FIA PTG
PRINCIPAL TRADERS GROUP

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April 19, 2023

Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex C)
Washington, DC 20580.

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

Dear Ms. Tabor:

The FIA Principal Traders Group ("FIA PTG")[1] appreciates the opportunity to submit this letter to the Federal Trade Commission ("FTC" or the "Commission") in response to the Non-Compete Clause Rulemaking (the "Proposal").[2] FIA PTG members invest significant time, monies and skills in the development of intellectual property to support the trading that enables them to provide the liquidity that makes our financial markets among the best in the world. This intellectual property comprises, on a non-exhaustive basis, proprietary (quantitative) research, software, technology infrastructure, trading models, business tactics and strategies, positive and negative know-how, as well as information about a company's revenues, organizational structure and personnel, all of which is developed throughout years of labor and capital investment. The employees who develop, maintain and utilize this intellectual property are critical to the operations and success of these firms, which in turn support the efficient price discovery and risk management functions of the U.S. markets. Our members care deeply about not only retaining these employees but managing their separation from the firm in an equitable and responsible fashion. Accordingly, FIA PTG members would be significantly impacted by this Proposal and encourage the Commission to consider the points raised in this letter as reasons not to proceed with implementing the Proposal, or at a minimum not in its current form.

[1] FIA PTG is an association of firms, many of whom are broker-dealers, who trade their own capital on exchanges in futures, options and equities markets worldwide. FIA PTG members engage in manual, automated and hybrid methods of trading, and they are active in a wide variety of asset classes, including equities, fixed income, foreign exchange and commodities. FIA PTG member firms serve as a critical source of liquidity, allowing those who use the markets, including individual investors, to manage their risks and invest effectively. The presence of competitive professional traders contributing to price discovery and the provision of liquidity is a hallmark of well-functioning markets. FIA PTG advocates for open access to markets, transparency and data-driven policy.

[2] https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule

Critically, hampering FIA PTG members' ability to protect their intellectual property from disclosure to competitors jeopardizes the liquidity of the U.S. financial markets. Software, and the innovative source code that runs it, is the lifeblood of many FIA PTG members' commercial success. Typically, the software employed to run their trading systems has been developed and continually refined by the firms themselves, not purchased or licensed from a third party. This code is fundamentally different from other types of software because it embodies significant trade secrets created through the expenditure of time, money, research, and talent. And while this code could ultimately be ruled a trade secret after expensive litigation[3] and risk of public disclosure, the technology infrastructure that permits the code to operate, let alone other material elements of intellectual property, may not be protected under the same laws. Relegating employers to relying on trade secret litigation to protect their intellectual property serves neither companies nor their employees. From the employers' perspective, such litigation is costly and, crucially, takes place after harm has occurred; from employees' perspective, a noncompete agreement clearly delineates what is and is not permissible upfront and does not require an understanding of how complex trade secret law may apply. Fundamentally, this intellectual property is commercially very valuable, and its competitive value is lost if the information is disclosed. Moreover, once exposed, its protected character and value cannot be retrieved.

One, if not the primary, way FIA PTG member firms currently allow employees to develop, enhance and deploy this intellectual property while still protecting its confidential nature is through the use of non-compete agreements. These agreements are essential to the protection of each firm's intellectual property and trade secrets, especially the proprietary information that may not rise to the legal definition of trade secret. Should the Proposal be finalized, our members would lose this protection which, in turn, would likely result in less collaboration among employees and within the firm generally. Restricting intra-firm access to information and intellectual property will have the likely effects of (i) increasing time to market for improvements to proprietary software and other intellectual property; (ii) decreasing the earning, advancement and career potential for employees as they will receive less training and have more narrow roles and responsibilities; (iii) negatively impacting the value of a business should it be sold; and (iv) in the end, while clearly an insufficient remedy as the damage has already been done, increasing litigation. These are only some of the foreseeable negative consequences of the Proposal; given the absence of robust literature on the consequences of a complete ban such as contained in the Proposal, there may well be additional negative consequences that have yet to be identified.

Assuming the Proposal is adopted in some form, to protect firms from the harms referenced above, FIA PTG recommends the Commission include an exemption in the Final Rule for paid noncompete agreements provided to highly-compensated employees. It is fairly common in the principal trading community to use *paid* non-compete agreements in connection with these highly paid workers who receive significant training and develop significant knowledge and skills while

[3] California, which prohibits noncompete agreements, highlights the risk of increased trade secret litigation: during the period 2016 to 2020, the highest number of trade secret cases nationwide (397 cases or 5.9% of the total case count) was heard in the Central District of California. https://lexmachina.com/media/press/lex-machina-releases-2021-trade-secret-litigation-report/

at a firm. When enforced, these agreements often include guaranteed payment(s) after separation from the firm, for the full length of any restricted period.

This proposed exemption is consistent with the Commission's proffered purpose for the Proposal—protecting against "suppress[ed] wages, hamper[ing] innovation, and block[ing] entrepreneurs from starting new businesses."[4] Indeed, all workers would (1) receive guaranteed payment(s); (2) continue to be permitted to collaborate and have access to relevant internal information, training, and skill development during their employment; and (3) remain free to start their own businesses if desired after their paid time off is complete. In reality, failure to include this exemption in the Final Rule would likely result in the exact suppressed wages and hampered innovation the Commission's Proposal intends to correct.

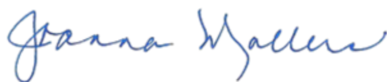
Finally, to the extent the Commission moves forward with a Final Rule on this topic, the 180-day compliance requirement is impracticable. A minimum of 365 days to comply with the Final Rule's mandates would allow firms sufficient time to develop alternative means and processes to ensure their intellectual property is secure from disclosure to their competitors. This will be a complex, costly, and time-consuming process, that will likely require shifts in firm culture from collaborative workplaces to siloed, secretive, and individualized workers. The process will probably also require rewriting compensation plans and changing organizational bonus structures for current employees to reflect the new reality. Moreover, in the event the Final Rule is required to be applied retroactively, amending or voiding existing employee non-compete clauses will take significant time and effort, and further supports the request for an implementation date at least 365 days after the finalization of the Rule.

Given the negative impact the Proposal will have on the U.S. financial markets, we encourage the Commission to abandon the Proposal in its entirety. If the Commission opts to move forward with the Proposal in some form, FIA PTG strongly encourages the Commission to add an exemption for paid noncompetes provided to highly-compensated employees. Finally, when a Final Rule is published, FIA PTG requests the Commission provide 365 days to comply given the expansive application of the Rule and the complex and lengthy steps necessarily involved in compliance.

If you have any questions, please do not hesitate to contact Joanna Mallers at jmallers@fia.org.

Respectfully,

FIA Principal Traders Group



Joanna Mallers
Secretary

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[4] https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition