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Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Solicitation for Public Comments on Contract Terms that May Harm Competition, Relating to Worker Non-Compete Clauses

Dear Commissioners:

On behalf of the U.S. Chamber of Commerce ("the Chamber"), we are pleased to submit these comments to the Federal Trade Commission ("FTC") in response to its Solicitation for Public Comments on Contract Terms that May Harm Competition. These comments will focus on non-compete clauses, in reference to a Petition for Rulemaking to Prohibit Worker Non-Compete Clauses. That petition asks the FTC to interpret the FTC Act's prohibition on unfair methods of competition (UMC) to "write a rule holding that the use or enforcement of non-compete clauses is a per se violation of Section 5 of the FTC Act."

As explained more fully below, the FTC should combat potentially anticompetitive non-compete clauses through its traditional tools, such as competition advocacy and case-by-case litigation, rather than through a rule for two principal reasons: First, the FTC lacks legal authority to promulgate a rule that would ban non-compete clauses. Second, and in any event, such a rule would harm consumers by banning the many pro-competitive aspects of non-competes.

The petition advocates for a "solution" in search of a problem. Should the FTC attempt to respond to the petition and initiate a rule making, it will face strong legal challenges that waste precious enforcement resources.

The FTC Lacks Statutory Authority to Promulgate a UMC Banning Non-Compete Clauses.

The FTC Act's text, structure, and history, as well as recent guidance from the Supreme Court, all point in the same direction: the FTC lacks statutory authority to promulgate a UMC rule banning or severely restricting non-competes. Although Section 5 of the FTC Act prohibits "unfair methods of competition," and Section 6(g) states that the Commission "shall have power … [f]rom time to time to classify corporations and … to make rules or regulations for the purpose of carrying out the [Act's] provisions." 15 U.S.C. §§ 45, 46(g), nothing in the Act's text expressly gives the FTC rulemaking authority to prohibit business practices that the FTC deems

an unfair method of competition. Nowhere, for example, does the Act state that the FTC "shall or may" promulgate rules to determine whether certain types of business practices are per se fair or unfair, to supplant state law, or to invalidate or proscribe entire categories of business contracts. Indeed, such a broad grant of statutory authority would have been extraordinary, as it would have allowed a majority of commissioners (which can be made up of as few as two people), with little guidance from the President or Congress, to dictate commercial practices, and override state laws, across virtually the entire U.S. economy.

The FTC Act's structure confirms that the FTC lacks UMC rulemaking authority. In sharp contrast to the text's silence on such authority, Congress expressly granted the FTC authority to promulgate other rules. For example, statutes such as the Children's Online Privacy Protection Act and Telemarketing and Consumer Fraud and Abuse Prevention Act expressly grant the FTC the authority to engage in notice and comment rulemaking to enforce their provisions.[1] Congress also provided the FTC explicit rulemaking authority for unfair and deceptive acts and practices through the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act of 1975. In these statutes, Congress clearly defined the scope of its delegation to the FTC, either in terms of a proposed rule's substantive scope or its procedural path, or both. The fact that Congress failed to set forth any similar guidance or guardrails for UMC rulemaking authority confirms that no such authority exists.

Moreover, this Congressional silence stands to the issue of remedies for any UMC rule violations: the FTC Act fails to provide for any sanctions for violations of rules promulgated pursuant to Section 6. This omission strongly reinforces the point that Congress never intended to give the FTC substantive, binding UMC rulemaking authority at all. As the American Bar Association explained, the Act's "fail[ure] to provide any sanctions for violating any rule adopted pursuant to Section 6(g) . . . strongly suggest[s] that Congress did not intend to give the agency substantive rulemaking powers when it passed the Federal Trade Commission Act."[2] By contrast, Congress clearly provided the FTC in Magnuson-Moss the authority to initiate civil actions for unfair or deceptive act or practice rule violations.

Perhaps recognizing these textual and structural shortfalls, the FTC has historically hesitated to assert that it has UMC rulemaking authority. Until 1962, and for nearly half a century since the enactment of Magnuson-Moss in 1975, the FTC never attempted to promulgate a UMC rule. The time period since 1975 spans eight presidential administrations, from both political parties, and FTC chairs and commissioners with widely differing philosophies and priorities. Indeed, even prior to 1975, only once had the FTC's authority to conduct rulemaking under Section 6(g) been tested in court. In *National Petroleum Refiners Association v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), the FTC promulgated a rule defining the failure to post octane rating numbers on gasoline pumps at service stations as "an unfair method of competition and an unfair or deceptive act or practice." The D.C. Circuit found that Section 6(g) conferred such authority, which led Congress to enact Magnuson-Moss. Critically, Magnuson-Moss expressly confers rulemaking

[1] *See* Jeffrey Lubbers, *It's Time to Remove the 'Mossified' Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1789, 1991-92 (Nov. 2015).

