



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Office of Policy Planning

January 23, 2023

**MEMORANDUM**

FROM: Shannon Lane

TO: April Tabor

SUBJECT: Summary of Interview of Elizabeth Wilkins by Firewall Podcast

**EXECUTIVE SUMMARY:**

On January 17, 2023, the podcast Firewall published an interview with Elizabeth Wilkins, the Federal Trade Commission's ("FTC") Director of the Office of Policy Planning. The interview was hosted by Bradley Tusk and is publicly available on Firewall's website.<sup>1</sup> The interview concerned the FTC's proposed Non-Complete Clause Rule, 88 Fed. Reg. 3482 (Jan. 19, 2023) ("Proposed Rule") and the FTC's work more broadly, and the podcast episode included other topics unrelated to the FTC. This memorandum is to be placed on the public record pursuant to 16 C.F.R. § 1.26(b)(5) and the Notice of Proposed Rulemaking, under which summaries or transcripts of oral communications respecting the merits of the proposed rulemaking from any outside party to any Commissioner or Commissioner advisor are to be placed in the public record. This executive summary does not summarize the entire interview, but rather focuses on information concerning the Proposed Rule that is not already included in the rulemaking record.

First, Ms. Wilkins described the FTC and its work. She then described non-compete clauses and their impact on workers, employers, and on the market as a whole. Mr. Tusk said that many companies have non-competes but do not enforce them and are not sure if they are even enforceable, and asked whether there was significant opposition to the Proposed Rule from businesses. Ms. Wilkins stated that standard form contracts are common in employment and there are instances where employers are challenged and drop non-competes immediately. But other companies do enforce non-competes, as seen in the recent FTC consent decree with a security guard company. There are some companies that will not enforce the clauses, but employees do not know that and there is still a chilling effect on those employees. Mr. Tusk said that workers would lose even if they won their non-compete case in court, because the court process takes time and money.

Mr. Tusk asked if there was a difference between non-competes for low-wage workers versus those for high-wage workers with access to trade secrets. Ms. Wilkins first said that workers suffer curtailment of their liberty from non-competes at both income levels. She stated that employers often say that they need non-competes because they invested in training workers and disclosed trade secrets to them. However, Ms. Wilkins said, employers have other options like non-disclosure agreements, trade secrets law, and other tools that are much less blunt and detrimental to worker liberty. Also, non-competes affect product markets because high-earners such as engineers might be more likely to start a business or bring new ideas (though not trade secrets)

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<sup>1</sup> Firewall, *Are Americans Getting Dumber and Lazier* (Jan. 17, 2023), available at <https://podcasts.apple.com/us/podcast/are-americans-getting-dumber-and-lazier/id1199693682?i=1000594896363>. The interview with Ms. Wilkins begins at 24 minutes and 55 seconds.

to a new company. The workers that employers may have more justifications for subjecting to non-competes might be the same workers that can spur innovation in product and service markets.

Mr. Tusk asked what the strongest argument against the Proposed Rule was and how Ms. Wilkins would respond. Ms. Wilkins said the strongest argument is that some workers, such as higher-wage or specialized employees or senior executives are better able to bargain, have lawyers involved, and may get the benefit of bargaining for a non-compete. Those are arguably the people employers need the most. Employers also might argue that other tools are not as good as non-competes and are harder to enforce. The FTC asked for comments on the Proposed Rule on senior executives, but she is also concerned that executives might be the ones most likely spur competition. Further, even if other tools are not as protective—though Ms. Wilkins did not concede that they were not—the marginal benefits of non-competes over those other tools does not outweigh the significant curtailment of workers’ liberty.

Mr. Tusk asked what would happen if workers wanted to sell this right. Ms. Wilkins responded that such a bargain was largely theoretical and only perhaps happened with senior executives. The vast majority of workers cannot bargain. Workers are often asked to sign non-competes on their first day along with many other papers, and many do not know they are subject to a non-compete until their first day or even until they try to leave that job. While bargaining may be a good idea in contract theory, in reality there is no bargaining.

Mr. Tusk asked what the process for the Proposed Rule was from here. Ms. Wilkins explained that this is a proposal and asked for comments. The FTC is interested in feedback on every aspect of the Proposed Rule, including the evidentiary base, the language, how it impacts specific industries and workers, and any dynamics that the FTC may not be thinking of. If people have knowledge of or experience with non-competes, please comment. Once comments close, the FTC takes its obligation seriously to consider those comments as it develops a final rule and decides if there will be a rule. A majority of commissioners then need to vote to approve the Rule. It will not take effect for at least some months, though she cannot provide a binding date.

In a separate discussion, Ms. Wilkins explained that the Proposed Rule was an example of the FTC promoting business. For example, the CEO of the Chamber of Progress was excited about the Proposed Rule because smaller businesses currently cannot get the workers they need due to non-competes.