April 19, 2023

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex C)
Washington, DC 20580

Re: Non-Compete Clause Rulemaking, Matter No. P201200

Dear Chair Khan:

On behalf of the Independent Insurance Agents and Brokers of America ("IIABA"), the largest insurance agent and broker organization in the country, I write to offer our association's comments and concerns regarding the Notice of Proposed Rulemaking ("NPRM") referenced above. Our association represents 250,000 insurance professionals who work at more than 25,000 locations – from the biggest insurance brokerage firms in the United States to much smaller insurance agencies. Our members offer all types of insurance products and services in large and small communities across America. We appreciated having the opportunity to participate in your February 16 forum and thank the Federal Trade Commission ("Commission" or "FTC") for its consideration of our comments below.

Initial Comments

IIABA members have significant interest in the proposed regulation and worry the proposal will threaten the competitiveness, viability, and value of their businesses. The value of insurance agencies is rooted in the goodwill they develop in their communities and the relationships, client bases, and confidential knowledge about their customers that is built and nurtured over many years. Independent insurance agents and brokers often use reasonably crafted non-compete clauses to protect the investments they have made in the course of building their businesses. Our members fear the Commission's sweeping proposal – and particularly its sale-of-a-business

provisions and its application to senior executives and highly paid workers – will needlessly erode their value.

The nature of this proposed rule has shocked and surprised many. The proposal would, suddenly and without legislative action, prohibit business practices and forms of contracts that have been lawful in most jurisdictions for longer than any of our members have been alive. The manner in which non-compete agreements may be used has long been a matter of state law, and all states restrict their use to some extent (with considerable state level legislative activity occurring over the last decade). The rule, however, would preempt the laws of every state[1] and replace them with a paradigm devised by the Commission that is dismissive of and far more restrictive than the state laws that have been enacted in recent years. The Commission, which claims its proposal is based in large part on recent state activity, could perhaps reasonably argue that banning the use of non-compete clauses for low-wage workers mirrors trends seen at the state level, but the proposed rule extends far beyond such an outcome and would prohibit the use of such clauses in most contexts and for nearly all workers.

The proposed rule also has a faulty and flawed foundation because the Commission lacks the statutory authority to issue this rule. We do not believe the Federal Trade Commission Act authorizes the Commission to promulgate substantive rules defining unfair methods of competition in this manner or that the power to do so has essentially laid dormant until now being used as a tool to make sweeping changes to business law. IIABA expects this question will ultimately be settled in the courts, but we nevertheless believe such expansive changes in the law should be debated and enacted by elected policymakers (and preferably by those at the state level).

While IIABA does not believe the Commission possesses the authority to act in this manner, we do appreciate certain elements of the proposal. First, the proposed rule appropriately includes a sale-of-a-business exemption and recognizes that non-compete clauses are appropriate and important tools in this context. The proposal, however, would unfortunately and unnecessarily limit the availability of the exemption to instances in which an individual that remains a worker holds at least a 25% ownership interest in a business entity at the time of a sale. We discuss the problems with this arbitrary 25% threshold in our comments below, but we nevertheless appreciate the recognition that an across-the-board ban of non-compete clauses is unwarranted. Second, and on a related note, IIABA appreciates the Commission's discussion of alternatives and particularly its suggestion that different treatment may also be warranted for senior executives and those that are not low-wage workers. The addition of such an exemption is necessary and critically important. Third, we are pleased the proposed rule would not affect or improperly restrict the use of other types of restrictive covenants. Given the nature of our industry, the ability to utilize non-solicitation, no-business, non-disclosure, and similar agreements is very

[1] Although California, North Dakota, and Oklahoma generally prohibit the use of non-compete clauses today, their use is permitted in these jurisdictions when a business or its goodwill is sold.

important. We urge the Commission to emphasize in any final rule it issues that such clauses and contractual provisions are lawful and may be employed.

Specific Concerns

Sale-of-a-Business Exception

The proposed rule includes an exemption – found in Section 910.3 – for certain non-compete clauses between a buyer of a business and a seller who becomes a worker for the acquiring entity. The inclusion of this exemption is warranted and incredibly important. Allowing the use of such clauses in the business sales context benefits both buyers (who can help protect the goodwill and value of the acquired business) and sellers (who benefit financially when bargaining and negotiating the terms of a non-compete clause). The exemption is flawed as crafted, however, because it is only available to the subset of business sales in which the seller holds at least a 25% ownership interest in the entity being sold. We urge the Commission to delete this 25% ownership interest restriction.

