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Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Washington, DC 20580

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

To whom it may concern:

On behalf of the Illinois Chamber of Commerce (the "Illinois Chamber"), we appreciate the opportunity to submit comments on the proposed rule issued by the Federal Trade Commission to amend 16 CFR Part 910 to prohibit post-employment noncompetition agreements (the "Proposed Rule"). We write to express the Illinois Chamber's concerns about, and opposition to, the Proposed Rule.

Background Regarding the Illinois Chamber.

The Illinois Chamber is the voice of the business community in Illinois. It is a statewide organization with more than 1,800 members in virtually every industry, including manufacturing, retail, insurance, construction, and finance. The Illinois Chamber advocates on behalf of its members to achieve an optimal business environment that enhances job creation and economic growth. Unions also belong to the Illinois Chamber, which has supported and promoted, and continues to support and promote, union-related issues.

The 2021 Illinois Compromise Regarding Noncompete Agreements.

Over Memorial Day weekend 2021, the Illinois legislature accomplished something truly remarkable: a comprehensive reform of noncompete and nonsolicit law that was passed *unanimously* by the Illinois state Senate and House of Representatives (the "Illinois Compromise"). The Illinois Compromise was not a complete ban on noncompetes, as some competing bills and employee advocates originally sought. And the bill was certainly not "pro-enforcement," as many employers would have preferred. Instead, it was that increasingly rare political creature: *a true compromise*.

The Illinois Compromise was the result of negotiations primarily involving the Illinois Chamber (on behalf of the business community in Illinois), the Chicago Chapter of the National

Employment Lawyers Association (whose members represent individuals in employment matters), the AFL-CIO, and the Illinois Attorney General's Office.

The Illinois Compromise *fairly* addressed the competing concerns of employees and employers in Illinois, as evidenced by the fact that it was *unanimously* passed by the state legislature, one of the most employee-friendly in the country.

This carefully crafted compromise, however, would be wiped out with the stroke of a regulatory pen by the Proposed Rule. This would be grossly anti-democratic and would impinge on the role of states as laboratories of democracy.

Why is the Illinois Compromise significant?

Attitudes toward noncompetes do not fit neatly in to a "red" or a "blue" political litmus test, as there are competing interests recognized by those on both sides of the political aisle. On the one hand, post-employment noncompetes are one of the most effective tools to protect trade secrets and confidential information, customer relationships, and a business's investment in itself and its employees. On the other hand, post-employment noncompetes can impede employee mobility, and thereby may conflict with fundamental notions of individual liberty.

47 states and the District of Columbia permit post-employment noncompetition agreements to varying degrees, while three states ban them.[1] Two of the states which ban them (North Dakota and Oklahoma) are among the politically "reddest" of the red, while the third – California is among the "bluest" of the blue.[2] Notably, each of these states passed their noncompete bans in the 1800s, well before the FTC came into existence in 1914, and no state has done so since.[3]

In recent years, abusive uses of noncompetes have received wide media attention,[4] which has led to an active debate across the country about the appropriate uses of post-employment noncompetes.[5] Should there be minimum income thresholds? If so, at what level? In recent years, states have answered that question with widely varying answers, from New Hampshire ($30,160/year) on the low end,[6] to Colorado, Oregon, Washington state and Washington, D.C. on

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[1] *See* Beck Reed Riden 50-State Noncompete Survey, available at https://beckreedriden.com/wp-content/uploads/2022/11/Noncompetes-50-State-Survey-Chart-20221121.pdf. *See also* Epstein Becker Green 50-State Noncompete Survey, available at https://www.ebglaw.com/50-State-Noncompete-Survey.

[2] *See* N.D. Cent. Code § 9-08-06; Cal. Bus. & Prof. Code § 16600; OK. Stat. §15-2 19A.

[3] Michigan also passed legislation banning noncompetes in 1905, but rescinded that legislation in 1985.

[4] *See, e.g.*, Daniel Wiessner, *Jimmy Johns settles Illinois lawsuit over non-compete agreements*, Reuters (Dec. 7, 2016), https://www.reuters.com/article/us-jimmyjohns-settlement/jimmy-johns-settles-illinois-lawsuit-over-non-compete-agreements-idUSKBN13W2JA.

[5] Indeed, in a classic example of noncompete overreach, one of the authors of these comments was required to sign a noncompete in order to work as a house painter as a college kid over summer break.

