AGRICULTURAL
RETAILERS
ASSOCIATION

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April 19, 2023

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

Re: Notice of Proposed Rulemaking, Federal Trade Commission; Non-Compete Clause Rule; Docket # FTC-2023-007-0001; 88 Fed. Reg. 3482 (RIN: 3084-AB74) (January 19, 2023)

Dear Chair Khan:

On behalf of the Agricultural Retailers Association (ARA), I submit these comments on the Federal Trade Commission's (FTC) proposed Non-Compete Clause Rule.

STATEMENT OF INTEREST

ARA is a not-for-profit trade association that represents America's agricultural retailers and distributors. ARA members provide goods and services to farmers and ranchers which include fertilizer, crop protection chemicals, seed, crop scouting, soil testing, custom application of pesticides and fertilizers, and development of comprehensive nutrient management plans. Retail and distribution facilities are scattered throughout all 50 states and range in size from small family-held businesses or farmer cooperatives to large companies with multiple outlets.

COMMENTS

The ARA recognizes the need to address genuine unequal bargaining power between certain employers and their workers, and respects the FTC's efforts to address this economic imbalance. Agricultural retailers and suppliers are dynamic organizations that employ a wide variety of personnel, including crop advisors, truck drivers, logistics experts, and more. Many of these organizations operate in a unique economic environment that has presented them with significant challenges in recent years. The lack of a large pool of potential employees, combined with high barriers to entry for potential employees to develop requisite skills, has led to many agricultural retailers significantly investing in their employees. A blanket ban on non-compete clauses would restrict the necessary efforts of regional retailers to recoup human capital development costs. Additionally, ARA contends that the FTC lacks the legal authority to institute such a significant and wide-sweeping rule. Even if the FTC does possess the legal authority to pass the proposed rule, the ARA contends that the proposed rule's lack of nuance would be significantly injurious to the

agricultural economy and the rural economy in general, and that a blanket ban would have major negative effects on a sector of the economy already facing numerous systemic challenges.

A. THE FTC LACKS LEGAL AUTHORITY TO ISSUE THE PROPOSED RULE

Aside of the substantive economic issues that the proposed rule would create, the ARA holds major doubts regarding the legality of the prosed rule. The ARA is of the opinion that the FTC has no statutory authority to issue a rule that would invalidate both existing and future non-compete agreements across all sectors of the United States economy.

The ARA's concerns regarding the legality of the proposed rule have been well established in the comments of other organizations. However, it is worth highlighting the major legal deficiencies that the proposed rule faces.

- First, the FTC cites sections 5 and 6(g) of the FTC Act as giving authority to issue the proposed rule. However, these provisions do not clearly connote the authority to make a rule that prohibits a business practice that the FTC deems an unfair method of competition. Specifically, Section 6(g) only connotes rulemaking authority limited to agency procedural rules. When Congress has intended to grant the FTC substantive rulemaking authority in other contexts, it has been explicit in that intention.[1] Additionally, the Magnuson-Moss Act of 1975 expressly excluded rulemaking for unfair methods of competition, and the FTC has not attempted to promulgate a rule on that subject in the time since the law's passage.[2] Altogether, the statutory text, legislative history, and historical agency practice strongly

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[1] See generally Thomas W. Merrill, Antitrust Rulemaking: The FTC's Delegation Deficit, at https://administrativestate.gmu.edu/wp-content/uploads/2022/09/Merrill_22-18.pdf ("As evinced by the drafting conventions at the time Congress passed the Federal Trade Commission Act, the original law was never intended to grant legislative rulemaking authority to the FTC. Likewise, Congress repeatedly ratified this interpretation by enacting limited grants of rulemaking power to the FTC in the decades after the original Act. The evidence that the FTC has the power to promulgate legislative rules regulating anticompetitive behavior consists of a single activist D.C. Circuit opinion and a plethora of arguments about why legislative rulemaking power would be a good thing. The Supreme Court should make quick work of these arguments if and when any upcoming rules are challenged.")

[2] See, e.g., Am. Bar Ass'n, 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" 57 (April 24, 2020), https://ourcuriousamalgam.com/wpcontent/uploads/Comment-on-Non-Competes-in-theWorkplace_Final_4.24.2020.pdf ("[G]iven that Magnuson-Moss was enacted to address concerns raised by National Petroleum Refiners and similar cases, it's hard to see Section 6(g), with its vague and broad language, as providing a firm footing for informal antitrust rulemaking by the Commission .... There have been no antitrust rules promulgated by the Commission post-Magnuson-Moss. Accordingly, the Section remains skeptical of the Commission's authority under Section 6(g) of the Federal Trade Commission Act to promulgate antitrust rules—in this case, one banning or limiting the use of non-compete clauses in employment agreements as an unfair method of competition. Antitrust problems are in general too factspecific and context-specific to lend themselves to a broad sweeping rule. Assuming for the sake of argument that noncompete clauses can raise competition concerns, they would seem to do so only under particular circumstances and conditions, thereby requiring case-by-case adjudication instead of the issuance of a trade regulation rule.").

suggest that the FTC lacks the legal authority to promulgate the proposed rule under Sections 5 and 6(g).

