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OF THE
UNITED STATES OF AMERICA

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March 10, 2020

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

RE: Public Comments Regarding Non-Compete Clauses Used in Employment Contracts

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 the FTC's Request for Comment regarding employers' use of non-compete agreements.

The Chamber believes non-compete agreements can have a legitimate role in employment contracts. Further, the Chamber sees as unnecessary rulemaking by the FTC under either its unfair methods of competition authority (assuming such authority even exists), or its unfair and deceptive practices authority. At a federal level, anticompetitive non-compete clauses should be enforced as a matter of antitrust law under the appropriate rule of reason analysis applied to the given facts of a specific case. Where non-compete clauses raise concerns beyond the scope of the antitrust laws, those concerns should be decided as a matter of contract law by the courts, or left to state legislatures to intentionally design an approach to non-compete agreements that reflects the priorities and needs of their local communities and economies.

Non-Compete Provisions Often Serve a Legitimate Role in Employment Contracts

In a traditional "non-compete" contract, an employee[1] agrees to accept something of value (such as money, a promotion, an employment opportunity, stock or equity, among many other possible things of value) in exchange for a promise, once the employment ends, not to engage in activity that will harm the business interests of that employer, for a limited period of time. Usually, the employee's promise in a traditional non-compete is to refrain from providing similar services to a competitor of the original employer, in a particular geographic location, for a period of several months to a year or more. Through such an agreement, an employer ensures that its special

[1] The term "employee" is used in these Comments for the sake of simplicity. But non-compete agreements also are frequently entered by non-employee independent contractors, business owners, vendors and other relationship partners. The comments and arguments made here apply equally to such non-employee arrangements as they do to employee contracts.

investment in, training of and disclosure of sensitive business information to the employee will not be unfairly leveraged to benefit a competitor who subsequently engages that employee.

State legislatures and courts nationwide 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.[2] Courts further uniformly recognize that "non-compete" agreements are a reasonable tool for achieving such protection. The kinds of protectable information that non-compete contracts legitimately protect include trade secrets known by the employee[3], special business relationships (customer, vendors, etc.) managed or known by the employee[4], confidential business plans designed or known by the employee[5], pricing or bidding strategies learned by the employee[6]; among other things.

Non-competes are enforced only when legitimate business interests such as those noted above are present.[7] In virtually every case, courts conduct a balancing analysis, weighing the value

[2] See, e.g., Sensus USA, Inc. v. Franklin, 2016 WL 1466488, *7 (D. Del. Apr. 14, 2016) (applying Delaware law) (restrictive covenants are appropriate to protect companies' legitimate business interests such as "preserving employer good will and protecting an employer's confidential information, including customer lists, pricing, trade secrets and proprietary information."); Nortec Communications, Inc. v. Lee-Llacer, 548 F. Supp. 2d 226, 230-31 (E.D. Va. 2008) (applying Virginia law) ("It is not unreasonable to conclude that [the employer] has a legitimate interest in limiting the potential harm they would suffer through the loss of business that could result were former employees permitted to leave their employ and take the business sensitive knowledge and contacts acquired through their employment… and use that information to compete with [it] for their clients' business."); Hess v. Gebhard & Co. Inc., 570 Pa. 148, 163 (Pa. 2002) ("Generally, interests that can be protected through covenants include trade secrets, confidential information, good will, and unique or extraordinary skills."); Ala. Code § 8-1-191; Ark. Code § 4-75-101; Fla. Stat. § 542.335; O.C.GA. §§ 13-8-51(9), 13-8-53, 13-8-55; Idaho Code §§ 44-2701, 2702.

[3] See, e.g., Saturn Wireless Consulting, LLC v. Aversa, 2017 WL 1538157, *13 (D.N.J. Apr. 26, 2017) ("New Jersey courts considering restrictive covenants 'recognize as legitimate the employer's interest in protecting trade secrets, confidential information, and customer relations.'") (citation omitted).