Business sales of this nature are arms-length transactions, and there is no imbalance of bargaining power between buyer and seller that would justify the prohibition of non-compete clauses in this context. Unfortunately, and without justification, the proposed rule limits the exemption and the use of non-compete clauses to sellers who hold at least a 25% ownership interest of a business being acquired. No state restricts the use of non-compete clauses in the sale-of-a-business context in this way, and the inclusion of this restrictive threshold is an unprecedented and arbitrary invention.

It is incorrect to conclude that a 25% stake in an enterprise is required for a buyer to have a legitimate interest in protecting the value of the business acquired through the use of a non-compete clause. Even small stakes in businesses can have a considerable dollar value, and buyers of businesses should be able to protect their investments and the goodwill they are purchasing through the use of narrow and reasonably crafted non-compete clauses. These sellers possess considerable bargaining power, regardless of the precise ownership interest they hold, and should be allowed to negotiate the terms of a non-compete clause if they choose to be a worker with the acquiring entity.

The NPRM offers no meaningful or relevant rationale for including the 25% threshold and engaging in this arbitrary line-drawing. There is no reason to believe, and no evidence or research cited that suggests unfair competition occurs when a seller of a business with less than a 25% ownership interest elects to stay on with the acquired business as a worker and enters into a non-compete agreement. A seller, including one who holds a relatively small stake in a company, is in a very different position than a low-wage worker that loses a job or employment opportunity. The use of clauses in connection with sellers of even relatively small stakes in businesses does not arise solely out of employment (which is the primary area of concern for the

Commission) and is not exploitative or coercive. In addition, sellers who enter into non-compete clauses in such a context do not experience undue hardship or have negative effects on competitive conditions.

The NPRM points to only one fact pattern and potential source of concern when attempting to justify the decision to include the 25% ownership interest threshold. It suggests the threshold and the limited application of the sale-of-a-business exemption are needed because the proposed prohibition on non-compete clauses should apply "where a worker with a small amount of company stock sells stock back to the company as part of a stock redemption agreement when the worker's employment ends."[2] This scenario, which arises solely out of employment, is distinct from and inherently different than the business sale transactions that the exemption is designed to address. Any concerns the Commission might have about stock buybacks can be addressed in a myriad of alternative ways (such as with a narrowly tailored exclusion from the exemption), and it is not necessary for the proposed rule to include an ownership stake threshold and to restrict legitimate access to the exemption in order to do so. The ownership stake threshold (and especially one at such a high level) is a blunt and inefficient response that would improperly prevent many buyers of businesses from protecting the goodwill they have purchased and unnecessarily alter business acquisitions. The inclusion of the threshold also harms sellers that hold less than a 25% ownership stake because buyers seeking to protect their interests may feel compelled not retain such sellers (even when a seller would prefer to remain with the acquired entity) if the use of reasonable non-compete agreements is prohibited and not an option.

Again, IIABA urges the Commission to eliminate the ownership stake threshold and to not restrict access to the sale-of-a-business exception as proposed. Even if the threshold is eliminated, the use of non-compete clauses in connection with business sales would still be restricted by applicable federal and state law and would be required to be tailored to protect a legitimate business interest and be limited in duration, geographic area, and scope of activity prohibited.

Application of the Rule to Low-Wage Workers

State and federal policymakers in recent years have increasingly scrutinized the use of non-compete clauses in connection with hourly and low-wage workers, and a growing number of states have prohibited the use of these clauses with such workers over the last decade. The Commission has cited this state activity and suggested the lessons learned from those efforts are a justification for issuing the proposed rule, but the proposal deviates significantly from what has occurred at the state level. A diverse group of states have successfully enacted measures in recent years that ban the use of non-compete agreements for low-wage workers, but the FTC proposal goes much further and would prohibit their use in connection with nearly all workers.

[2] Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3510 (Jan. 19, 2023).

Any final rule that is issued should more closely align with the recent measures enacted by some states and focus exclusively on low-wage workers. Specifically, we urge the Commission, if it moves forward, to embrace Alternative #2 as outlined in Part VI.B.2 of the NPRM, and to not apply the rule and the proposed prohibition to senior executives and highly paid workers. This approach is particularly important to IIABA members because insurance firms invest heavily in their staffs and because on-the-job training is how most insurance agents and brokers learn the business.

Prospective Application

Any final rule that is promulgated by the Commission should apply prospectively and not affect any non-compete clauses currently in place. Altering terms after the fact distorts existing contracts and the equilibrium that was achieved at the time they were entered into.

Conclusion

IIABA thanks the Federal Trade Commission for its consideration of our views. While our association does not believe the Commission possesses the statutory authority needed to issue such a rule and encourages you not to move forward, we respectfully urge you to revise the proposal as outlined above if you elect to promulgate the regulation in final form. Finally, please do not hesitate to contact our association if we can provide additional information, respond to questions, or assist your efforts in any way.

Very truly yours,

Charles E. Symington, Jr.
Executive Vice President