

4/18/2023

To:

Lina M. Khan
Chairwoman,
Federal Trade Commission
600 Pennsylvania Avenue NW, Washington, D.C. 20580

Re: Proposed addition of a new Subchapter J, consisting of part 910 to Chapter I in title 16 of the Code of Federal Regulations: Concerning Unfair Methods of Competition, Part 910—Non-Compete Clauses

A ban on noncompetes would help curb yet another of Big Tech’s anticompetitive business practices that ultimately stymie innovation. As detailed in the October 2022 Heritage Report, “Big Tech’s National Security Red Herring,” these and other practices warp the labor market and hamper growth:

...Big Tech companies also hoard talent by hiring programmers to “work on next to nothing,” in the words of venture capitalist Chamath Palihapitiya, solely to prevent them from being hired by other companies where their skillsets could disrupt the incumbent’s business.¹

Similarly, Big Tech companies are no strangers to the practice of “killer acquisitions,” or buying out innovative young businesses just to kill them so they cannot compete with the acquirer in the future.² As part of this strategy, Big Tech companies specifically target and terminate the smaller company’s innovation initiatives in order to strangle the future competitor and its incipient ideas in the crib.³

Additionally, in April, *The Wall Street Journal* reported that Big Tech companies such as Meta hire employees for the sole purpose of taking them out of the labor market.⁴ And according to Founders Fund partner Keith Rabois, Big Tech companies like Google hire more talent than necessary in order to prevent engineers from actually *using* their talent.⁵ Noncompetes, by limiting access to this type of talent in the tech sector, are another tool to help further entrench Big Tech monopolies within the market at the expense of up-and-comers.

The Federal Trade Commission has accurately identified noncompetes as a drain on innovation. However, Congress should instead exercise its clear legal authority to address their negative impact on the workforce and tech sector generally. While section 5 of the Federal Trade Commission Act does grant the Commission the authority to act against “unfair methods of competition,”⁶ enacting the proposed rule appears to exceed that mandate. As outlined in the 1935 Supreme Court decision

¹ Chamath Palihapitiya, “E64: Antitrust Standards and Enforcement, Tech Repricing, Lab Leak Obfuscation, E63 Reactions and More,” All-In Podcast, 1:36:15 (35:09), January 22, 2022, <https://www.youtube.com/watch?v=s9n9db373e8> (accessed October 17, 2022).

² Gerrit De Vynck and Cat Zakrzewski, “Tech Giants Quietly Buy up Dozens of Companies a Year. Regulators Are Finally Noticing,” *The Washington Post*, September 22, 2021, <https://www.washingtonpost.com/technology/2021/09/20/secret-tech-acquisitions-ftc/> (accessed October 17, 2022).

³ Kim Hart, “Big Tech’s Small Biz Squeeze,” *Axios*, July 12, 2021, <https://www.axios.com/2021/07/12/big-techs-small-biz-squeeze> (accessed October 18, 2022).

⁴ Te-Ping Chen, “These Tech Workers Say They Were Hired to Do Nothing,” *The Wall Street Journal*, April 7, 2023, <https://www.wsj.com/articles/these-tech-workers-say-they-were-hired-to-do-nothing-762ff158> (April 18, 2023).

⁵ Hasan Chowdhury, “Google and Meta over-hired thousands of employees who do ‘fake work,’ says PayPal Mafia’s Keith Rabois” *Business Insider*. March 8, 2023, https://www.businessinsider.com/google-meta-staff-do-fake-work-says-vc-keith-rabois-2023-3?IR=T&r=US&utm_medium=referral&utm_source=yahoo.com (April 18, 2023).

⁶ Federal Trade Commission Act, 15 U.S.C. §§ 41-58.

Humphrey's Executor v. United States, the FTC is “an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed.”⁷ In other words, the Commission does not have the authority to craft policy. Further, *West Virginia v. EPA*, in calling for a direct link between regulatory action and Congressional approval for such action, would set up a protracted legal fight regarding the FTC’s authority to enact this proposed rule.

For clarity’s sake, new regulations regarding noncompetes should instead be contingent on an explicit grant of approval by Congress. The appetite exists for such action. For example, Rep. Scott Peters (CA-52) and Rep. Mike Gallagher’s (WI-08) Workforce Mobility Act of 2021⁸ would nearly end the use of non-compete clauses nationwide, provide for employee awareness, and ensure the FTC retains enforcement authority.

It is Congress that should help encourage the free flow of and widespread access to talent that fosters a dynamic and innovative market landscape by partially banning noncompetes. Lawmakers, not a federal enforcement agency, should be the prime movers when it comes to restricting the use of these clauses.

Respectfully Submitted,

/s/ Jake Denton with Will Thibeau

⁷ *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

⁸ Rep. Scott Peters Press Release, “Bill to Protect American Workers, Limit Non-Compete Agreements.” Press Release. February 25, 2021. Reps. Peters, Gallagher, Eshoo, Meijer Re-Introduce Bill to Protect American Workers, Limit Non-Compete Agreements - Press Releases - United States Congressman Scott Peters (house.gov)