Via electronic submission

September 30, 2021

The Honorable Lina Khan
Chair, Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: FTC-2021-0036-0022 – Solicitation for Public Comment on Contract Terms that May Harm Competition (Non-Compete Clauses)

Dear Chairwoman Khan:

The Consumer Bankers Association ("CBA")[1] appreciates the opportunity to provide our comments in response to the Federal Trade Commission's ("FTC") Solicitation for Public Comment on Contract Terms that May Harm Competition ("Solicitation").[2] In particular, CBA will focus its comments on the reasonable use of non-compete clauses, also known as non-compete agreements. Consistent with these comments, CBA strongly supports effective workforce protections and, specifically, the principles of choice, transparency, and fairness in employment relationships.

When used properly, non-compete agreements advance legitimate business interests. These agreements are an important tool in the protection of trade secrets and other strategic confidential information, especially in circumstances where such information is most likely to be put at risk. Accordingly, CBA urges the FTC to acknowledge the many circumstances, including circumstances related to protection of trade secrets, offering of unique employee services, and employer investment in specialized training, where the use of non-compete clauses are appropriate and to refrain from advancing any overbroad policies that would ban the use of non-competes or unreasonably limit the use of non-competes that serve a legitimate business purpose.

[1] The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.
[2] See Federal Trade Commission, Solicitation for Public Comment. August 5, 2021. Available at: https://www.regulations.gov/document/FTC-2021-0036-0022.

Discussion

In recent years, the FTC has sharpened its focus on the unfair use of non-compete agreements that serve little to no legitimate business purpose.[3] For instance, in January 2020, FTC Commissioner Rebecca Slaughter noted in remarks that non-compete clauses have been unfairly included as "sometimes boilerplate provisions in contracts with all of a firm's employees without any regard to whether there may [be] a legitimate justification or a less restrictive means of protecting trade secrets or proprietary business information."[4] Her remarks highlighted powerful examples of non-competes being inappropriately used. Perhaps taking notice of the FTC's recent work, President Biden issued an Executive Order in July 2021 that called upon the FTC to curtail the *unfair* use of non-compete clauses or agreements that may *unfairly* limit worker mobility (emphases added).[5]

CBA agrees that unfair (i.e., unreasonable) non-compete agreements have no place in the modern workforce as a broad-based condition of employment. But in moving to address these considerations, some policymakers have turned to an "all-or-nothing" policy approach that looks to establish an outright ban on the use of all non-competes. The DC Council, for instance, recently enacted a complete ban on non-compete agreements in the nation's capital.[6]

However, CBA believes that any policy response to non-compete agreements must focus on the *unfair* use of such agreements, meaning the use of agreements that serve little to no legitimate business purpose, consistent with the President's Executive Order. Otherwise, policymakers risk sweeping in reasonable and properly tailored non-compete agreements that serve a legitimate business purpose and are not "unfair." Indeed, many of these agreements have been historically addressed through state law frameworks premised on reasonableness. In its 2020 letter to the FTC, the American Bar Association ("ABA") Antitrust Law Section outlined this well:

> "Nearly every state accepts the protection of trade secrets as a viable justification for an employee non-compete clause. But, even in those states where the justification is recognized, the enforceability of any non-compete clause based on

[3] *See* FTC Workshop, "Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues." January 09, 2020. Available at: https://www.ftc.gov/news-events/events-calendar/non-competes-workplace-examining-antitrust-consumer-protection-issues.

[4] *See* Commissioner Slaughter's Remarks. January 09, 2020. Page 4. Available at: https://www.ftc.gov/system/files/documents/public_statements/1561475/slaughter_-_noncompete_clauses_workshop_remarks_1-9-20.pdf.

[5] *See* White House Executive Order on Promoting Competition in the American Economy. July 09, 2021. Available at: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

[6] *See* Washington City Paper "Calls to Amend, Delay Non-Compete Ban Grow." July 20, 2021. Available at: https://washingtoncitypaper.com/article/524388/calls-to-amend-delay-non-compete-ban-grow/.

this justification if still subject to the requirements of ancillarity and reasonableness."[7]

Consider that a 2009 survey showed that more than half of ex-employees admit to stealing company data when they leave their job.[8] The harm caused by this data theft is estimated to be in the hundreds of billions of dollars per year.[9] Given that employers do not really have an alternative mechanism other than non-competes to address this problem, the use of non-competes can, at times, be a business necessity.

