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April 19, 2023

VIA ELECTRONIC SUBMMISSION (www.regulations.gov/)

April Tabor
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex C)
Washington, DC 20580

Re: Notice of Proposed Rulemaking, Federal Trade Commission; Non-Compete Clause Rule; 88 Fed. Reg. 3482 (RIN: 3084-AB74) (January 19, 2023).

Dear Ms. Tabor:

The Securities Industry and Financial Markets Association[1] ("**SIFMA**"), jointly with its Asset Management Group[2] ("**SIFMA AMG**"), appreciates the opportunity to comment on the Federal Trade Commission's proposed near-total ban of worker non-compete clauses (the "**Proposed Rule**").[3] The Proposed Rule seeks to (a) prohibit an employer from entering into or attempting to enter into a non-compete clause, defined to include "de facto" non-compete clauses, with a worker, to (b) maintain with a worker a non-compete clause, or (c) under certain circumstances, represent to a worker that the worker is subject to a non-compete clause. The Proposed Rule would also require employers to rescind existing non-compete clauses and provide notice to workers that their non-compete clauses are no longer in effect.

We oppose the Proposed Rule and urge the Commission not to promulgate it. If the Commission decides to proceed, it should modify the final rule to mitigate its adverse consequences.

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[1] SIFMA is the leading trade association for broker-dealers, investment banks, and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million workers, we advocate on legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the US regional member of the Global Financial Markets Association (GFMA).

[2] SIFMA's Asset Management Group (SIFMA AMG) brings the asset management community together to provide views on U.S. and global policy and to create industry best practices. SIFMA AMG's members represent U.S. and global asset management firms whose combined assets under management exceed $45 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds.

[3] Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3535–35 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

I. EXECUTIVE SUMMARY

The Proposed Rule should not be promulgated because:

1) The near-categorical prohibition on non-compete clauses will hurt competition and the economy.

2) It would terminate long-established practices of using non-compete clauses to protect a business's sensitive information, including trade secrets, proprietary information, and intellectual property, as well as to ensure that a purchaser of a business can preserve the value of the goodwill included in the purchase price.

3) There is no effective substitute for non-compete clauses. The Proposed Rule would produce needless litigation to protect sensitive information through the use of inferior alternative methods (*e.g.*, trade secrets law and non-disclosure agreements), reduce the efficiency of business operations as businesses take steps to unnecessarily reduce the number of workers who acquire their sensitive information, and provide an unfair windfall to businesses that recruit workers with knowledge of their competitors' competitively sensitive information.

4) As a result of the Commission's limited jurisdiction, it will create an uneven playing field between businesses subject to the Commission's limited jurisdiction and their competitors that lie outside of that jurisdiction.[4] The Proposed Rule also risks creating confusion due to its potentially inconsistent application within banking organizations as some workers could be employed by segments outside the Commission's jurisdiction while other workers could be employed by affiliate entities that the FTC believes are subject to the Proposed Rule.

5) It greatly underestimates its compliance costs, while failing to establish a clear record on its benefits.

6) It is unnecessary as state law already governs effectively the use of non-compete clauses.[5] State law governing non-competes is long-established and has effectively balanced the

[4] Specifically, the Commission lacks jurisdiction over banks, savings and loan institutions, federal credit unions, common carriers, air carriers and foreign air carriers, non-profit organizations, persons subject to the Packers and Stockyards Act of 1921, and certain state and local government entities protected by the state action doctrine. 15 U.S.C. § 44; Non-Compete Clause Rule, *supra* note 3, at 3510.

[5] The variety of approaches to non-compete clauses across the country reflects the understanding of local markets, policies, and preferences that state legislatures possess. Many states generally permit non-compete clauses but impose limits on their use for certain workers and in certain contexts. Hawaii law voids all non-compete and non-solicitation clauses entered into by workers of technology businesses. HAW. REV. STAT. § 480-4(d) (2023). Other states, like Massachusetts and Rhode Island, render non-compete clauses unenforceable when entered into by student interns and workers eighteen or under. MASS. GEN. LAWS c. 149 § 24L(c) (2022) (non-compete clauses unenforceable against nonexempt workers under the FLSA, student interns and short-term workers, workers terminated without cause, and workers 18 and under); R.I. GEN. LAWS § 28-59-3(a)(1)-(3) (2023) (same). In Idaho, non-compete clauses are enforceable only with "key employees," who "have the ability to harm or threaten an employer's legitimate business interests" due to special skills or knowledge they acquired during their employment. IDAHO CODE § 44-2701, 44-2702 (2023). Non-compete provisions that exempt categories of workers based on income, similarly, reflect local realities and preferences. Maine, for example, renders non-compete clauses entered into with workers who earn 400% of the poverty level,

legitimate commercial needs for non-compete clauses with the need to protect workers from abuses and protect competition. In the states that do enforce some non-compete clauses, courts will not enforce unreasonable non-compete clauses.[6] To the extent that reforms are necessary in light of new business practices, the states also have been more than willing to modify their laws.

Yet no state has enacted a statute that bans non-compete clauses as broadly as the Proposed Rule. Indeed, only three states have enacted broad statutory bans, and even those statutes contain broader exemptions than the Proposed Rule.[7] The general validity of non-compete clauses under state law demonstrates that the states have recognized the legitimate commercial interests served through the use of non-compete clauses.[8] The Commission should allow the states to continue to establish sensible laws governing non-compete clauses.

Nevertheless, if the Commission decides to finalize the Proposed Rule, the Commission should make the following changes to mitigate its adverse consequences:

1) **The Commission should discard its vague *de facto* rules and clarify that the Rule permits provisions that (a) allow workers the ability to choose to compete, (b) apply only while a worker is still employed, and (c) do not impede a worker's ability to secure new employment.** The Proposed Rule's lack of clarity over what constitutes a de facto non-compete clause will result in legal disputes over whether clauses fall under the Proposed Rule's ban on de facto non-compete clauses. To avoid this undesirable result, the final rule should cover only actual non-compete clauses, not de facto non-compete clauses.

   If the Commission continues to ban de facto non-compete clauses, it should modify the final rule to state clearly that it does not cover (a) provisions through which employers provide benefits to their workers, and where workers have the ability to choose whether to continue to receive those benefits or compete, including deferred compensation, long-term incentive, severance, and retirement agreements; (b) conditions that apply only while the worker remains employed with the employer, including advance notice provisions, and retention agreements; and (c) provisions that do not impede a worker's ability to secure new employment, including non-solicitation agreements, non-disclosure

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$14,580 in 2023, making Maine's threshold around $58,320. ME. STAT. tit. 26 § 599-A(3) (2023). In Washington, the threshold is $100,000. WASH. REV. CODE § 49.62.020(1)(b) (2023).