[4] See, e.g., A-Tech Computer Svcs., Inc. v. Soo Hoo, 627 N.E.2d 21, 26 (Ill. App. 1993) ("An employer has a valid interest in protecting its long-standing client relationships against the subterfuge and sabotage of former employees."); Fla. Stat. § 542.335 (legitimate business interests include, among other things, "substantial relationships with specific prospective or existing customers, patients, or clients").

[5] See, e.g., Intermetro Corp. v. Kent, 2007 WL 1140637, *6 (M.D. Pa. Apr. 17, 2007) (employer's "strategic plans, discounts, pricing practices, product margins, and product development are also protectable interests."); Idaho Code § 44-2702 (legitimate business interests include, among other things, an employer's business plans, business processes, and methods of operation).

[6] See, e.g., Intermetro, 2007 WL 1140637, *6 (pricing practices are protectable); Twin City Catering, Inc. v. LaFond, 2001 WL 1335685, *3 (Mn. App. Oct. 30, 2001) (unpublished) (recognizing the employer had a legitimate interest in protecting confidential information which the employee had access to while employed, "such as customer preferences and confidential pricing information").

[7] See, e.g., Hinson v O'Rourke, 2015 WL 5033908 (Tenn. Ct. App. Aug. 25, 2015) (when determining if a non-compete is enforceable, whether the employer has a legitimate business interest is a "threshold question"); David H. Fleisher, Inc. v. Bergman, 100 A.3d 324 (Pa. Super. Ct. 2014) ("[T]he presence of a legitimate, protectable business interest of the employer is a threshold requirement for an enforceable non-competition covenant.") (internal quotations and citation omitted).

of employer's protectable interest against the important interests of the employee in mobility and freedom to earn a living in a chosen line of work.[8]

Further, the Chamber believes that non-compete contracts are not frequently enforced relative to the number of agreements in place and the number of violations that likely occur. The decision whether to seek enforcement of a non-compete contract in a court is a complex one in which the employer must consider the cost of litigation, the distraction to its own workforce witnesses, and the possibility of ultimately failing to prevail. Rates of enforcement differ based on industry, the seriousness of the breach, and the facts of each case, but employers much more frequently choose to tolerate violations or send a cautionary letter, than they choose to file suit.

Antitrust Enforcement, Under a Rule of Reason Analysis, can Reach Anti-Competitive Harm

The legitimate uses of non-compete agreements outlined above arguably meets pro-competitive justifications supporting their use. Where a non-compete is used for ill-legitimate business purposes and the result is anti-competitive harm to 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 does not require rulemaking. However, if necessary, the FTC might consider undertaking a joint exercise with the Department of Justice to issue guidelines. The Chamber isn't aware that the business community is in need of such clarity at this time, but leaves open the possibility that given complaints the FTC may have received of anti-competitive non-competes that such guidance might prove useful. Finally, we note that some have called for non-competes to be deemed at the federal level per se unlawful. The Chamber would oppose any attempt to change the antitrust laws governing non-competes away from the rule of reason standard which continues to serve antitrust enforcement well.

Concerns Beyond the Scope of the Antitrust Laws Should Be Governed by the Courts as a matter of Contract Law or Left to State Legislatures to Regulate

In general, "fairness" is not a recognizable antitrust legal standard. To the degree there are concerns that non-compete agreements are "unfair" to the employee, that is not a recognizable antitrust concern. It is important to note that non-compete contracts are not unilaterally imposed on employees. They are contracts freely bargained for before or during a period of employment. The employee gains something valuable in exchange for the voluntary commitment. That fact that an employee might regret that commitment after accepting value from the employer, is not an

[8] See, e.g., Hess, 570 Pa. 148, 163 ("In determining whether to enforce a non-competition covenant, this Court requires the application of a balancing test whereby the court balances the employer's protectable business interests against the interest of the employee in earning a living in his or her chosen profession, trade or occupation, and then balances the result against the interest of the public."); Chapman v. Blue Cross Blue Shield of S.C., 2015 WL 13158310, *2 (D.S.C. July 28, 2015) (Under South Carolina law, the courts must give consideration, among other things, to whether the covenant is "not unduly harsh and oppressive in curtailing the legitimate efforts of an employee to earn a livelihood[.]").

antitrust concern, nor is it a reason to upend the state-level common law of contracting through federal regulation.

