



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Office of Policy  
Planning

January 23, 2023

**MEMORANDUM**

**FROM:** Shannon Lane

**TO:** April Tabor

**SUBJECT:** Summary of Interview of Elizabeth Wilkins by The Capitol Forum

**EXECUTIVE SUMMARY:**

On January 11, 2023, Elizabeth Wilkins, Director of the Office of Policy Planning, was interviewed by Teddy Downey from The Capitol Forum on a conference call open to the public about the Federal Trade Commission's ("FTC") proposed Non-Complete Clause Rule, 88 Fed. Reg. 3482 (Jan. 19, 2023) ("Proposed Rule").<sup>1</sup> After Mr. Downey conducted the interview, he read questions from unnamed callers. Questions were submitted via [editorial@thecapitolforum.com](mailto:editorial@thecapitolforum.com). The podcast featuring the interview can be found on The Capitol Forum's website.<sup>2</sup> This memorandum is to be placed on the public record pursuant to 16 C.F.R. § 1.26(b)(5) and the Notice of Proposed Rulemaking, under which summaries or transcripts of oral communications respecting the merits of the proposed rulemaking from any outside party to any Commissioner or Commissioner advisor are to be placed in the public record. This executive summary does not summarize the entire interview, but rather focuses on information concerning the Proposed Rule that is not already included in the rulemaking record.

Mr. Downey asked what monopoly or economic problem the proposed rule was addressing. Ms. Wilkins highlighted a recent report from the Treasury Department finding that buyers of labor have monopsony power over workers, which is depressing wages in the American workforce by as much as 20 percent, and said that the Proposed Rule would reduce such monopsony power and create a healthier labor market.

Mr. Downey stated that, as a business owner, his company does not use non-competes, but it has had difficulty hiring from some competitors due to their non-competes. Ms. Wilkins stated that the Proposed Rule would be a significant boost for small businesses trying to enter the market and pointed to recent FTC enforcement actions against two glass container manufacturers whose non-competes acted as a barrier to entry for potential competitors. She noted that both workers and consumers would benefit from another company offering a potentially cheaper, better product or more employment

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<sup>1</sup> In attendance on the conference call from the FTC was Shannon Lane. Other attendees were unnamed members of the public.

<sup>2</sup> The Capitol Forum, *FTC's Elizabeth Wilkins Discusses Proposed Ban on Non-Compete Agreements* (Jan. 20, 2023), available at <https://thecapitolforum.com/resources/ftcs-elizabeth-wilkins-discusses-proposed-ban-on-non-competite-agreements/>.

opportunities. She said that there were businesses that had trouble getting the workers with knowledge and skills that they need to operate because those workers are locked in by non-competes.

Mr. Downey asked which studies were influential when drafting the Proposed Rule and what economic effects those studies show. Ms. Wilkins responded that the variety of state laws has created a natural experiment showing the effects of various non-compete laws. Studies based on that data show that wages increase when non-competes are less enforceable, and the FTC found that data compelling when considering the Proposed Rule.

An audience member asked about the caveat that the Proposed Rule does not extend to non-solicitation agreements. Ms. Wilkins gave an example of a training repayment agreement, which ordinarily would not be considered as a non-compete unless it required a very disproportionate payment if an employee leaves. A non-solicitation agreement also would not ordinarily be covered unless it was written in a way that an employee could never start their own business. Another audience member asked if the FTC would ban returning bonuses or rewards for staying with an employer. Ms. Wilkins responded no, but reiterated that comments would be helpful in drawing lines between various agreements.

An audience member asked why the exemption for 25 percent owners selling a business was set at 25 percent. Ms. Wilkins explained that the FTC was trying to draw a line between selling a business versus a worker who has a small share of the company. The FTC wanted to avoid a loophole where an employer could give an employee some stock and thus bind them to a non-compete. On the other hand, many businesses are not owned by one person, so the FTC made a distinction and welcomes comments.

An audience member asked about no-hire agreements. Ms. Wilkins responded that while no hire and no poach agreements might not fall under the Rule, such agreements may still raise antitrust concerns and the Department of Justice has been active in this area.

Finally, an audience member asked how the FTC would consider borderline training reimbursement agreements, and how the FTC will enforce the Proposed Rule for those agreements. Ms. Wilkins stated that in writing the Proposed Rule, the FTC looked to state law and case law, and will look at the comment record for public guidance on the types of agreements that exist. She also stated that one of the reasons behind the requirement for employers to affirmatively rescind non-competes was the finding that non-competes are just as prevalent in states where they are unenforceable. She said that workers should not be responsible for determining if a clause is enforceable, and if a worker does not know the clause is unenforceable, it would have the same chilling effect as an enforceable non-compete.