[6] Non-Compete Clause Rule, *supra* note 3, at 3494 ("In the 47 states where at least some non-compete clauses may be enforced, courts use a reasonableness inquiry to determine whether to enforce a non-compete clause, in addition to whatever statutory limits they are bound to apply.").

[7] The three states, California, Oklahoma, and North Dakota, all recognize a broader exemption for sale of a business than the Proposed Rule, in addition to providing exemptions for dissolution of a partnerships and corporations, and for dissociation of partners. OKLA. STAT. tit. 15 § 218 (2023) (sale of the goodwill of a business); OKLA. STAT. TIT. 15 § 219 (2023) (dissolution of a partnership); N.D. CENT. CODE § 9-08-06 (2023) (sale of the goodwill of a business and dissolution of a partnership, LLC, or corporation; dissociation of a partner or a member); Cal. Bus. & Prof. Code § 16601 (West 2023) (sale of a business or of the goodwill of a business); Cal. Bus. & Prof. Code § 16602 (West 2023) (dissolution of a partnership or dissociation of a partner from the partnership); Cal. Bus. & Prof. Code § 16602.5 (West 2023) (dissolution or termination of interest in an LLC).

[8] As the Commission recognizes, states view protecting trade secrets, confidential information, and investment in training as legitimate business interests, among others. Non-Compete Clause Rule, *supra* note 3, at 3495.

agreements, and other confidentiality agreements. In carving out these provisions, the Commission would clarify that agreements recognized as valid by the employee choice doctrine remain enforceable. This additional clarity will also help employers comply with the Proposed Rule's requirement that they provide current and former workers notice that their non-compete clauses have been rescinded.

2) **The Commission should exempt highly compensated workers.** The Proposed Rule would cover all workers even where the Commission has recognized that workers can effectively negotiate on their own behalf. These workers include executives, managers, professionals, and other highly-compensated workers. The Proposed Rule's overly-broad approach would prevent these workers from securing benefits they deem valuable in exchange for entering into a non-compete clause. Further, these workers are also the most likely to possess sensitive information that, if transferred to a rival, could hurt competition. In recognition of this, many states that have adopted restrictions on non-compete clauses continue to allow enforcement of non-compete clauses for highly compensated workers.[9]

3) **The Commission should exempt all sale-of-a-business transactions.** The Proposed Rule would permit non-compete clauses only with an owner, member, or partner if 25 percent or more of a business is being sold. This high threshold fails to protect the strong interests of buyers in preserving their investments (particularly the value of the goodwill purchased). As a result, the Commission should exempt from a final rule all non-compete clauses entered into in connection with the sale of a business and allow state law to continue governing their enforceability.

4) **The Commission should exempt non-compete clauses approved by federal regulators.** The Proposed Rule would conflict with other federal regulations that approve of the use of non-compete clauses. Federal agencies and regulatory bodies with particular industry expertise have recognized the value of non-compete clauses in particular settings. The Commission should defer to these regulators and exempt any non-compete clause sanctioned by another federal regulator, including FINRA Rule 2040(b).

5) **The final rule should not be retroactive.** The Proposed Rule requires employers to rescind existing non-compete contracts, unsettling negotiated contracts and depriving parties of their bargained-for benefits. Yet Congress has not authorized the FTC to promulgate a retroactive rule (nor, indeed, any rule). As a result, the final rule should not apply retroactively.

The remainder of this Comment is organized as follows. Section II discusses the adverse consequences the Proposed Rule would have if it is finalized in its current form and offers several recommendations for mitigating these outcomes. Section III discusses how the Proposed Rule's assessment of costs and benefits unreasonably understates its costs while overstating its benefits. Finally, Section IV explains that the Proposed Rule is impermissibly retroactive and

[9] See, e.g., WASH. REV. CODE § 42.62.020(1)(b) (2023) ($100,000 threshold); D.C. CODE § 32–581.01 (2023) ($150,000 threshold, $250,000 threshold for medical professionals); 820 ILL. COMP. STAT. act 90 § 10 (2022) ($75,000 threshold).

should be revised to only apply prospectively. Finally, SIFMA has also signed the comment submitted by the U.S. Chamber of Commerce arguing that the FTC has improperly exceeded its statutory authority.

II. THE PROPOSED RULE WOULD HAVE ADVERSE CONSEQUENCES NOT RECOGNIZED BY THE COMMISSION

A. The Proposed Rule would result in costly disputes about what types of clauses constitute a de facto non-compete clause.

The Proposed Rule would ban both actual non-compete clauses and "de facto" non-compete clauses.[10] However, the Proposed Rule fails to provide clear guidance on what would constitute a de facto non-compete clause. Instead, it provides a "functional test" that renders unenforceable any contractual term that "has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment."[11] Further, the Commission highlights several types of widely-used agreements and arrangements that could be considered de facto non-compete clauses, including non-disclosure agreements, [12] non-solicitation agreements,[13] no-business agreements,[14] no-recruit agreements, liquidated damages provisions,[15] and training-repayment agreements.[16] Courts reviewing agreements at-risk of being deemed "de facto" non-compete clauses, such as deferred compensation agreements and retirement arrangements, have recognized their validity and treated them preferentially by adopting doctrines such as the employee choice doctrine, which recognizes that under these agreements, workers retain the right to choose to compete.

The Commission's definition of a de facto non-compete and accompanying guidance is so broad and amorphous that it fails to provide any reliable instructions to employers and workers on how they can structure such clauses to avoid them from being classified as a de facto non-compete clause under the Proposed Rule. In effect, the Commission retains almost unfettered discretion on when it can bring enforcement actions with regards to such clauses because nearly any post-employment condition could arguably prevent a worker from "seeking or accepting employment" with another business.[17]

Post-employment contractual terms are a commercial necessity given the legitimate interest employers have in protecting their sensitive information from use by their competitors who hire former workers. The Commission recognizes that non-compete clauses "increase an employer's incentive to make productive investments—such as investing in trade secrets or other confidential information, sharing this information with its workers, or training its workers—

