remain effectively blocked from
4 doing so. Franchisees should be permitted to
5 innovate and compete as well.

6 Thank you.

7 MR. KAPLAN: Thanks, Art.

8 Our next speaker is Eric
9 Poggemiller. I'm sorry if I messed up your
10 name. Poggemiller

11 MR. POGGEMILLER: You got it right.
12 Thank you.

13 MR. KAPLAN: Eric?

14 MR. POGGEMILLER: Yeah, I'm here.

15 MR. KAPLAN: It's your turn.

16 MR. POGGEMILLER: Okay. Yeah.

17 I'm an attorney who represents
18 small- to medium-sized businesses, and I
19 definitely believe that there should be
20 carve-outs for senior executives and for
21 employees with access to sensitive
22 technological information for several of the
23 reasons previously mentioned.

24 I believe to do otherwise is going
25 to stifle innovation. Businesses already take

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2 a big risk by investing a significant amount of
3 money into projects that may not pan out, and
4 to take further risk that those employees can
5 immediately take that know-how to a competitor
6 may lead to businesses just opting not to take
7 that risk and not wanting to throw the money at
8 it. And as Emily eloquently mentioned earlier,
9 NDAs cannot make an employee forget what he's
10 learned or allow an employer to monitor what's
11 being disclosed, so those are not an adequate
12 tool for the employer.

13 Large businesses might be able to
14 absorb that risk, but smaller ones will not.
15 This will lead to fewer job opportunities for
16 workers in the tech field, not more, as smaller
17 businesses will exit the marketplace, leaving
18 fewer employers in the industry.

19 To further comment on the
20 retroactive rescission, this creates a large
21 burden on businesses who will have to dig up
22 any contract, including contracts with
23 independent contractors that it's signed in the
24 past, trying to dig up contact information,
25 follow up to make sure that their notice was

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received.

As the FTC is already aware, these agreements are already limited in time in any event in order to be enforceable, so they would eventually expire before too long in any event.

There's also kind of been this presumption here today that these are all non-negotiated, and that is not always the case, as many of these have been signed as part of a negotiated severance payment which the employee is not otherwise entitled to.

Sometimes they're granted as part of a stock grant.

If these contracts are rescinded, rescission typically restores the parties to the position that they occupied prior to the contract. So would the employer then be entitled to sue the employee to require a repayment of any consideration it's granted?

I would further ask that these limitations on noncompetes be left to the laboratories of democracy, known as the states, because they've ably demonstrated the ability to do this in the past, and it's clear from the

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2 FTC's request for comments that it currently
3 lacks the necessary information to know how
4 wide or narrow to make this rule, so that's as
5 good of an argument as any for caution in this
6 area.

7 So in conclusion, I would just ask
8 that this rule, if it is to go forward, have a
9 carve-out for executives and for employees
10 possessing sensitive information. I would
11 further ask that these not be applied
12 retroactively.

13 Thank you.

14 MR. KAPLAN: Thanks, Eric.

15 Our next speaker is Hillard Taylor.
16 Hillard?

17 MR. TAYLOR: Yes. How are you
18 doing?

19 My name is Hillard Taylor, and I am
20 a U.S. Army veteran; and I worked for a company
21 for a year, and I had no knowledge of anything
22 that the company does or any trade secrets or
23 -- or anything of that sort.

24 They came in one day, and they let
25 go 500-and-something-odd employees. Nine

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2 months after that, I received an email from my
3 former employer stating that I had helped a
4 friend of mine start his own business and was,
5 therefore, in violation of the noncompete
6 agreement.

7 I had no idea that I was even under
8 a noncompete agreement, and so when I went back
9 to read the noncompete agreement, I learned
10 that I had, indeed, signed noncompete agreement
11 for ten years. So they had a noncompete
12 agreement against me that was enforceable for
13 the next ten years; so meaning that if I wanted
14 to compete, go work for another company that
15 essentially did the same thing they did, that I
16 would be unable to.

