



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 Power at Work

EXECUTIVE SUMMARY:

On January 13, 2023, Power at Work published an interview with Elizabeth Wilkins, the Federal Trade Commission's ("FTC") Director of the Office of Policy Planning. The interview was hosted by Seth Harris, Professor of Practice and Senior Fellow, Burnes Center for Social Change at Northeastern University. The other panelist was Professor Sanjukta Paul, University of Michigan Law School. The interview is publicly available on Power at Work's website.¹ The interview concerned the FTC's proposed Non-Complete Clause Rule, 88 Fed. Reg. 3482 (Jan. 19, 2023) ("Proposed Rule"), as well as other topics. 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.

Ms. Wilkins began by giving an overview of non-competes and the Proposed Rule. Mr. Harris noted that the FTC is a competition agency, not typically a labor agency. Ms. Wilkins responded that non-compete agreements hamper labor and other competition and innovation and have market and economy-wide, not just individual, effects, and the FTC is accordingly interested in them.

Ms. Wilkins said that many businesses were excited about the Proposed Rule, and the FTC has received positive responses from the tech, entrepreneurial, and small business communities who say the Proposed Rule will help them find the workers they need. They want trained, skilled, and happy workers to be matched with the right job. In addition, new entrants cannot enter markets if they cannot hire the right workers. There has been a tremendous response from certain parts of the business and venture capital communities who see the Proposed Rule as promoting innovation, entrepreneurship, and business dynamism. There is a compelling case that the Proposed Rule is important for healthy competition in product markets.

Mr. Harris asked if the FTC had authority to promulgate the Proposed Rule and Ms. Wilkins explained that Congress gave the FTC authority to regulate unfair methods of competition in the FTC Act, and case law confirms that the FTC has the authority. The FTC found significant evidence that non-competes cause substantial harm in multiple markets. Unlike case-by-case enforcement, a rule is the better tool here because it

¹ Power at Work, *Blogcast #3: Non-Compete Agreements and Worker Power* (Jan. 13, 2023), available at <https://poweratwork.us/power-at-work-blogcast-3-non-compete-agreements-and-worker-power>.

can affect multiple markets. Congress charged the FTC with regulating unfair methods of competition and the FTC needs to take that responsibility seriously and use its tools where appropriate.

Ms. Wilkins then discussed the FTC's three recent enforcement actions against glass companies and a security company who used non-competes and explained how those cases illustrate the issues with non-competes. Separately, Ms. Wilkins stated that the Proposed Rule does not have an income cap because the FTC believes that non-competes cause harm at every level of the market.