[10] Non-Compete Clause Rule, *supra* note 3, at 3509.
[11] Non-Compete Clause Rule, *supra* note 3, at 3535.
[12] Non-Compete Clause Rule, *supra* note 3, at 3484, 3507 ("NDAs that are unusually broad in scope may function as de facto non-compete clauses, hence falling within the scope of the proposed rule.").
[13] Non-Compete Clause Rule, *supra* note 3, at 3484.
[14] Non-Compete Clause Rule, *supra* note 3, at 3484.
[15] Non-Compete Clause Rule, *supra* note 3, at 3509.
[16] Non-Compete Clause Rule, *supra* note 3, at 3484.
[17] Non-Compete Clause Rule, *supra* note 3, at 3535.

because employers may be more likely to make such investments if they know workers are not going to depart for or establish a competing firm."[18]

Rather than creating legal uncertainty around such legitimate post-employment contractual conditions, the Commission should modify the Proposed Rule to only apply to actual non-compete clauses. In doing so, the Proposed Rule would capture the vast majority of the conduct that the Commission intends to prohibit. This modification would also prevent needless litigation over whether post-employment contractual clauses are de facto employment clauses. The absence of a bright-line definition for non-compete clauses will inevitably spur litigation between employers and workers over whether disputed contract clauses fall under the rule. To the extent that other clauses raise public policy concerns, the states can take appropriate enforcement action. Accordingly, we request that the Commission modify the Proposed Rule to cover only actual non-compete clauses and remove Section 910.1(b)(2) from its final Rule.

Further, we request that the Commission specifically exempt the following post-employment agreements and arrangements from its definition of de facto non-compete clauses to clarify that these agreements and arrangements are not barred by the ban on non-compete clauses:

1. **Deferred compensation, long-term incentive, severance, and retirement arrangements.**

Deferred compensation, long-term incentive, retirement, severance, and other benefit arrangements provide additional compensation over time in exchange for a worker agreeing to not work with or for a competitor while employed by the employer and for a reasonable period of time after termination of the worker's employment. In the retirement context, individuals who have made the decision to retire and no longer work in any capacity choose to enter into a limited-time non-compete in exchange for consideration or some benefit they would not otherwise receive. For example, retirement compensation plans are also specifically provided for in the broker-dealer context by FINRA Rule 2040(b) (discussed further in Section II.D). [19]

In many cases, these types of arrangements do not prohibit workers from accepting employment elsewhere because the workers retain the ability to choose to forgo benefits under the agreement or plan, and initiate employment with a competitor. This distinction is recognized under state common law governing non-compete clauses, including the State of New York's employee choice doctrine. [20] Although New York generally disfavors non-compete clauses, the employee choice doctrine creates an exception for "cases where an employer conditions receipt

[18] Non-Compete Clause Rule, *supra* note 3, at 3505.
[19] See *infra* Section II.D.
[20] Courts outside of New York continue to recognize the differences between non-compete clauses and forfeiture for competition agreements. *See, e.g.*, Smythe v. Raycom Media, Inc., 2013 WL 4401811, at *3 (E.D. Mo. Aug. 15, 2013) (distinguishing between non-compete provisions and forfeiture-for-competition clauses); Allegis Group, Inc. v. Jordan, 951 F.3d 203, 209 (4th Cir. 2020) ("[F]orfeiture provisions . . . do not necessarily receive the same level of scrutiny as restrictive covenants.") (citing Rochester Corp. v. Rochester, 450 F.2d 118, 122 (4th Cir. 1971)); Raquet v. Allstate Corp., 501 F. Supp. 3d 630, 642 (N.D. Ill. 2020) (finding a forfeiture provision was not an unreasonable restraint on competition because it "simply divests employees from stock options if they do, in fact, compete. And unlike traditional non-competes that the Seventh Circuit cautioned might constitute illegal restraints, this one neither threatens the loss of regular or bonus compensation nor prevents Plaintiff from competing").

of postemployment benefits upon compliance with a restrictive covenant."[21] The exception exists because when an employee retains the ability to choose between competing and forfeiting their rights to the benefits, "there is no unreasonable restraint upon an employee's liberty to earn a living. . . . [i]t assumes that an employee who leaves his employer makes an informed choice between forfeiting his benefit or retaining the benefit."[22] Furthermore, the employment market in the financial services industry is competitive. Departing workers who forfeit deferred compensation by leaving for a competitor are typically able to negotiate additional compensation to account for the amounts they have forfeited. The Commission should follow the precedent set by the employee choice doctrine and explicitly exempt from its final rule deferred compensation plans, long-term incentive, retirement, severance, and other benefit arrangements to the extent that they are consistent with the employee choice doctrine.

2. **Advance notice provisions and retention agreements.**

Advance notice provisions between workers and businesses provide for a paid cooling-off period, allowing the worker to continue to receive compensation and giving the employer the opportunity to protect its sensitive information and ensure a smooth transition. These agreements let employers prepare for the worker's departure, hire replacement workers, secure sensitive information, and draw on the departing worker's experience to train replacements. Workers also benefit, as under the terms of some advance notice provisions workers continue to be paid but are not required to actively work. Retention agreements provide bonuses to retain workers considering other jobs on the condition that the worker not seek employment elsewhere for a period of time. These pro-competitive agreements help employers compete for talent and allow workers to receive additional compensation for their work.

Under the Proposed Rule, advance notice provisions and retention agreements should not be considered non-compete clauses because they apply only during the term of employment, and the Proposed Rule only covers clauses that prevent workers from competing "*after* the conclusion of the worker's employment with the employer."[23] If it proceeds to a final rule, the Commission should clarify that advance notice provisions and retention agreements are not covered, so as to avoid any uncertainty and unnecessary litigation over whether such provisions constitute de facto non-compete clauses.

3. **Non-solicitation agreements, non-disclosure agreements, and other confidentiality agreements.**

The Commission suggests that some client or customer non-solicitation agreements, non-disclosure agreements, and other confidentiality agreements could be de facto non-compete clauses if they are overly broad.[24] This suggestion is particularly problematic because the Commission states that the prohibition on the use of non-compete clauses will not impact the ability of businesses to protect their sensitive information because they can use other means,

[21] Morris v. Schroder Capital Mgmt. Int'l, 859 N.E.2d 503, 620-21 (N.Y. 2006).
[22] *Id.* at 621. Because it is premised on the worker's choice, the employer's continued willingness to employ the worker is an "essential element" of the doctrine. *Id.*
[23] Non-Compete Clause Rule, *supra* note 3, at 3509 (emphasis added).
[24] Non-Compete Clause Rule, *supra* note 3, at 3484.

including client or customer non-solicitation agreements and non-disclosure agreements, to protect that information.[25] By suggesting that these agreements may also be de facto non-compete clauses under the Proposed Rule, the Commission undercuts its assurances that employers will have alternative means to protect their sensitive information. The Commission rightly notes that client or customer non-solicitation agreements "generally do not prevent a worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer."[26] The Commission should therefore explicitly exempt client or customer non-solicitation agreements, non-disclosure agreements, and other confidentiality agreements in a final rule.