17 I am currently being sued by my
18 former employer, and we have a litigation or a
19 mediation scheduled for next month, and they
20 are suing me in the tune of \$250,000. I have
21 not worked since I worked for them, but they're
22 still trying to sue me for \$250,000 and not
23 that I worked for another company, just on
24 the -- that they think I gave someone else some
25 information to start another company.

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2 I think -- you know, I'm not really
3 abreast on the ban. I think it should be
4 either adjusted or done away with altogether,
5 and so I just want to bring in my support today
6 on banning those noncompetes, and especially
7 ones that hold you hostage for a period of ten
8 years. I think that is very excessive.

9 MR. KAPLAN: Thanks, Hillard.

10 Our next speaker is Amy Shulman.

11 Amy?

12 MS. SHULMAN: Good afternoon.

13 Thank you, Commissioner Khan and the FTC, for
14 allowing us to speak today.

15 I am a partner in the executives
16 and professionals group and the medical
17 professionals employment group at Outten &
18 Golden, a national law firm representing
19 individual employees, including many
20 physicians, technology workers, and other
21 workers in industries covered here today.

22 We fully support the FTC's ban for
23 the reasons that have been shared by many here
24 today. I would like to focus my comments on
25 the healthcare industry. As the physicians who

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2 spoke earlier aptly described the deleterious
3 effects of noncompetes on physician --
4 physicians' abilities to practice, I would like
5 to call attention to the fact that healthcare
6 is one of the most regulated industries in the
7 country, and that is because of the recognized
8 need to protect the public. The problem is
9 that noncompetes completely take away patient
10 choice from seeing the physician of their
11 choosing.

12 Doctors are frequently subjected to
13 noncompetes that prohibit them from practicing
14 in a geographic area that is within reach of
15 the patients they have served for many years,
16 and because of the high level of
17 merger-and-acquisition activity in the
18 healthcare space, they frequently, even if
19 there is a somewhat narrowly tailored
20 geographic restriction, have limited options to
21 no options to go outside that geographic area
22 to practice.

23 We further fully support the ban of
24 noncompetes at all income levels and at all
25 positions within companies. The notion that

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2 someone should be forced to --

3 MR. KAPLAN: Thanks, Amy. You're
4 over your two minutes. Can you wrap up?

5 MS. SHULMAN: Sure.

6 The notion that -- that someone at
7 any income level should be forced to sit out
8 from their career for a period of time simply
9 because they want to change jobs is an
10 unjustifiable, draconian punishment.

11 MR. KAPLAN: Thanks, Amy.

12 Our next speaker is Lynne Bernabei,
13 if I got that right.

14 Lynne?

15 MS. BERNABEI: Thank you.

16 I am from the law firm of Bernabei
17 & Kabat and am testifying on behalf of the
18 National Employment Lawyers Association, which
19 is the largest group of lawyers representing
20 workers in labor and employment disputes.

21 I would like to address
22 specifically the harm to low-wage workers from
23 noncompetes. Specifically, these are the
24 people who were called "essential workers"
25 during the pandemic, and I think banning

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2 noncompetes would be the best way you could
3 thank them for their service.

4 There are three specific problems I
5 want to identify.

6 First, noncompetes keep low-wage
7 workers locked into bad jobs because they
8 cannot -- because of the geographical
9 restrictions, cannot search for jobs unless --
10 except from very far away from where they work
11 or where they live. These are the people that
12 are already taxed by not being able to live
13 near their workplace because of the high cost
14 of housing in urban areas.

15 Second, these low-wage workers do
16 not have the funds to legally challenge
17 noncompetes, even those that are overbroad or
18 illegal. In fact, as we've heard today, even
19 executives and professionals do not have those
20 funds.

21 Third, noncompetes can force
22 low-wage workers to put up with and not report
23 on-the-job discrimination and dangerous working
24 conditions because if they do so, their
25 employers will fire them, and then they'll be

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2 subject to noncompetes. So in this way,
3 noncompetes actually impair the effective
4 enforcement in the antidiscrimination and
5 whistleblower statutes.