Ultimately, CBA is concerned that the FTC may be contemplating a rulemaking[10] on non-compete agreements that would be overbroad and negatively impact the CBA members that responsibly use such agreements for legitimate business purposes. Such a rulemaking would serve as an unprecedented rejection of the laws of the vast majority of states that have determined that there are appropriate use cases for non-competes. As the aforementioned ABA Antitrust Law Section letter states, "[t]he Commission therefore should not lose sight of the long legal, economic, and social history associated with non-compete clauses as it proceeds to consider whether their supposedly rampant usage today in the workplace is giving rise to contemporary legal problems."[11] The ABA's concluding observations[12] are exactly on point:

- None of the traditional justifications for non-compete clauses in employment agreements should raise the kinds of concerns that are now triggering public scrutiny.
- Importantly, as illuminated by centuries of court decisions, each of these justifications—trade secrets, customer relationships, unique employee services, and investment in specialized training—reasonably maps to a legitimate employer business interest tied to specific employees and therefore would not support the indiscriminate imposition of non-compete clauses on all employees.
- As seen in the case law, these justifications strike an appropriate balance between protecting an employer's legitimate business interests and an employee's right to seek

[7] *See* American Bar Association Letter (ABA Letter) regarding the FTC workshop on non-competes in the workplace. April 24, 2020. Available at: https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/april-2020/comment-42420-ftc.pdf.

[8] *See* Norton LifeLock Survey. February 23, 2009. Available at: https://investor.nortonlifelock.com/About/Investors/press-releases/press-release-details/2009/More-Than-Half-Of-Ex-Employees-Admit-To-Stealing-Company-Data-According-To-New-Study/default.aspx.

[9] *See* Beck Reed Riden LLP's letter on the potential federal regulation of noncompetition agreements. July 14, 2021. Available at: https://faircompetitionlaw.com/wp-content/uploads/2021/07/White-House-and-FTC-20210714-Joint-Submission-of-Trade-Secret-Lawyers-Beck-et-al.pdf.

[10] The FTC's renewed interest in non-compete agreements appears to exist alongside credible doubts that the Commission has the statutory authorization to engage in the type of APA notice and comment rulemaking commonly granted to other agencies. See U.S. Chamber of Commerce "Pushing the Limits? A Primer on FTC Competition Rulemaking." August 12, 2021. Available at: https://www.uschamber.com/sites/default/files/ftc_rulemaking_white_paper_aug12.pdf.

[11] *See* ABA Letter at pg. 3.

[12] *See* ABA Letter at pg. 13.

gainful employment using general knowledge and skills that he or she has acquired through experience.

Within CBA's membership, you will find responsible employers that are selective in who they ask to sign non-compete agreements to ensure that such agreements are reasonable and enforceable under applicable state laws. These members limit non-competes to highly compensated executives and other senior employees presenting a threat of unfair competition because of their access to commercially sensitive confidential information and trade secrets. They are not using non-competes with low-wage earners.

Further, these members premise their non-compete coverage strategy on legitimate business interests such as the protection of confidential information and trade secrets and the prevention of unfair competition. For example, they might ask questions like:

- Is the employee trained in or creating proprietary techniques, insights, or strategies?
- Is the employee meaningfully exposed to confidential information that is, or is expected to be, a significant driver of competitive advantage?
- Does the employee have a significant understanding of such confidential information?
- If the employee were to perform the same services at a competitor, would that service inevitably involve the use or disclosure of protected confidential information?

These members are also careful to ensure that the limitations imposed by non-competes are only as broad as reasonably necessary to protect their legitimate business interests. As noted above, the failure to do so risks being unable to enforce these agreements in the states in which they were executed. When used properly, these agreements contain narrowly drawn restrictions tailored functionally, geographically, and temporally to the competitive threat posed by the employee.

Non-compete agreements can benefit both employers and employees. Consider the U.S. Treasury Department's 2016 study[13] describing non-competes as solving a "hold-up" problem, which is when employers and employees do not share vital information even when it is in their collective interest to do so. In essence, employees not subject to legal recourse have an incentive to threaten to divulge sensitive information unless they are compensated for not doing so, which leads employers fearing such an outcome to avoid sharing information in the first place.[14] By solving this hold-up problem and promoting information sharing between employers and employees, non-compete clauses arguably enhance worker productivity, thereby spurring economic growth and innovation.

Non-competes also protect employers that provide employees valuable, specialized training. Employers understandably want to ensure that such specialized employee training

[13] *See* US Dept of Treasury, Office of Economic Policy. Non-compete Contracts: Economics Effects and Implications. (Treasury Study). March 2016. Available at: https://bit.ly/2O3QPyr.
[14] *See* Treasury Study at pg. 7.

does not become an unfair subsidy to existing or future competitors.[15] As noted in the Treasury Department study, non-competes offer employers "an assurance that workers are unlikely to leave for some period of time, allowing [employers] to capture more of the increased productivity from the costly training it provides, and workers [to] receive more training than they otherwise would."[16]

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CBA appreciates the opportunity to work with the FTC on this important issue. Again, we urge the FTC to consider circumstances where the use of non-compete clauses are appropriate and to refrain from issuing overly broad policy determinations that seek to ban the use of non-compete agreements completely or unreasonably limit the use of non-competes. If any follow up is needed, please contact the undersigned at dpommerehn@consumerbankers.com or at 202-552-6368.

Sincerely,

David Pommerehn
SVP, General Counsel
Consumer Bankers Association

[15] *See* ABA Letter at pgs. 13-14.
[16] *See* Treasury Study at pg. 8.