

ONE HUNDRED EIGHTEENTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON THE JUDICIARY

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January 12, 2024

Mr. Andrew Katsaros  
Inspector General  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Dear Mr. Katsaros:

The Committee on the Judiciary is conducting oversight of Federal Trade Commission's (FTC) proposed competition rulemaking concerning non-compete agreements.<sup>1</sup> In the course of our oversight, we have become aware of an email exchange critical of the rulemaking effort that the FTC should have, but has not, made public. The FTC's treatment of this document raises concerns about the FTC failing to properly maintain the rulemaking record and disclose *ex parte* communications pursuant to agency regulations.<sup>2</sup> Given the seriousness of this issue, we raise this matter with you now as it may warrant your immediate investigation.

On January 30, 2023, Dr. Gerald Carlino, Emeritus Economist in the Research Department of the Federal Reserve Bank of Philadelphia, wrote an email to Elizabeth Wilkins, then-FTC Director of the Office of Policy Planning and Chief of Staff for Chair Lina Khan, about the FTC's proposed rulemaking.<sup>3</sup> In the rulemaking, the FTC had dismissed as "inconclusive" a study conducted by Dr. Carlino that estimated that "the job creation rate at startups increased by 7.8% when Michigan increased non-compete clause enforceability."<sup>4</sup> In his email to Ms. Wilkins, Dr. Carlino told her that he had "misgivings" with the FTC's characterization of his findings, and then explained that there "is a serious problem" with the FTC's reliance on studies "based on multiple legal changes to non-compete clause enforceability from a variety of states."<sup>5</sup>

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<sup>1</sup> See Letter from Rep. Jim Jordan, Chair, H. Comm. on the Judic., et al. to Hon. Lina Khan, Chair, Fed. Trade Comm'n (Feb. 14, 2023).

<sup>2</sup> See 16 C.F.R. 1.18(c)(1)(i).

<sup>3</sup> FTC-000004608.

<sup>4</sup> See Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3488 (Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

<sup>5</sup> See FTC-000004607-8 (explaining, "[T]he [C]ommission's [conclusion] might be cause for concern if I looked at job creation rate for a single year or a few years, but my study considers a 27-year period, 1977 to 2013.

Importantly, my findings are based on a difference-in-difference methodology measuring the *average* change in the

When she received Dr. Carlino’s email, Ms. Wilkins forwarded the email to others in the FTC, advising that she thought Dr. Carlino’s email belonged on the public record.<sup>6</sup> Mr. Wilkins noted to Chair Khan’s special assistant: “I know we worked out a way to deal with stuff coming into Lina where the emailer didn’t realize their note would become public.”<sup>7</sup> The special assistant responded that Ms. Wilkins should send the email to the Secretary of the FTC.<sup>8</sup> Another FTC staff member asked: “Should you also let Mr. [sic] Carlino know that you will be submitting his comments to the public record?”<sup>9</sup> It is unclear what action Ms. Wilkins or anyone else at the FTC took related to this matter, as the FTC has not produced any other related material regarding this exchange.

The relevant FTC regulations require the agency to include third-party communications related to the merits of a rulemaking on the rulemaking record.<sup>10</sup> The FTC’s public record of the non-compete rulemaking, however, does not include Dr. Carlino’s email exchange with Ms. Wilkins. The record does contain an entry filed by Dr. Carlino on March 9, 2023, regarding the rulemaking.<sup>11</sup> However, the record only includes Dr. Carlino’s introductory statement, in which he expressed concern that the FTC “is dismissive of academic studies, such as my own, not offering support for a rule banning noncomplete agreements.”<sup>12</sup> While Dr. Carlino referenced an attachment in his introductory statement, the public record does not include a copy of this attachment.<sup>13</sup>

We bring this matter to your attention because the Office of Inspector General “is responsible for conducting audits and investigations relating to the programs and operations of the FTC,” and that such audits and investigations “are conducted for the purpose of finding and preventing fraud, waste and abuse and to promote economy, efficiency and the effectiveness within the agency.”<sup>14</sup> The fact that Dr. Carlino’s full comment is not publicly available, and that his email to the FTC has not been posted on the record or as an *ex parte* communication, raises multiple concerns. It appears that under Chair Khan, the FTC may have adopted a policy to skirt

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job creation rate for Michigan (the treatment group), relative to the *average* change in job creation rate for the control group. I do not believe that the objection raised in the Commission’s report diminishes my findings,” and that “[T]here is a serious problem with studies based on multiple legal changes to non-compete clause enforceability from a variety of states. It is highly likely that both employers and employees will anticipate the changes in enforceability *ex ante* and adjust their behavior before the effective date of the new law, thereby biasing the results.”) (emphasis in original).

<sup>6</sup> See FTC-000004607.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See 16 C.F.R. 1.18(c)(1)(i).

<sup>11</sup> See Comment from Carlino, Gerald, FTC-2023-0007-16588 (Apr. 20, 2023), <https://www.regulations.gov/comment/FTC-2023-0007-16588> (last visited Jan. 11, 2024) (The submission portal indicates that Dr. Carlino’s comment was received on March 9, 2023) [hereinafter Dr. Carlino’s Comment].

<sup>12</sup> *Id.*

<sup>13</sup> See *Id.* The link to the attachment directs to a copy of the FTC’s own notice of proposed rulemaking appears, and not Dr. Carlino’s Comment. *Id.*

<sup>14</sup> See *Office of Inspector General*, FED. TRADE COMM’N, <https://www.ftc.gov/office-inspector-general> (last accessed Jan. 11, 2024).

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public transparency requirements and this policy is being applied in such a way to conceal from the public criticism of the FTC. In light of this new information, we believe it may be prudent for the Office of Inspector General to investigate:

1. Whether the FTC, and specifically Chair Khan, has adopted policies to address third-party comments and communications made to the Chair in ways that may violate record-retention or public transparency laws and regulations;
2. Who at the FTC gave authorization to adopt such a policy;
3. Whether Chair Khan and other senior leaders are maintaining and preserving such documents;
4. Whether the FTC is deliberately taking steps to avoid posting public comments critical of the agency including, but not limited to, criticism of the FTC's non-competent rulemaking; and
5. Other policies and procedures of the FTC with respect to responding to Congressional oversight and Freedom of Information Act requests to assess whether the FTC is improperly withholding information that should be disclosed.

The Committee on the Judiciary is authorized by Rule X of the Rules of the House of Representatives to conduct oversight of and legislate on matters relating to the “[p]rotection of trade and commerce against unlawful restraints and monopolies.”<sup>15</sup>

Thank you for your prompt attention to this matter.

Sincerely,



Jim Jordan  
Chairman

cc: The Honorable Jerrold Nadler, Ranking Member

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<sup>15</sup> Rules of the U.S. House of Representatives, R. X (2023).