6 So I'll just say that the last two
7 issues I raised affect employees of every
8 strata. It's not just low-wage workers. They
9 affect professionals and -- professionals, and
10 even executives.

11 And NELA would strongly support and
12 will submit written comments supporting the
13 whole ban.

14 MR. KAPLAN: Thanks, Lynne.

15 Our next speaker is David Wert.

16 David?

17 MR. WERT: Hi. My name is David
18 Wert.

19 I've owned a senior home care
20 franchise for 16 years. I am directly hurt by
21 the noncompete.

22 All franchisees live under the
23 threat that their franchise contract will
24 change for the worse and they can't get out.
25 I'm embarrassed to come to you asking for help

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2 when I know you have so many initiatives on
3 your plates, but my ask is simple enough:
4 Franchisees are simply looking to be included
5 in the total banning of noncompete agreements
6 if that passes for everyone else.

7 We have nowhere else to turn.
8 We're treated like sitting ducks all across the
9 country. It's far too easy for the franchisor
10 to take excessively from the franchisee, and
11 the noncompete is the tool that allows them to
12 get away with it.

13 The Franchise Rule was a big step
14 in forcing clarity in franchise agreements, but
15 the protections only helped us get a fair
16 picture for what we were buying. After the
17 sale, franchisors run rampant every year making
18 their franchise contract renewals a worse deal,
19 and they threaten to terminate owners that
20 don't do exactly what they want.

21 My original contract was fine, but
22 in my renewal I will have to agree to things no
23 worker in their right mind would agree to.
24 They do more damage than just restricting
25 movement. My franchisor knows I will lose

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2 everything so I can't walk away, and the
3 noncompete enables this poor behavior.

4 For tens of thousands of
5 franchisees, eliminating the noncompete will
6 force franchisors to write a slightly more fair
7 contract, and it will help competition thrive
8 and keep prices down.

9 In conclusion, the consequences are
10 enormous for tens of thousands of operators
11 that are not adequately protected against the
12 abuses of practices of franchisors. If we
13 don't include franchisees now with everyone
14 else, who knows when this needed fix will be on
15 the table again.

16 You can take the bold step and fix
17 it. I respectfully ask you to include me in
18 the noncompete ban. My wages are affected too,
19 and franchisees receive no stock options or
20 anything else for their noncompetes.

21 MR. KAPLAN: Thanks, David. Thanks
22 a lot MR. WERT: The ability to walk
23 is the foundation block of any negotiation.
24 Thank you.

25 MR. KAPLAN: Thanks, David.

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Our next speaker is Brian Walsh.

Brian?

MR. WALSH: Hi, Peter. Thank you.

Hello. My name is Brian Walsh, and I'm the director of labor and employment policy at the National Association of Manufacturers. The NAM is the largest manufacturing association in the United States, representing over 14,000 manufacturers which are in every industrial sector in all 50 states.

I would like to begin by thanking the staff at the FTC for hosting this forum on its proposed rule to ban noncompete clauses.

Manufacturing competitiveness and innovation relies on an employer's ability to protect its patents, trade secrets, industrial processes, research and development, and other proprietary information. Noncompete agreements are instrumental to safeguarding competitive edge.

Despite the agency's articulated concern over noncompete agreements, manufacturers apply these agreements in a narrow and deliberate way, viewing them as

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2 critical tools to protect innovation and human
3 capital.

4 Typically, a noncompete is used for
5 individuals who have access to the highest and
6 most sophisticated knowledge of a company's
7 process and strategies. Employers have
8 identified these employees as a key to their
9 success, and they have invested not only time,
10 but significant compensation and training to
11 support and advance these employees' expertise.
12 Without access to noncompete agreements, it
13 will become harder for manufacturers to protect
14 company assets, leading to dramatic changes to
15 business operations and strategy.

16 This one-size-fits-all proposal is
17 unworkable and has the power to allow for trade
18 secrets and other types of closely held company
19 information to be more freely given away to
20 competitors and foreign adversaries by
21 departing employees.