4. Non-compete clauses subject to the notice requirement.

The Proposed Rule's lack of clarity on what constitutes a de facto non-compete clause will also frustrate compliance with the rule's notification requirements. The Proposed Rule would require employers to both rescind their non-compete clauses and provide notice to workers that those clauses are void and unenforceable.[27] Compliance is required within 180 days after the publication of the final Rule.[28] Because the Proposed Rule's rescission and notification requirements also apply to vaguely defined de facto non-competes, employers will have only 180 days to analyze all of their agreements with workers, regardless of whether those agreements contain a non-compete clause, and determine whether they contain clauses that could be de facto non-compete clauses under the Commission's scant guidance. This in-depth and time consuming contractual review process will result in substantial costs not considered by the Commission.[29] It will also expose employers to enforcement actions by the Commission if they fail to provide notice after determining in good faith that a particular clause was not a de facto non-compete clause. Accordingly, even if the Commission declines to provide other explicit exemptions from the definition of de facto non-compete clauses, the Commission should at a minimum limit the notice requirement to actual non-compete clauses and provide a safe harbor for good faith efforts to determine whether a particular clause is a non-compete clause.

B. The Proposed Rule's definition of "worker" fails to adequately address the unique position of highly compensated workers.

The Commission should exempt highly compensated workers and skilled professionals from any final rule. These workers include executives, managers, professionals, and other highly compensated workers who are more likely to have access to sensitive information that could harm competition if shared with competitors. As noted above, and as the Commission has recognized, these workers also have more power to effectively bargain on their own behalf.[30] However, without the use of non-compete clauses, employers may not be able to ensure that

[25] Non-Compete Clause Rule, *supra* note 3, at 3483.
[26] Non-Compete Clause Rule, *supra* note 3, at 3483.
[27] Non-Compete Clause Rule, *supra* note 3, at 3536, 3538.
[28] Non-Compete Clause Rule, *supra* note 3, at 3538.
[29] See *infra*, Part III.B.
[30] Non-Compete Clause Rule, *supra* note 3, at 3504. (writing "[n]on-compete clauses for senior executives are unlikely to be exploitative or coercive at the time of contracting, because senior executives are likely to negotiate the terms of their employment and may often do so with the assistance of counsel," and requesting comment "on whether there are other categories of highly paid or highly skilled workers . . . to whom this preliminary finding should not apply." Id.

these workers uphold their contractual obligations because the alternative mechanisms to non-compete clauses, such as non-disclosure agreements and trade secrets law, are less effective and more costly. For highly compensated workers, many of whom have access to sensitive information, non-compete clauses are the only way businesses can adequately ex ante protect that information. The alternatives suggested by the Commission, such as non-disclosure clauses and trade secrets law, provide remedies only after a worker has hurt competition by sharing competitively sensitive information with a rival – non-compete clauses alone prevent workers from being in the position to disclose or use that information in the first place. It is also difficult for an employer to know whether a worker who goes to work for a competitor has provided its sensitive information to the competitor.

C. The Proposed Rule's sale-of-business exemption does not achieve the Commission's goal of protecting investments.

The Proposed Rule would exempt non-compete clauses entered into as part of the sale of a business only when the person restricted by the non-compete holds at least 25 percent ownership interest in the business entity.[31] This unreasonably high threshold neglects the fact that key holders of sensitive information are, today, likely to own significantly less than 25 percent of a business in all industries, including the financial services sector. For example, only 3.6 percent of the chief executive officers of the 3,000 largest publicly traded companies own more than 25 percent of company shares.[32] Despite this, the Proposed Rule would prohibit non-compete clauses with workers, even CEOs, who own less than 25 percent of the business. In practice, buyers regularly bargain for non-compete clauses with owners of less than 25 percent of an entity to protect the value (including goodwill) of their purchase. Although the Commission states that the purpose of their sale of a business exception is to allow buyers to protect the value of their purchase, the unnecessarily high threshold will prevent most buyers from doing so.[33]

The Proposed Rule's 25 percent threshold appears even more arbitrary when compared with the approaches adopted by the states in this same context. None of the states have adopted a 25 percent threshold. Instead, state law uniformly provides broader protections for the use of non-competes in the context of the sale of a business. For example, the State of Colorado carves out an exception to its ban on non-compete clauses to allow non-compete clauses for the purchase and sale of a business or the assets of a business.[34] The State of Georgia presumes non-compete clauses enforced against the seller of "all or a material part of" a business are reasonable so long as they are less than five years in duration or equal to the amount of time payments are

[31] Non-Compete Clause Rule, *supra* note 3, at 3510.
[32] Jessica Phan, *The Effects of CEO Ownership on Total Shareholder Return*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (Nov. 23, 2018), https://corpgov.law.harvard.edu/2018/11/23/the-effects-of-ceo-ownership-on-total-shareholder-return/.
[33] Non-Compete Clause Rule, *supra* note 3, at 3511.
[34] COLO. REV. STAT. § 8-2-113(3)(c) (2022).

made to the seller.[35] State courts applying the common law similarly treat non-compete clauses entered into as part of a sale of a business preferentially.[36]

Even the few states that ban non-compete clauses accommodate non-compete clauses attached to the sale of a business. California, for example, allows "any person who sells the goodwill of a business, or any owner of a business entity selling or otherwise disposing of his or her ownership interest in the business or entity, or any owner of a business entity that sells" all or substantially all of the entity's assets together with the goodwill of that entity, "may agree with the buyer to refrain from carrying on a similar business within a specified geographic area . . . so long as the buyer . . . carries on a like business therein."[37] California courts have applied this exception and allowed enforcement of non-compete clauses against shareholders who sold their entire interest in a company, even when that interest amounted to only 3 percent of the total business.[38] The purpose of the exception "is to prevent the seller from depriving the buyer of the full value of its acquisition, including the sold company's goodwill."[39] Yet under the Proposed Rule, sellers could do just that, as long as they sell less than 25 percent of the business at issue.

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[35] GA. CODE ANN. § 13-8-57(d) (2022); *see also* HAW. REV. STAT. § 480-4(c) (2022) ("[I]t shall be lawful for a person to enter into . . . [a] covenant or agreement by the transferor of a business not to compete within a reasonable area and within a reasonable period of time in connection with the sale of the business"); ALA. CODE § 8-1-190 (2022) (allowing, "[o]ne who sells the good will of a business [to] agree with the buyer from carrying on or engaging in a similar business."); ARK. CODE § 4-75-101(h) (2022) ("This subsection does not apply to a covenant not to compete agreement that is ancillary to other contractual relationships, including any type of agreement for the sale and purchase of a business"); S.D. CODIFIED LAWS § 53-9-9 (2022) ("Any person who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business within a specified county, city, or other specified area.").