[2] ABA, *Comments of the Antitrust Law Section of the American Bar Association in Connection with the Federal Trade Commission Workshop on "Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues"* at 54.

authority for unfair and deceptive acts and practices, but not unfair methods of competition. Since that time, the FTC has never claimed UMC rulemaking authority. That silence speaks volumes.

The enactment of Magnuson-Moss led to the creation of Section 18 of the FTC Act, which provides the FTC with the power to "prescribe interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of Section (a)(1) of [the FTC] Act)." Even if the Commission determines there are situations in which non-competes constitute "unfair or deceptive acts or practices" the hybrid treatment of such terms as a both "unfair methods of competition" and "unfair or deceptive acts or practices" precludes the FTC from relying on Section 18 of the FTC Act to enact a rule governing exclusive contracts. The FTC already addresses "unfair methods of competition" appropriately through its enforcement proceedings.[3] The use of case-specific analysis in enforcement proceedings rather than a broad rulemaking to challenge unfair methods of competition ensures that decisions are narrowly tailored to address the competitive concerns while maintaining potentially pro-competitive business activity.

Recent court decisions confirm that the FTC cannot assert broad authority without an express grant from Congress. In *AMG Capital Management v. FTC*, 141 S. Ct. 1341 (2021), the Supreme Court unanimously rejected the FTC's claim that it could assert broad remedial powers without an express grant of authority from Congress. In its decision, the Court stressed that the Commission must operate within the strict confines of the statutory language: "to read those words [in Section 13(b)] as allowing what they do not say, namely, as allowing the Commission to dispense with administrative proceedings to obtain monetary relief as well, is to read the words as going well beyond the provision's subject matter." Even under the deferential standard of *Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc., 467 U.S. 837 (1984)*, the Court requires the agency to rely on a "permissible construction" of the statute, and it is unlikely that the Supreme Court would see a broad assertion of substantive antitrust rulemaking as "permissible" under the vague language of Section 6(g). As the Court has explained, "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). Applying these principles, Section 6(g) is best understood as granting the FTC ministerial, not legislative authority, to specify how it will carry out its adjudicative, investigative, and informative functions.

Reasonable Non-Compete Clauses Foster Legitimate, Pro-Competitive Interests.

As the Chamber has set forth previously, reasonable non-compete agreements can have a legitimate role in employment contracts. *See* the Chamber's Public Comments to the FTC Regarding Non-Compete Clauses Used in Employment Contracts (March 10, 2020).[4] The Chamber explained that reasonable non-compete clauses are pro-competitive because they

[3] *See generally*, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, adopted on August 13, 2015, rescinded on July 1, 2021. This bipartisan statement confirms the consumer welfare standard and promotes enforcement and rule of reason analysis for acts or practices that constitute unfair methods of competition. The FTC recently rescinded this statement in a 3-2 vote, with minority commissioners dissenting.

[4] *See* Public Comments Regarding Non-Compete Clauses Used in Employment Contracts, U.S. Chamber.

protect (among other things) an employer's special investment in, training of and disclosure of sensitive business information to its employees. For these reasons, state legislatures and courts nationwide continue to protect and enforce such clauses. Moreover, in recent years, many states have adopted non-compete laws that ***restrict*** non-compete clauses in order to prevent abuses and to regulate to whom they may be applied, the circumstances in which they are appropriate, and to ensure procedural protections.[5] Any attempt by the FTC to restrict or prohibit the enforcement of reasonable non-competes would undermine or eliminate pro-competitive benefits, jeopardize existing state efforts to distinguish between beneficial non-compete clauses and unreasonable non-compete clauses, and be inconsistent with existing jurisprudence.

At the FTC's October 16, 2018 hearing on *Competition and Consumer Protection in the 21st Century*, many witnesses agreed that non-compete clauses can foster competition, even if those witnesses expressed concern about overly aggressive non-competes. Professor Evan Starr explained the basic efficiency rationale behind non-compete clauses, which have existed since the 1400s: "If the firm could not use the non-compete, then competitors could hire that worker away and experience the benefits of the information they provided to him. So because of the efficiency motive, the result is that most states enforce non-competes according to a rule of reason except for a few states like California and North Dakota and Oklahoma, where they're banned." Hearing Tr. 139-140. Indeed, even the Petition for Rulemaking acknowledged that firms "principally use non-competes to protect their intangibles" and that "firms have a motive to defend against perceived free riding by competitors." Pet. 41, 50.