22 Another risk of the ban is that
23 employers will develop more internal controls
24 that change the nature of the workplace. These
25 strategies could result in less training across

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2 divisions and potential isolation of employees
3 to fulsomely protect the company's IP and
4 sensitive information. These new safeguards
5 will only increase costs and discourage
6 innovation.

7 In addition to the stated reasons I
8 have offered in opposition to the rulemaking,
9 the authority of the FTC to issue a blanket ban
10 on noncompete agreements is in question. This
11 novel rulemaking poses policy questions of vast
12 economic and political significance beyond the
13 scope of the FTC. The regulation of noncompete
14 agreements has been handled successfully at the
15 state level and manufacturers --

16 MR. KAPLAN: Thanks, Brian. Can
17 you wrap up? You're at your two minutes.

18 MR. WALSH: Absolutely.

19 Basically, we are -- we want you to
20 consider a more tailored approach and rethink
21 this rule and withdraw it; and actually, please
22 extend the comment period by another 60 days.
23 Thank you.

24 MR. KAPLAN: Thanks, Brian.

25 Our next speaker is Boyd Sumner.

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Boyd?

MR. SUMNER: Yes.

I'm a former executive for a global corporation where I'm under a five-year noncompete, and -- but it's also geographically global; so wherever I move, I can't work in the industry.

One, I'm fully supporting the FTC ban on noncompetes and supporting the Workforce Mobility Act where it has, for executives the maximum of a one-year noncompete ban; but ultimately, when you work for a company for 25 years and you have a carve-out in your noncompete to do something, I was then served with a lawsuit against my former company where I had to pay their legal fees as well. So I had to settle and resign from the -- my new position because they forced me into having hundreds of thousands of dollars in legal bills.

And I don't believe it should be at the state level because large corporations would allow their legislation or their contracts to be written out of states that

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2 favor them.

3 So right now my contract, even
4 though I live out in California, is written out
5 of Missouri where they favor noncompetes for
6 employers, so I'm limited in my scope of future
7 employment.

8 So I fully support the FTC's ban
9 for noncompetes at all levels. Thank you.

10 MR. KAPLAN: Thanks, Boyd.

11 Our next speaker is Shari
12 Goodstein.

13 Shari?

14 MS. GOODSTEIN: Yes. Thank you,
15 commissioners and staff, for the opportunity to
16 speak before the Commission.

17 I'm a partner at the Goodstein Law
18 Firm, an employment law firm, and I'm speaking
19 today on behalf of the National Employment
20 Lawyers Association, the New York chapter; and
21 I'm going to focus on employees in the finance
22 sector, and I'm going to share some examples of
23 the limitations imposed on those employees'
24 mobility and suppression of wages.

25 Our new attorneys see in our

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2 practice how attorneys at all income levels and
3 at all age levels are adversely affected by
4 noncompete agreements. In particular, it
5 really affects young people in their 20s and
6 30s, but it affects all employees limited by
7 these very overbroad noncompetes that actually
8 are not geographically restricted and are not
9 limited to protect the legitimate business
10 interests of the employee -- employer.

11 So let me just give you a few
12 examples, because I think that -- that speaks a
13 lot.

14 I represented an employee in her
15 20s at a hedge fund industry. She wanted to
16 leave for a much better position. She had a
17 12-month noncompete that said that she couldn't
18 compete with any entity that directly or
19 indirectly competed with the firm, and the
20 indirect language is very, very common in
21 noncompetes in general, but certainly in the
22 financial sectors industry.

23 The firm took the position that
24 indirect meant any company in the finance
25 industry, even those companies that had nothing

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2 to do with the kinds of responsibilities and
3 services that she was involved in, and the
4 general counsel of the hedge fund was not able
5 to provide any legitimate business reason for
6 the restriction and insisted that certain kinds
7 of information that the employee had access to
8 was highly proprietary, highly confidential;
9 but in fact, on inquiry, we saw that that
10 information was widely publicized on websites.