[6] N.H. Rev. Stat. Ann. § 275:70-a(I)(b) (prohibiting non-competes for "low-wage" employees, defined as "an employee who earns an hourly rate less than or equal to 200 percent of the federal minimum wage").

the high end (over $100,000/year),[7] with Maryland, Rhode Island, Massachusetts, Maine, and Virginia all falling in between. Should customer or coworker nonsolicits be treated differently than noncompetes? The Massachusetts, Oregon and Washington statutes expressly carve out nonsolicits, but the Illinois Compromise does not.[8] Should employers be required to pay an employee not to compete, either via a paid-post employment restricted period or other mutually agreed consideration, or via a required advance notice of resignation or termination (*i.e.*, a mandatory "garden leave" period)? Oregon has said "yes," while Washington requires payment during the restricted period in the event of a "layoff."[9] Massachusetts identifies garden leave as one form of acceptable consideration.

All of these issues, and many more, were debated, negotiated, and hashed out in Illinois – *democratically* – culminating in the Illinois Compromise.

What is the Illinois Compromise?

At its core, the Illinois Compromise balances due process protections for employees (by imposing compensation thresholds and providing various procedural protections), while still preserving for employers an effective tool to protect their trade secrets and confidential information, customer relationships, and the stability of their workforces. The Illinois Compromise also attempted to clarify the law about what constitutes adequate consideration and what qualifies as a legitimate business interest sufficient to warrant a restrictive covenant. Governor Pritzker signed the bill, and it went into effect on January 1, 2022.[10]

Highlights of the Illinois Compromise:

Prohibits restrictions for lower income employees, for construction tradespeople and public employees.

The Illinois Compromise bans noncompetes for employees earning $75,000/year or less, and bans customer and coworker nonsolicits for employees earning $45,000/year or less. Both of these salary thresholds are roughly indexed for inflation in future years.

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[7] *See* Wash. Rev. Code Ann. § 49.62.020(1)(b) and Col. Rev. Stat. § 8-2-113. On May 21, 2021, Oregon passed amendments to its non-compete statute raising the minimum income threshold from approximately $97,000, based on the median income for a four-person family as determined by the United States Census Bureau, to $100,533, to be adjusted for inflation pursuant to the Consumer Price Index for All Urban Consumers, Western Region (All Items). 2021 Or. SB No. 169, amending Or. Rev. Code Ann. § 653.295(1)(e). *See also*, https://www.tradesecretsandemployeemobility.com/2022/07/articles/non-compete-agreements/washington-d-c-scales-back-ban-on-non-competes/.

[8] *See* Mass. Gen. Laws Ann. ch. 149, § 24L(a), Or. Rev. Code Ann. § 653.295(5)(b) (numbering amended by 2021 Or. SB No. 169; formerly § 653.295(4)(b), and Wash. Rev. Code Ann. § 49.62.010(4).

[9] *See* Mass. Gen. Laws Ann. ch. 149, § 24L(b)(vii); Or. Rev. Code Ann. § 653.295(7) (numbering amended by 2021 Or. SB No. 169; formerly § 653.295(6); and Wash. Rev. Code Ann. § 49.62.020(1)(c).

[10] 820 Ill. Comp. Stat. Ann. 90/1 *et seq.* The Illinois Compromise is not retroactive, and therefore does not apply to covenants executed before January 1, 2022.

The Illinois Compromise also prohibits noncompetes and nonsolicits for construction tradespeople and public employees.

"Due Process" protections for employees – including attorneys' fees.

The Illinois Compromise mandates that individuals be permitted at least 14 days to review the agreement and decide whether to sign, although an employee is free to sign in less than 14 days should they elect to do so. The Illinois Compromise also requires that individuals be advised in writing to consult with an attorney before signing. And, importantly, the Illinois Compromise authorizes an employee to recover attorneys' fees, as well as "appropriate relief," if the employee "prevails" on a claim *filed by an employer* seeking to enforce a noncompete or nonsolicit.

Clarification of certain ambiguities in the common law.

The Illinois Compromise clarifies a number of ambiguities in Illinois's common law.

First, it reiterates that when determining whether an employer has a legitimate business interest sufficient to warrant a post-employment restrictive covenant, "the totality of the facts and circumstances of the individual case shall be considered," and "[e]ach situation must be determined on its own particular facts." Moreover, the Illinois Compromise reiterates that "[r]easonableness is gauged not just by some, but by all of the circumstances."

Second, the Illinois Compromise clarifies that while a court "may refrain from wholly rewriting contracts," "[i]n some circumstances, a court may, in its discretion, choose to reform or sever provisions of a covenant not to compete or a covenant not to solicit rather than hold such covenant unenforceable." Moreover, "[f]actors which may be considered when deciding whether such reformation is appropriate include the fairness of the restraints as originally written, whether the original restriction reflects a good-faith effort to protect a legitimate business interest of the employer, the extent of such reformation, and whether the parties included a clause authorizing such modifications in their agreement."