[36] *E.g.*, Zimmer Melia & Assocs., Inc. v. Stallings, 2008 WL 3887664, at *5 (M.D. Tenn. 2008) ("In Tennessee, non-competes ancillary to an employment agreement are viewed less favorably than those ancillary to the sale of a business . . . non-competes ancillary to the sale of a business are subjected to less intensive scrutiny."); Am. Homecare Supply Mid-Atlantic LLC v. Gannon, 10 Pa. D. & C. 5th 362, 387 (Ct. Com. Pl. 2009) ("[P]ost-employment restrictive covenants are subject to a more stringent test of reasonableness than covenants not to compete which are ancillary to the sale of a business."); Cooper v. Gidden, 515 So. 2d 900, 905 (Miss. 1987) ("[W]e must scrutinize to a lesser degree the pertinent facts supporting a finding of reasonableness where the sale of a business's goodwill is involved."); Sealock v. Petersen, 2008 WL 314146, at *6 (Minn. Ct. App. Feb. 5, 2008) ("Although the general rule is that noncompete agreements are strictly construed, the supreme court has noted that many of the reasons for that rule are not present when such an agreement is entered into in connection with the sale of a business."); Ellis v. McDaniel, 596 P.2d 222, 224 (Nev. 1979) ("[B]ecause the loss of a person's livelihood is a very serious matter, post employment anti-competitive covenants are scrutinized with greater care than are similar covenants incident to the sale of a business.").

[37] CAL. BUS. & PROF. CODE § 16601 (West 2022). "Owner of a business" includes "any owner of capital stock, in the case of a business entity that is a corporation." "Ownership interest means . . . a capital stockholder, in the case of a business that is a corporation."

[38] Vacco Indus., Inc. v. Van Den Berg, 6 Cal. Rptr. 2d 602, 609-11 (Cal. Ct. App. 1992) (ruling on an earlier version of the statute). Although Section § 16601 has been modified since *Van Den Berg*, changes were intended to expand the coverage of the statute. In 2002, Section 16601 was modified to apply to "owners," and to clarify that several groups of people could be owners, including shareholders and partners. The purpose of the modification was to extend Section 16601 to apply to the sale of assets of a limited partnership or a LLC. S. Bill Analysis AB 601, 2001-2002 Sess., at 2 (Cal. 2002). North Dakota and Oklahoma, the other two states with sweeping bans on non-compete agreements, similarly allow for sale-of-a-business exceptions. North Dakota recognizes that the "sale of less than a majority interest is still a sale of goodwill and meets the exception," and allows courts to perform a case-by-case analysis to determine whether the exception is met in any given sale. N.D. Cent. Code § 9-08-06 (2022) (sale of the goodwill of a business and dissolution of a partnership, LLC, or corporation; dissociation of a partner or a member); Warner and Co. v. Solberg, 634 N.W.2d 65, 74 (N.D. 2001) (deciding that a sale of shares that amounted to 1/200 of total interest in the company did not meet the exception). Oklahoma recognizes a similar exception. OKLA. STAT. tit. 15 § 218 (2023); OKLA. STAT. tit. 15 § 219A (2008); Bayly, Martin & Fay, Inc. v. Pickard, 780 P.2d 1168, 1170 (Okla. 1989) (finding that the sale of 0.8 percent of stock did not qualify for the exception, but noting another case where sale of 20 percent of stock triggered the exception) (citing Key v. Perkins, 46 P.2d 530, 532 (O.K. 1935)).

[39] Alliant Ins. Servs., Inc. v. Gaddy, 72 Cal. Rptr. 3d 259, 267 (Cal. Ct. App. 2008).

Given these fundamental flaws with the Proposed Rule's sale-of-business provision, the Commission should exempt all non-competes clauses entered into in connection with the sale of a business from any final rule and allow state law to govern such situations.

In addition, and as numerous courts considering non-competes in the franchise context have noted, the relationship between the buyer and seller of a business is similar to the relationship between a franchisor and a franchisee.[40] In the franchise context, as in the sale of a business context, non-competes are essential to protect the goodwill of the franchisor's business.[41] Given its stated commitment to protecting the interests of buyers of a business, the Commission should continue to protect that same interest in the franchise context by exempting non-compete clauses entered into by franchisees from the Proposed Rule.

D. The Proposed Rule conflicts with other regulators' policies on non-compete clauses.

Federal regulators have recognized the value of non-compete clauses.[42] For example, FINRA's Rule 2040(b) requires FINRA members to enter into non-compete clauses if they choose to pay continuing commissions to their retired registered representatives.[43] Specifically, FINRA Rule 2040(b) authorizes its members to continue to pay commissions to their registered representatives who have retired, as long as the member and the registered representative have a bona fide contract that "prohibits the retiring registered representative from soliciting new business, opening new accounts, or servicing the accounts generating the continuing commission payments."[44] To qualify as a "retiring registered representative" capable of receiving continuing

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[40] *See, e.g.*, Sentilles v. Kwik-Kopy Corp., 652 So.2d 79, 83 (La. Ct. App. 1995) ("[A] franchise is much more akin to the sale of a business, and the franchisee's agreement not to compete is part of the compensation for the franchisor's transfer of its reputation and know-how.").

[41] *See, e.g.*, Sylvan Learning, Inc. v. Gulf Coast Educ., Inc., 2010 WL 3943643, at *6 (M.D. Ala. Oct. 6, 2010) (finding a franchisor's non-compete clause "justifiable and reasonably necessary to protect . . . goodwill, business opportunities . . . , franchise network, and for 'protection against diversion of [its] business.'") (citations omitted); Jiffy Lube Int'l, Inc. v. Weiss Bros., Inc., 834 F. Supp. 683, 691 (D.N.J. 1993) ("One can view a franchise agreement, in part, as a conveyance of the franchisor's good will to the franchisee for the length of the franchise. When the franchise terminates, the good will is, metaphysically, reconveyed to the franchisor. A restrictive covenant, reasonably crafted, is necessary to protect the good will after that reconveyance.").