11 MR. KAPLAN: Thanks, Shari. I'm
12 sorry, your two -- you ran your two minutes.
13 Thanks a lot for your comments.

14 MS. GOODSTEIN: Okay. And we will
15 be submitting written comments, and we
16 appreciate that.

17 MR. KAPLAN: That's great.
18 Absolutely.

19 Our next speaker is Sam Westgate.

20 Sam?

21 MR. WESTGATE: Yes. Thank you.

22 I'm here on behalf of the Amusement
23 & Music Operators Association. Our 75-year-old
24 association represents operators, distributors,
25 manufacturers, and suppliers of coin-operated

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2 amusement products. AMOA membership is made up
3 of multigenerational small business owners who
4 operate across the United States.

5 We are deeply concerned that
6 noncompete agreements are not allowed for key
7 employees. The revolving door for those
8 employees could eventually force smaller
9 companies out of business, as they are
10 constantly training new competition, and
11 sensitive internal information is readily
12 available to competitors.

13 It's been our experience it's very
14 difficult to prove a violation of a
15 nondisclosure agreement. When the NDA is tied
16 to a noncompete, violation of the NDA and
17 sharing of trade secrets is less likely to
18 occur.

19 It was stated eliminating
20 noncompete agreements would drive employees'
21 wages higher. We respectfully disagree. Ross
22 used the term "average worker." We only ask
23 highly compensated key employees to have a
24 noncompete clause as part of the employment
25 agreement and are thus compensated for

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2 noncompete and nondisclosure clauses.

3 The employment agreements will
4 guarantee them jobs, wages, wage increases,
5 benefits, and opportunities. The employees
6 truly have access to sensitive information that
7 would be detrimental to our businesses if
8 easily obtained by our competitors. The bulk
9 of our workforce is not asked to sign a
10 noncompete agreement.

11 The nature of our business is
12 geographically restricted in most cases. Our
13 noncompete agreements only apply to our current
14 business operating areas.

15 Our industry is also currently
16 experiencing quite a few mergers and
17 acquisitions. Without noncompetes, a larger
18 company could force a smaller company out of
19 business by simply poaching their key
20 employees.

21 We strongly believe that not being
22 able to negotiate employment agreements with
23 noncompete clauses could lower the value of
24 businesses for the buyers and the sellers.

25 We appreciate the ability to

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comment. Thank you.

MR. KAPLAN: Great. Thanks, Sam.

And we have run out of time, so that's going to conclude our comments from members of the public.

As I mentioned earlier, we had a large number of people sign up to speak; and because of that, we weren't able to get quite to everybody. But if you did not get a chance to speak, we very much encourage you to submit comments in writing by using the link on FTC.gov.

And now I will turn things over to Commissioner Bedoya for some final thoughts.

Mr. Bedoya?

MR. BEDOYA: Thank you, Peter.

I want to thank every single person who signed up to speak today. Even if you weren't heard, I want to urge you to please comment in the open proceeding.

I want to thank Elizabeth Wilkins and the extraordinary work that she and her staff are doing at the Office of Policy Planning, and, of course, my colleagues at the

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2 Commission, and yourself and Doug and everyone
3 at the Office of Public Affairs.

4 I want to note three takeaways for
5 me from this session that I think respond to
6 some of the misconceptions that have grown up
7 around noncompetes and that a lot of people who
8 aren't familiar with them and how they operate
9 might think at first blush.

10 The first one is this idea that
11 noncompetes are just a problem for blue-collar
12 workers, for, say, entry -- entry-level workers
13 at a fast food restaurant.

14 We heard today from an oncologist
15 and a radiologist, Dr. Baig and Dr. Massengale.
16 These -- yes, these are sophisticated
17 professionals. These, I suspect, are high-wage
18 earners. But what they shared was that this
19 was not -- noncompetes for them were not
20 something that they negotiated. This was
21 something that was imposed on them, and this is
22 something that impacted their ability to
23 provide healthcare and impacts that ability to
24 this day and that impacts their families.