Employees are protected from unfair outcomes by common law requirements of contract enforcement that require awareness, a conscious meeting of the minds, and adequacy of consideration, among other things. Like any other contract, a non-compete contract will not be enforced unless it is proven that both parties entered it with full awareness and a mutual accurate understanding of its terms. Likewise, common law in every state requires that non-compete commitments are given in exchange for something of real value to the employee. States have individually determined the level of "value" an employer must deliver in order to obtain an enforceable non-compete commitment. For example, some states declare that mere employment, or continued employment, alone is not sufficient to trade for a non-compete commitment.

Further, employees are protected from unfair enforcement of non-competes through the balancing of several important factors by the courts, an analysis that has become nearly universal among the states. In order to be deemed "fair" in any jurisdiction, a non-compete must (a) be designed to protect a legitimately protectable interest of the employer , (b) be drafted narrowly with regard to prohibited activity for a future employer, and (c) be reasonably limited in geographic scope and temporal duration. Through this universal balancing test, employees are assured that non-compete commitments are not frivolous, not unilateral, and not unduly restrictive to the employee in the circumstances of each case. Concerns about an imbalance of bargaining power in occasional cases are legitimate. But that potential for such an imbalance has been recognized and addressed by state law. Simply stated, a lack of understanding by an employee or an imbalance in bargaining power is a factor that will invalidate a non-compete agreement in that instance.

Finally, in addition to reviewing fairness under the law of contract formation and the balancing of interest factors, courts often consider enforceability of non-competes through a lens of equity. The principle of "equity" in legal adjudication recognizes that the outcome under the law may still be unfair to a party under certain circumstances, and empowers a judge to allow her instincts of fairness to supersede the outcome produced under a strictly law-based analysis.

In short, non-compete agreements are no less fair than any other contract bargained for by two knowing parties, and the fact that non-compete agreements often appear in employment settings does not change this. Multiple levels of objective and subjective fairness analyses at the state level regulate the use of non-compete agreements to ensure fairness to employees and to the public interest.

Rulemaking by the FTC to Regulate Non-Competes is Unwise and Unnecessary

As illustrated above, the state legislatures and courts have designed robust and unique bodies of law to regulate non-compete contracts. While the analyses among the states are uniform in balancing common factors, they are also unique in many details, and reflect the priorities and circumstances of the local communities, industries and economies. For example, certain states virtually prohibit non-competes altogether, while others dictate a more nuanced approach.

These differences reflect differing priorities regionally and locally that are informed by local dynamics. This is an important principle of federalism, particularly in an area such as contract law, which has typically been reserved to the states for regulation. It would be inappropriate for the FTC to seek to usurp the legitimate and nuanced policy decisions made by each of the 50 states through federal rulemaking simply because the FTC holds a public policy view that differs from the views of many of state based policymakers. Doing so would invade the freedom and authority of states to regulate contract formation and application within their states. This is particularly true given that no state simply permits non-competes to be indiscriminately applied without close scrutiny as to their reasonableness.

In closing, the Chamber believes the FTC's role with respect to non-compete agreements is clear, it has a responsibility to enforce the antitrust laws against anti-competitive, non-compete arrangements where there is clear harm to the competitive process. Beyond this important, but limited role, the FTC should leave the courts and state legislatures to address any additional concerns. For these reasons, the Chamber sees no need for the FTC to contemplate rulemaking, particularly given its limited rule-making authority, its existing antitrust enforcement powers, the role of the courts, and the ability of the states to regulate if they so desire.

The Chamber thanks the FTC for the opportunity to share our views through this comment letter.

Sincerely,

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