[42] FINRA Rule 2040(b) (2022). Also, the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), does not preclude forfeiture of the benefits of some types of plans for violations of non-competition clauses, even where state law would otherwise prevent enforcement of those forfeiture provisions. In general, ERISA provides that, with certain exceptions not relevant here, state laws are preempted by ERISA to the extent that they relate to an employee benefit plan. 29 U.S.C. § 1144(a). This is sometimes referred to as the "preemption provision." Some courts have applied the preemption provision when analyzing whether a non-compete forfeiture provision in a benefit plan is enforceable even when the state law would preclude enforcement of such a provision. Rather, these courts have held that federal common law should apply to the analysis of whether the non-compete forfeiture provision should be given effect and have upheld the forfeiture under federal common law on that basis. Koenig v. Automatic Data Processing, 156 Fed. App'x 461, 467 (3d Cir. 2005) ("[C]ourts have determined that plans and agreements exhibiting these features are governed by ERISA and should be construed under the federal common law of contract."); Bigda v. Fischbach Corp., 898 F. Supp. 1004, 1016 (S.D.N.Y. 1995) (finding that ERISA preempted claims brought under state law that a forfeiture provision was unenforceable).

[43] FINRA Rule 2040(b) (2022).

[44] FINRA Rule 2040(b) (2022). SIFMA members are regulated by FINRA, which has jurisdiction over broker-dealers, capital acquisition brokers, and funding portals. *Firms We Regulate*, FINRA, https://www.finra.org/about/firms-we-regulate (Feb. 16, 2023).

commission payments from their former employers, retirees must "leave[] the securities industry."[45]

FINRA's rule was preceded by a rule established by its predecessor NASD, Rule IM-2420-2,[46] as well as several no-action letters articulating the same principle from both FINRA and the Securities and Exchange Commission ("**SEC**").[47] In its explanation for Rule 2040(b), the SEC recognized that the Rule "codified existing guidance" issued under NASD IM-2420-2.[48] The purpose of the policy enshrined in NASD IM-2420-2 was to "recognize[] the validity of contracts entered into in good faith between employers and workers at the time the workers are registered representatives of the employing members."[49] The SEC has recognized the validity of this policy for decades, and the Commission should continue to respect it.

The Commission should defer to such policies on non-compete clauses adopted by federal regulators due to their greater expertise and experience with the specific industries they regulate. By exempting non-compete clauses approved by federal regulators, including self-regulatory bodies overseen by federal regulators, the Commission would also prevent creating confusion over the applicability of a final rule.

III. THE PROPOSED RULE'S COST-BENEFIT ANALYSIS IS UNREASONABLE

The Commission's estimates of the Proposed Rule's expected benefits and costs are unreasonable. [50] In many cases, the Commission recognizes that it does not have sufficient data to properly evaluate the Proposed Rule's benefits and costs. And where it does cite data, the Commission overestimates the benefits and underestimates the costs. Given the significance of the Proposed Rule and its likely adverse consequences, the Commission should firmly understand the benefits and costs before proceeding with a final rule.

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[45] *Id.*

[46] FINRA, NASD IM-2420-2; Continuing Commissions Policy (Nov. 19, 1998), https://www.finra.org/rules-guidance/rulebooks/retired-rules/im-2420-2.

[47] Securities Industry and Financial Markets Association, SEC Staff No-Action Letter, 2008 WL 5205814 (Nov. 20, 2008); Packerland Brokerage Services, SEC Staff No-Action Letter, 2013 WL 1143915 (Mar. 18, 2013); Ted A. Troutman, FINRA Interpretive Letter (Feb. 4, 2002), https://www.finra.org/rules-guidance/guidance/interpretive-letters/ted-troutman-esquire-muir-troutman; Joe Tully, Commonwealth Financial Network, FINRA Interpretive Letter (Aug. 9, 2001), https://www.finra.org/rules-guidance/guidance/interpretive-letters/joe-tully-commonwealth-financial-network; Name Not Public, FINRA Interpretive Letter (Nov. 27, 2012), https://www.finra.org/rules-guidance/guidance/interpretive-letters/name-not-public-84.

[48] SEC No. 34-73954; File No. SR-FINRA-2014-037, at 9–10 (Dec. 30, 2014), https://www.sec.gov/rules/sro/finra/2014/34-73954.pdf; 70 Fed. Reg. 59324 (Proposed Oct. 1, 2014).

[49] SEC, No SR-NASD-98-86, at 7, 20 (Nov. 18, 1998), https://www.finra.org/sites/default/files/RuleFiling/p000088.pdf.

[50] Courts will strike down rules as arbitrary and capricious where, for example, an agency has performed a cost-benefit analysis that fails to address key costs. *See, e.g.*, Bus. Roundtable v. S.E.C., 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) (finding a SEC rule arbitrary and capricious for a poorly done cost benefit analysis); High Country Conservation Advocates v. U.S. Forest Service, 52 F. Supp. 3d 1174, 1196 (D. Col. 2014) (finding decision to forgo calculating one cost of a proposed rule "was arbitrary in light of the agencies' apparent ability to perform such calculations and their decision to include a detailed economic analysis of the benefits associated with the rule."); Nat'l Ass'n of Home Builders v. EPA, 682 F.3d 1032, 1040 (D.C. Cir. 2012) ("[W]hen an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable.").

A. The Commission has not established creditable benefit estimates of the Proposed Rule

The Commission concedes that it is unable to estimate the size of the Proposed Rule's benefits arising from "the rate of new firm formation, the rate of innovation, and the extent of competition in product and service markets" based on the economic literature.[51] While the Commission provides an estimate of the expected gains in workers' earnings, it also notes that it is "difficult to determine the extent to which the earnings effects discussed . . . represent transfers versus benefits."[52] Further, the Commission cites several studies on the economic benefit of prohibiting non-compete clauses, but also indicates the difficulty of extrapolating the results for a population-wide measure of impact or providing a monetized benefit.[53] In two studies, the results showed that an increase in the enforceability of non-compete clauses either had no impact on the entry rate of new firms or resulted in increased entry of large businesses, contradicting the proposition that a decrease in enforceability would result in the entry of more firms.[54] The Commission also cites studies on the relationship between non-compete clauses and innovation, but the cited studies produced contradictory results. The Commission found "no clear reason" for the discrepancy and recognized that it was unable to quantify or monetize the benefit of increased innovation, but still proceeded to arrive at the conclusion that innovation was a benefit even when facing studies with contradictory outcomes it was unable to explain.[55]

Finally, although the Commission includes an analysis of the Proposed Rule's impact on prices in the "benefits" section of its analysis, the Commission does not reach a definitive conclusion on how the Proposed Rule will impact prices. Although the Commission speculates that due to increased wages, the Proposed Rule cause prices to increase, it also comments that "better worker-firm matching" could increase productivity, driving down prices.[56] Although it offers these two contradictory predictions, the Commission fails to resolve this discrepancy.[57]

In sum, the Commission has very incomplete data on the possible benefits of the Proposed Rule and recognizes this fact but nevertheless still asserts that the Proposed Rule would yield benefits.[58]

B. The Commission underestimates the costs of the Proposed Rule

The Commission underestimates the costs of the Proposed Rule for two reasons. First, it relies on inaccurate numbers when calculating the costs it does quantify. Second, it understates or does not account for several significant costs.