- Second, even if the FTC has statutory authority to issue a rule limiting non-compete clauses, a rule with such widespread, sweeping effects would be subject to scrutiny under the "major questions doctrine". The "major questions doctrine" stipulates that an agency cannot regulate issues of vast economic or political significance without clear and direct authorization from Congress.[3] In this case, the proposed rule would have broad and sweeping repercussions on the national economy, and the conclusions in the first point of this analysis indicate that the FTC certainly does not have the "direct authorization" necessary to avoid "major questions" scrutiny.
- Third, the FTC lacks the legal authority to retroactively invalidate existing private employment contracts that contain a non-compete clause. Retroactivity, particularly in a direct or express form, is generally not favored in agency rulemaking, and an agency may not issue expressly retroactive rules without explicit congressional authority.[4] In this case, there is no evidence that the text or history of the enabling statute connotes the extraordinary authority to issue a rule retroactively invalidating private contracts.

For the above reasons, it is unlikely that the proposed rule will survive legal scrutiny. The ARA asserts that States have long shown an ability to competently regulate non-compete agreements, and so a rule providing broad guidelines for states to follow in their future regulation of non-compete agreements would stand a much better chance of surviving legal challenges.

B. FTC SHOULD WITHDRAW THIS PROPOSED RULE AND WORK WITH STATES AND INDUSTRY STAKEHOLDERS ON MODEL PROVISIONS FOR ENFORCEABLE NON-COMPETE AGREEMENTS

Non-compete agreements are an important tool for the agricultural retail industry and other essential industries to help protect legitimate business interests of a company. FTC could serve an important role in developing Model Best Practices to ensure non-compete agreements are fair, legal, and reasonable for both the employer and employee. Most U.S. courts will enforce non-compete

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[3] See generally Carrie Jenks et. al., Supreme Court Embraces the Major Questions Doctrine as Limiting but Leaving the Door Open for Power Sector GHG Regulations, at https://eelp.law.harvard.edu/2022/07/supreme-court-embraces-the-major-questions-doctrine-as-limiting-but-leaving-the-door-open-for-power-sector-ghg-regulations/ ("The Court employs the major questions doctrine to conclude that the EPA lacks authority to require a generation-shifting approach to reduce power sector emissions as envisioned in the CPP. In announcing its use of the doctrine, which has never been articulated by the majority, the Court explains that in "extraordinary cases," such as this one, an agency must have clear authority from Congress.")

[4] Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

agreements if they are reasonable as to geography, length of time, and there is a legitimate business interest at stake. The FTC could lay out guidelines related to the following key provisions –

- Duration and Geographical Restrictions
- Key Employees that Noncompete Agreements are Applicable
- Outline Allowable Considerations Provided for Agreement
- Outline timeframe for review of a written non-compete agreement by the employee's attorney before signature is required.
- Outline eligible choice of law and choice forum to ensure the rights of the employee is fully considered
- Outline alternatives to non-compete agreements such as non-solicitation agreements and non-disclosure agreements

ARA believes that the FTC would be better served by working with the states and impacted industry stakeholders on model language non-compete agreements that could be incorporated into most agreements without mandating a one-size-fits all approach as there may be different circumstances depending on the industry sector and location of the employer's business operations.

C. IF THE FTC MOVES FORWARD WITH THE PROPOSED RULE, IT SHOULD EXEMPT THE AGRICULTURAL RETAILER AND SUPPLIER INDUSTRY FROM ITS BAN ON NON-COMPETE CLAUSES

The ARA recognizes the systemic power imbalance issues that the proposed rule is intended to address and concedes that, overall, the proliferation of non-compete clauses has been damaging to the American worker. However, the ARA contends that the economic environment in which ARA members operate is substantially different from those that drove the promulgation of this proposed rule. Due to this difference, organizations working in the agricultural sector, including retailers and suppliers, should be exempted from the restrictions created in this rule. Agricultural retailers, in particular, invest significant amounts of capital into developing employees with the hope and expectation that trained individuals will remain employees for years to come. Specifically, agricultural retailers often subsidize the education of employees so that those employees can obtain commercial drivers licenses or become certified crop advisors.

Most agricultural retailers operate in economically suppressed rural environments with a small, relatively unskilled labor pool to draw upon. Employees with highly specific skills are few and far between, and so retailers instead invest in developing employees to have those skills over time. Additionally, most retailers only have one or two competitors in their operational region. If an employee leaves to work for a competitor shortly after receiving training, that transition is seriously injurious to the retailer that provided the training and generally disincentives training any future employees. This negative feedback loop would lead to an even more significant shortage of skilled workers in the agricultural economy than the country already faces. Due to the above factors, it is only fair for retailers to seek to recoup their investment by implementing non-compete clauses into

the employment contracts for individuals in which they have invested significant amounts of time and capital.

D. CONCLUSION

For all the reasons stated above the FTC should withdraw the proposed rule. If the FTC persists in issuing a final rule, it should take the more measured and incremental approach of providing guidelines to states in their regulation of non-compete clauses, and it should consider carve-outs for employers, such as agricultural retailers, facing exogenous circumstances. Prudence would dictate that the FTC focus its regulatory power towards the most egregious examples of bargaining power abuse in the workforce, rather than push forward a blanket, one-size-fits-all final rule. Thank you for your review and consideration of our comments.

Sincerely,

Richard D. Gupton

Richard Gupton
Senior Vice President, Public Policy and Counsel