This efficiency rationale continues to justify reasonable non-compete clauses. Professor Alan Krueger testified that non-compete restrictions "may be justified in a limited number of cases to protect returns to specific training or trade secrets." Hearing Tr. 14. Likewise, Professor Marty Gaynor argued that "for highly skilled people like, say, doctors, engineers, whatever, we think, well, there may be some real efficiencies" to non-compete clauses. Hearing Tr. 162. Professor Starr also noted that non-competes can lead to higher wages. As he explained, two studies "find that the use of non-competes is associated with higher wages and longer tenure, so there is some evidence of these compensating differentials." Hearing Tr. 144.

As Professor Starr noted, almost all states recognize that an employer has a legitimate interest in protecting against a competitor's acquisition of its sensitive business information through engaging a former employee. Accordingly, non-compete clauses can lead to more investment in employees and, according to some studies, higher wages. Balancing the employer's interests with the employee's interests, courts continue to uphold non-compete agreements when they serve as a reasonable tool for protecting an employer's investment in protectable information, including trade secrets known by the employee, special business relationships such as customers and vendors managed or known by the employee, confidential business plans designed or known by the employee, and pricing or bidding strategies learned by the employee. *See* Chamber Comments of March 10, 2020 (discussing state laws and court cases).

[5] *See* https://news.bloomberglaw.com/daily-labor-report/employee-noncompete-clause-limits-adopted-by-three-more-states.

Because Reasonable Non-Compete Clauses Foster Competition, the FTC Should Not Promulgate a Rule and Instead Adhere to Its Traditional Tools to Combat Anticompetitive Non-Compete Clauses.

All of this evidence and testimony undermines the case for a blanket ban on non-compete clauses. At the FTC's own hearing, many witnesses testified, and pointed to studies concluding, that many non-compete clauses serve legitimate, pro-competitive rationales for employers and can even raise wages for employees. Around the country, almost all states and courts continue to enforce reasonable non-compete clauses. Only if non-compete clauses were always, or even almost always, anticompetitive, would grounds exist to consider a categorical ban. No such evidence exists.

Instead, the FTC should combat overly aggressive, potentially anticompetitive non-compete agreements through its traditional tools such as case-by-case litigation, *amicus* briefs, competition advocacy, speeches, reports, and perhaps even guidelines. All of these tools would inform courts and legislators as to the costs and benefits of non-compete clauses and the general circumstances in which the costs of non-competes might outweigh their benefits. Litigation and *amicus* briefs would help courts to identify specific instances in which non-competes harm competition. Competition advocacy would help elected legislators evaluate whether to restrict or regulate non-compete clauses, which are a creature of state law, at the state level. As the petition acknowledges, many states already restrict the enforceability of overly broad non-competes, such as clauses of unlimited duration. Pet. 43. The FTC could help educate legislators as to other circumstances in which non-competes may harm competition. Through these traditional tools, which adhere closely to the FTC's statutory authority, the FTC could effectively combat anticompetitive non-competes while leaving reasonable non-competes in place.

In addition, if necessary, the FTC might consider a joint exercise with the Department of Justice to issue guidelines on non-compete clauses. The Chamber is not aware that the business community is in need of such clarity at this time. Nevertheless, the Chamber leaves open the possibility that, given complaints the FTC may have received of anticompetitive non-competes, such guidance might prove useful. Such guidelines, which fall well within the FTC's statutory authority and traditional practice, could delineate the circumstances in which the FTC believes that non-compete clauses potentially unreasonably harm competition. *E.g.*, FTC Hearing, *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues* (Jan. 9, 2020), Comments of Prof. Howard Shelanski at 264-65 (discussing potential guidelines).

Finally, if the FTC truly believes that non-compete clauses should be deemed per se illegal, it is free to advocate for that position through competition advocacy filings, reports, and speeches. Through these tools of persuasion -- which, again, fall well within the FTC's statutory authority and traditional practice -- the FTC would have the opportunity to educate elected officials, as well as the business community and employees, about non-compete clauses. No doubt the public would benefit from such a robust discussion.

Conclusion

The Chamber agrees that, where a non-compete clause is used for illegitimate business purposes and harms the competitive process, the FTC should step in as a matter of antitrust enforcement. Such power is clearly consistent with the FTC's existing statutory authority and traditional practice. It does not require rulemaking. The Chamber also encourages the FTC to use its full panoply of other traditional tools, such as *amicus* briefs and competition advocacy, to educate courts and elected legislators.

On the other hand, the FTC lacks legal authority to promulgate a rule that would ban non-compete clauses. Moreover, and in any event, such a prohibition would harm consumers by proscribing the many pro-competitive aspects of non-competes. Non-compete clauses have been used for 600 hundred years. Today, they are enforced by the vast majority of states and courts in the United States. Any attempt by the FTC issue a blanket ban on such provisions without express congressional authority would be unprecedented.

Sincerely,

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