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[51] Non-Compete Clause Rule, *supra* note 3, at 3522.
[52] Non-Compete Clause Rule, *supra* note 3, at 3525.
[53] Non-Compete Clause Rule, *supra* note 3, at 3523-24.
[54] Non-Compete Clause Rule, *supra* note 3, at 3527. The study that predicted an increase of entry of large businesses found a decrease in entry of small businesses, but proceeded to find an increase in concentration. *Id.*
[55] Non-Compete Clause Rule, *supra* note 3, at 3527.
[56] Non-Compete Clause Rule, *supra* note 3, at 3528.
[57] Perhaps this is why the Commission concedes that whatever impact on price the Proposed Rule will have, it considers "evidence on prices to be corroborating evidence, rather than a unique cost or benefit on its own." Non-Compete Clause Rule, *supra* note 3, at 3527.
[58] Non-Compete Clause Rule, *supra* note 3, at 3522.

As an initial matter, the Commission's calculations of the costs of the Proposed Rule rely on numbers and estimates that do not reflect reality. For example, the Commission estimates that, on average, it will cost each business $9.98 to comply with the Proposed Rule's notice requirement.[59] Yet even if this unrealistically low number is an accurate estimation of the amount of time it will take employers to notify workers of their actual non-compete clauses, employers are required by the Proposed Rule not only to inform workers of their actual non-compete clauses under Section 910.1(b)(1), but also of their de facto non-compete clauses under Section 910.1(b)(2). To comply with the notice requirement, employers will have to review each of their contracts with current and former workers to determine whether there are any clauses or agreements that could be a de facto non-compete clause under the Proposed Rule's ambiguous test. This analysis, which will likely require the assistance of counsel, will be costly and time-consuming, yet the Commission does not address this cost at all.

The Commission also estimates that it would cost one hour of a lawyer's time, billed at $61.54 per hour, for each business to update its contracts with new workers to comply with the Proposed Rule, and that employers would pay for an average of four to eight hours of a lawyer's time, at the same $61.54 rate, to update their existing contracts to include new provisions, such as non-disclosure agreements.[60] A closer look into what this $61.54 value is based on shows that it does not reflect an attorney's hourly rate, but an attorney's hourly *wage*.[61] For businesses paying for legal services, it is the hourly rate, not the hourly wage, that is relevant.[62] One survey on the average hourly rate in 2022 for an attorney's services sets the average billing rate of law firm associates at $501 per hour, and $682 per hour for partners.[63] And even these figures may underestimate the real cost of compliance.

The Commission does not adequately assess other significant costs of the Proposed Rule, including harms to firm investment, job creation, and competition. The Commission concludes, for example, that it is "inconclusive" whether the Proposed Rule will impact job creation rates.[64] The Commission estimates that workers will receive less training overall and firms may invest less, but it was unable to assess the impact on the possibility of the Proposed Rule resulting in businesses being less likely to share their trade secrets with workers.[65] In practice, the Proposed

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[59] Non-Compete Clause Rule, *supra* note 3, at 3528.
[60] *Id.*
[61] The data cited by the Commission comes from the U.S. Bureau of Labor Statistics, which provides the 2021 median pay for lawyers, sourced from the Bureau's Occupational Employment and Wage Statistics Survey. Lawyers, U.S. Bur. Lab. Stats., https://www.bls.gov/ooh/legal/lawyers.htm (stating that the 2021 median wage for lawyers is $127,990 per year, or $61.54 per hour).
[62] The Commission's number, if accurate, might apply when a business employed its in-house counsel to perform these services. Yet for all employers that lack in-house counsel, and for employers with in-house counsel that would seek outside counsel for the services outlined in the Proposed Rule, the Commission's number does not apply.
[63] Additionally, the survey reported an average hourly billing rate of $547 per hour for commercial litigation associates and $812 per hour for commercial litigation partners. ALM, THE SURVEY OF LAW FIRM ECONOMICS: 2022 EDITION (2022). *See also* Clio, *Legal Trends Report 2022*, 68, 70 (2022), https://www.clio.com/wp-content/uploads/2022/09/2022-Legal-Trends-Report-16-02-23.pdf (finding that the average cost per hour of legal services around the country was $313, with amounts ranging from $168 per hour (WV) to $424 per hour (DC) depending on the state). In the District of Columbia, data prepared by the Civil Division of the United States Attorney's Office reports hourly rates ranging from $333 to $665 per hour. Civil Division of the United States Attorney's Office for the District of Columbia, USAO Attorney's Fees Matrix – 2015-2021, https://www.justice.gov/file/1461316/download.
[64] Non-Compete Clause Rule, *supra* note 3, at 3530.
[65] Non-Compete Clause Rule, *supra* note 3, at 3529.

Rule will force employers to implement additional, costly safeguards to protect their competitively sensitive information from reaching rivals.

The most significant cost of the Proposed Rule, however, is litigation. Although the Commission recognizes that it is "possible" that litigation associated with trade secrets law, non-disclosure clauses, and non-solicitation clauses may increase, the Commission does not recognize that the Proposed Rule's lack of clarity will itself spur costly litigation. Indeed, the Proposed Rule's failure to clearly define what constitutes a de facto non-compete will spur litigation over what kinds of agreements fall under that definition, and over whether employers have complied with the Proposed Rule's notice requirements for workers who have agreed to de facto non-compete clauses.

There are also costs the Commission does not address at all. For example, the Proposed Rule will impose costs on U.S. employers who compete with foreign companies that are not subject to the Proposed Rule. By restricting how U.S. employers may engage with workers, the Commission risks reducing their competitiveness on the global market, negatively impacting the U.S. market.

IV. THE PROPOSED RULE IS IMPERMISSIBLY RETROACTIVE

A federal agency may not promulgate a retroactive rule without express authorization from Congress.[66] Although the Commission claims that its ban on non-compete clauses is not retroactive, the Proposed Rule is retroactive because it would require employers to modify millions of existing contracts, eliminating key provisions and altering the bargained-for value received by contracting parties.

Retroactive application of statutes or rules has "long been disfavored," particularly when that retroactive application "would impair rights a party possessed when he acted."[67] Thus, agencies may not promulgate retroactive rules without express congressional authorization.[68] Cases where courts have found that Congress has authorized retroactivity "have involved statutory language that was so clear that it could sustain only one interpretation."[69] The test for finding congressional authorization of retroactivity is "a demanding one" that requires approval of retroactivity in a wholly unambiguous way.[70] If Congress has not authorized retroactivity, the next step is to determine whether the rule is impermissibly retroactive. A rule promulgated under a statute that lacks express authorization for retroactivity is impermissibly retroactive if it would

[66] Nat'l Mining Ass'n v. Dep't of Labor, 292 F.3d 849, 859 (D.C. Cir. 2002) (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988)); *see also* Reyes v. Garland, 11 F.4th 985, 991 (9th Cir. 2021) ("When an agency engages in formal rulemaking, the rules it promulgates are analogous to legislation and are construed to apply only prospectively (unless Congress has expressly authorized it to promulgate a retroactively applicable rule).").
[67] Landgraf v. USI Film Prods., 511 U.S. 244, 268, 280 (1994).
[68] See *supra* note 66.
[69] Lindh v. Murphy, 521 U.S. 320, 328 n.4 (1997).
[70] INS. v. St. Cyr, 533 U.S. 289, 316–17 (2001); *see also* Lopez Ventura v. Sessions, 907 F.3d 306, 311–12 (5th Cir. 2018) ("The statute must contain wholly unambiguous language that it applies retroactively."); Auto. Club of Mich. v. Comm'r of IRS, 353 U.S. 180, 184-85 (1957) (retroactivity permitted where statute included a section specifically authorizing the Commissioner of Internal Revenue to act retroactively).

"affect[] substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment."[71]

The Commission cites Section 5 and Section 6(g) of the FTC Act as its authority for the Proposed Rule.[72] Neither of these provisions contains the required "wholly unambiguous" permission from Congress for the Commission to enact retroactive rules and the FTC does not argue otherwise.[73] Section 5(a)(2) of the FTC Act empowers the Commission to prevent persons, partnerships, or corporations under its jurisdiction "from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."[74] Section 6(g) gives the Commission the authority to "[f]rom time to time classify corporations and . . . make rules and regulations for the purpose of carrying out the provisions of this subchapter."[75] Neither Section 5 nor Section 6 explicitly authorize retroactive rulemaking.[76]

Yet the Proposed Rule would apply retroactively. Section 910.1(a) of the Proposed Rule would prohibit employers from "maintaining with a worker a non-compete clause," imposing "new duties with respect to transactions already completed" by requiring employers to modify existing contracts and notify current and former workers of the change.[77] According to the Commission, that requirement is not impermissibly retroactive because employers would merely have "to refrain from these practices starting on the compliance date."[78] But the Proposed Rule indisputably would require millions of employers to "rescind *existing* non-compete clauses."[79] A regulation requiring changes to existing contracts is retroactive.[80] And that required change would be on a massive scale – to millions of contracts, affecting around one fifth of workers in the United States, according to the FTC.

Because the Commission lacks the authorization to promulgate the Proposed Rule retroactively and the Proposed Rule has significant retroactive effects, the Commission should not make any final rule retroactive.

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[71] Fernandez-Vargas v. Gonzales, 548 U.S. 30, 37 (2006) (quoting *Landgraf*, 511 U.S. at 278).
[72] Non-Compete Clause Rule, *supra* note 3, at 3535.
[73] As noted above, SIFMA agrees with the Chamber of Commerce's position in its Comment on the Proposed Rule that the Commission lacks the authorization under these sections to promulgate the Proposed Rule in the first place.
[74] 15 U.S.C. § 45(a)(2).
[75] 15 U.S.C. § 46(g).
[76] 15 U.S.C. § 45.
[77] Non-Compete Clause Rule, *supra* note 3, at 3511; Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994).
[78] Non-Compete Clause Rule, *supra* note 3, at 3512. No case law is cited for this position.
[79] Non-Compete Clause Rule, *supra* note 3, at 3511.
[80] *See, e.g.*, Talaie v. Wells Fargo Bank, NA, 808 F.3d 410, 412 (9th Cir. 2015) (holding statute could not be applied retroactively where it affected rights defendant banks had when they entered into loan agreements, and because "retroactive application would impose 'new duties' on transactions already completed"); Kia Motors Am., Inc. v. Glassman Oldsmobile Saab Hyundai, Inc., 706 F.3d 733, 738, 740–41 (6th Cir. 2013) (applying the presumption against retroactivity when an amendment to a statute "would alter a key aspect of the parties' bargain"); Quantum Ent. Ltd. v. U.S. Dep't of the Interior, 714 F.3d 1338, 1343-45 (D.C. Cir. 2013) (refusing to apply statute retroactively when doing so "would attach new legal consequences to the Agreement between" the parties); *In re* Burk Development Co., Inc., 205 B.R. 778, 798 (Bankr. M.D. La. 1997) (finding impermissibly retroactive a statute that would impair the contractual rights of the parties); Bay Farms Corp. v. Great American Alliance Ins. Co., 835 F. Supp. 2d 1227, 1242-43 (M.D. Fla. 2011) (same); *see also* Corporación Mexicana De Mantenimiento Integral v. Pemex-Exploración y Producción, 832 F.3d 92, 108 (2d Cir. 2016) ("Retroactive legislation that cancels existing contract rights is repugnant to United States law.").

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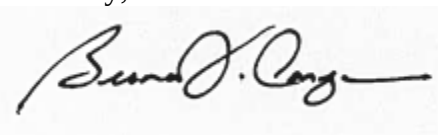
SIFMA, SIFMA AMG, and its members appreciate the opportunity to provide these comments, and sincerely welcome your consideration of our feedback. As discussed above, we believe that the Commission should not promulgate the Proposed Rule due to its significant costs, adverse impact on employers and workers, and unfairness. We also believe that the Commission has not conducted a reasonable enough cost-benefit analysis to proceed with finalizing the Proposed Rule. However, in the event that the Commission decides to proceed to a final rule, we request that the Proposed Rule be modified as described above to minimize its adverse impacts.

We would be pleased to further engage on the comments and points discussed here, or on the Proposed Rule generally. If you have any questions, please do not hesitate to the undersigned at (202) 962-7300 or bcanepa@sifma.org or lkeljo@sifma.org.

Sincerely,



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