25 I believe Dr. Massengale talked

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2 about having to, quote, move her family out of
3 state just to practice her profession; her
4 licensed profession, I might add. I think she
5 talked about having to move her three children
6 twice as a result of the noncompetes she was
7 subject to.

8 And so I think we need to ask
9 ourselves in the current environment, just two
10 years, three years after COVID, if this kind of
11 impact on competition in the healthcare market
12 is something that our country needs and
13 something that -- that is good.

14 The second is this misconception, I
15 think, that the NPRM somehow portrays senior
16 executives as weak market actors who need
17 protection.

18 I want to be very clear. The NPRM
19 was very carefully drafted, and it offers not
20 one, but two separate -- closely related but
21 separate grounds for the proposed -- for the
22 proposed ban.

23 The first is coercive and
24 exploitative conduct; and the second is harm to
25 competitive conditions. And, I might add,

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2 these grounds were -- are grounded in case law
3 before the Supreme Court and the circuit courts
4 that FTC staff reviewed closely and included in
5 the proposed NPRM, and that I myself reviewed,
6 and my colleagues.

7 I want to point out that the NPRM
8 does not assert -- I repeat, does not assert,
9 that senior executives are somehow subject to
10 coercion and exploitation. Rather, it relies
11 on evidence in line with what Ross Baird
12 shared, which is that noncompetes for senior
13 executives do harm competitive conditions.

14 The NPRM cites evidence that
15 noncompetes for these senior executives may
16 impede the creation of new competitors, new
17 businesses, businesses that are the life blood
18 of this economy, and we cite evidence that
19 noncompetes for senior executives impede the
20 creation of new jobs and fundamentally change
21 the competitive conditions in this country for
22 new businesses for the worse. And so I want to
23 clarify that, and that is something that jumped
24 out at me from today's session.

25 Thirdly, I want to speak to this

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2 idea that noncompetes may be harmful in some
3 instances, but people will have their day in
4 court; and I think one of the most compelling
5 aspects for me of this NPRM is its clarity, is
6 that it doesn't -- it doesn't turn on this --
7 this apparent benefit of the day in court. And
8 I was really struck by the remarks of
9 Mr. Kalish and the remarks of Courtney Van Cott
10 who explained that when a regular person is
11 faced with potential enforcement of a
12 noncompete, it isn't a simple matter of, well,
13 go to court, tell your story, and maybe you'll
14 win.

15 I believe Mr. Kalish said, quote,
16 they will go bankrupt; and that certainly,
17 unfortunately, sounds like what Courtney Van
18 Cott and folks like her have experienced. Ms.
19 Van Cott shared that she's faced four years of
20 protracted litigation, four years that have
21 required her to get a second job as a legal
22 assistant separate from her main job just to
23 pay for this litigation to pay for her right to
24 work.

25 And so these are three things that

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2 jumped out at me and that I'll take with me.
3 However, I should add that we are eager to read
4 the full docket of comments once it is
5 submitted. This is a complicated area and
6 complex area and one in which we benefit
7 greatly from more feedback, input, and
8 comments.

9 I want to add that I -- I listened
10 very closely to the remarks of the franchisees
11 who spoke today and shared their experiences,
12 and I'm particularly keen to understand how
13 noncompetes affect franchisees and their
14 ability to compete and their ability to succeed
15 as businesses and their shot at a level playing
16 field and what, in their view, may be coercive
17 or exploitative conditions in which they were
18 imposed, and so that's something that I'm
19 particularly looking forward to reading
20 comments about.

21 With that, I believe today's
22 session is closed. And, Peter, I'm not sure if
23 I turn it back to you. I should know this,
24 but -- or if I should declare the session
25 closed. I'll let you jump in for a second.

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And in that case, I will close today's session and open comments in this context for the noncompete rulemaking and look forward to reading the full docket once it is complete.

Thank you very much, and have a great day.

(CONCLUDED AT 3:01 P.M.)

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Dannielle Copeland

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