

April 19, 2023

Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

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

Dear Chair Khan,

Energy Workforce and Technology Council (“Energy Workforce”) appreciates the opportunity to comment on the Federal Trade Commission (“Commission”) proposed Non-Compete Clause Rule and the potential impact on the energy services and technology sector.

Energy Workforce represents more than 400 energy technology and services companies working to deliver safe, profitable, and sustainable lower-carbon products. Like the rest of the energy sector, the companies that comprise our membership are diverse in size, scope, and governance models. Our members represent the spectrum from private sole proprietorships, to publicly held companies with thousands of employees.

The energy services and technology sector is essential to the oil and gas industry, as it provides the necessary support and expertise to explore, develop, and produce energy in all of its forms. Overall, the energy services and technology sector plays a crucial role in the energy industry and in meeting global energy needs. Technologies developed and utilized by the industry are highly competitive and innovation is used by companies to gain market share over others. Competition exists both between US-based companies as well as foreign competitors.

The energy services and technology sector provides various services and equipment to support the exploration, production, and transportation of oil and gas resources and new energies. This sector includes companies that specialize in drilling, well completion, well maintenance, reservoir management, and other activities that are required for oil and gas production.

Equipment provided by this sector includes drilling rigs, mud pumps, blowout preventers, wellheads, and other equipment needed for drilling and completion operations.

Research & Development

The energy services and technology sector has and continues to invest significantly in research and development (R&D) for innovations to make energy production cleaner and more efficient. Most recently, the shale revolution which allowed the United States to operate as a net exporter of oil and gas for the first time in history is a direct result of the technologies created by companies in this sector, including hydraulic fracturing and horizontal drilling. New emission-lowering technologies are also highly competitive and present huge market opportunities for those that perfect the technology first. The Commission’s proposal as drafted presents a risk to Energy Workforce member companies that invest significant amounts of resources in research and development of technologies. The proposed rule might force companies to narrow the exposure that new hires get to new technologies and IP in order to lower the risk of transferred trade secrets should the employee decide to leave the company.

For example, one of our members and a leading energy services company invested 2.3% of its topline revenue in 2022, with R&D amounting to \$650 million with similar investments in 2021. Many other Energy Workforce companies make similar investments. These investments allow US companies to maintain competitiveness against foreign competition and the industry itself is highly competitive.

Senior Executives

Energy Workforce recommends defining the role of “Senior Executives” based on duties as opposed to separating workers based on compensation. Duties for senior executives could include:

- Those who concern themselves with strategic decision making
- Those who occupy a senior supervisory position and has responsibility for supervising the performance of the work of specific agreements or enterprise
- Those managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise
- The employee has the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight

Energy Workforce recommends that senior executives, engineers and other individuals who possess knowledge of intellectual property and other sensitive materials be exempted from the proposed rule. These individuals are highly paid, have specialized education and training, and Energy Workforce member companies invest significant financial resources into their development. In order to protect the IP and technology that these individuals develop, it is imperative to allow companies to continue to protect this IP. Continuing to protect this IP will ensure that companies can continue to invest resources into the development and that America can continue to dominate the development of energy technology for years to come.

Input on low and high-wage workers

Energy Workforce does not believe a salary cap, as suggested in the alternative rules, would be an effective tool due to the structure of many of its companies. Some of the positions that have significant access to IP fall into similar wage groups as other employees and therefore the distinction would be more effective if it was based on job scope. For example, in our sector some entry level engineers may have lower than average salaries but may have access to critical technology as part of their positions. Setting a blanket income cutoff would not cover all these employees. The rule, if ultimately enacted, should be based on information possessed, not salary or some other arbitrary standard.

Should the Commission move forward with the proposal, Energy Workforce also recommends that language be added that enables companies to add a contractual clause requiring employees to notify their employer if they are leaving for a competitor. These notifications allow for companies to quickly move an employee away from sensitive data and technology and protect IP. This is especially important when the employee is leaving for a foreign competitor.

FTC Authority and Overreach

Energy Workforce has concerns with the proposed rule by the FTC due the unintended consequences on the United States economy and the potential for the rule to hinder US companies with valuable IP to protect that IP from their competitors both within the US and abroad. This is especially concerning given the extremely tight labor market that exists in our sector and across the greater US economy.

Should the Commission move forward with this rule, Energy Workforce believes there is a likelihood of increased litigation between companies as they try to protect IP from leaving their companies as they would not be able to resort to using the non-compete clauses. This would likely lead companies to use other basis for litigation that would not necessarily simplify the employment situation but may in fact complicate it. Should the FTC move forward with the rule Energy Workforce asks for only employees who have little or no access to IP to be included in the final rule.

Energy Workforce and Technology Council has expressed concerns regarding the potential impact of the Federal Trade Commission proposed Non-Compete Clause Rule on the energy services and technology sector, and made recommendations based on input from its membership. Energy Workforce looks forward to engaging with the FTC as this proposed rule develops.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim Tarpley". The signature is written in a cursive, flowing style with some ink bleed-through or overlapping strokes.

Tim Tarpley
President
Energy Workforce & Technology Council