Finally, the Illinois Compromise provides some clarification as to what constitutes "adequate consideration" sufficient to support a restrictive covenant. Specifically, the Illinois Compromise provides that:

> "Adequate consideration" means (1) the employee worked for the employer for at least 2 years after the employee signed an agreement containing a covenant not to compete or a covenant not to solicit *or* (2) the employer otherwise provided consideration adequate to support an agreement to not compete or to not solicit, *which consideration can consist of a period of employment plus additional professional or financial benefits or merely professional or financial benefits adequate by themselves*. (emphasis added).

While this provision provides a clear "two-years of employment" "safe harbor" in terms of what is adequate consideration, it also clarifies that less than two years of employment may be sufficient if coupled with additional "professional or financial benefits" or merely "professional or financial benefits adequate by themselves." Although it will be up to the courts to flesh out the meaning of these terms, such professional or financial benefits are anticipated to include consideration such as a raise, a promotion, training, professional exposure and marketing, incentive compensation such as stock options or restricted stock, bonuses, separation pay, or other employee benefits. In other words, while on one hand this provision codifies to some extent the controversial "at least two years or more of continued employment" *Fifield* "rule," on the other hand this provision reinforces judicial and equitable flexibility.[11]

Key exceptions in the Illinois Compromise.

The Illinois Compromise contains a number of critical exceptions.

First, the Illinois Compromise expressly carves out confidentiality, trade secret, and invention assignment agreements from the definition of a covered noncompete.

Second, the Illinois Compromise also expressly exempts "garden leave" clauses (*i.e.*, clauses or agreements requiring advance notice of termination of employment, during which notice period the employee remains employed by the employer and receives compensation) from the definition of a covered noncompete.

Third, the Illinois Compromise expressly exempts agreements entered into in connection with the acquisition or disposition of an ownership interest in a business.

Fourth, the Illinois Compromise exempts "no reapplication" clauses in separation agreements.

Finally, although the protections in the Illinois Compromise apply to "no moonlighting" provisions in employment *agreements*, they do not apply to "no moonlighting" policies in employee *handbooks*.

State Attorney General enforcement.

In recent years, the Illinois Attorney General's Office has played an active and highly publicized role in policing certain situations involving form noncompete agreements that low wage employees were compelled to sign. The Illinois Compromise codifies the State Attorney General's power to protect the public in this area. Specifically, when the Attorney General has "reasonable cause to believe than any person or entity *is* engaged in a *pattern and practice* prohibited" by the

[11] *See Fifield v. Premier Dealer Services, Inc.*, 2013 IL App (1st) 120327, ¶ 19 ("Illinois courts have repeatedly held that there must be at least two years or more of continued employment to constitute adequate consideration in support of a restrictive covenant. This rule is maintained even if the employee resigns on his own instead of being terminated.") (internal citations omitted).

law (emphases added), it may initiate or intervene in litigation. Likewise, the Illinois Compromise also authorizes the Attorney General to initiate an investigation of potential violations, and in an action brought under the law, the Attorney General may (but is not required to) request a civil penalty (payable to the state), but the court has discretion as to whether to award any such penalty.

The Proposed Rule Banning Noncompetes Would Grossly Infringe On The States' Roles As Laboratories of Democracy.

The Illinois Compromise is just one example of how states have crafted a solution that balances protections for employees while preserving employer interests. Other states have enacted similar laws that balance the same interests, and which reflect the nuanced concerns of citizens of those states. Tellingly, despite proposals in multiple states to ban noncompetes outright, including in Illinois, no state has done so since 1890 and each state or city that has started there over the past several years has ended up with compromise legislation similar to the Illinois Compromise.[12]

But with one swipe of a regulatory pen, the FTC proposes to overrule the choices made by the citizens of 47 states and the District of Columbia *through their elected representatives*. Such an anti-democratic action should not be lightly taken. As Justice Louis Brandeis famously stated in his dissenting opinion in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932):

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Accordingly, the Illinois Chamber asks that the FTC leave the Illinois Compromise in place and not issue the Proposed Rule.

We thank you for the opportunity to submit these comments and look forward to working with the FTC moving forward on such an important issue for the State of Illinois and the nation.

Very truly yours,

Peter A. Steinmeyer and Erik W. Weibust,
on behalf of the Illinois Chamber of
Commerce

[12] *See, e.g.*, Massachusetts Noncompetition Agreement Act, Mass. Gen. Laws Ann. ch. 149, § 24L; Washington, D.C. Non-Compete Clarification Amendment Act of 2022, D.C. Law 24-175