

April 19, 2023

April Tabor
Acting Secretary of the Commission
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW, Ste. CC-5610
Washington, District of Columbia 20580

RE: Comments of ACT | The App Association to the Federal Trade Commission on its Non-Compete Clause Rule (88 FR 3482)

Dear Secretary Tabor:

ACT | The App Association (“App Association”) participated in the Federal Trade Commission’s (“FTC” or “the Commission”) public forum on the proposed prohibition of non-compete clauses in employment contracts on February 16, 2023, and we appreciate the opportunity to submit additional views here.¹

The App Association is a global trade association for small and medium-sized technology companies. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with verticals across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology. Today, the value of the ecosystem the App Association represents—which we call the app economy—is approximately \$1.7 trillion and is responsible for 5.9 million American jobs, while serving as a key driver of the \$8 trillion internet of things (IoT) revolution.²

Now more than ever, the small business and startup innovators we represent rely on a competitive, trustworthy, and secure legal and regulatory landscape to reach millions of potential users across consumer and enterprise opportunities so they can continue to grow their businesses and create new jobs. Non-compete clauses are routinely utilized within our community to preserve key interests such as the protection of intellectual property, strategies, and other information used to expand a small business. The App Association urges the FTC to withdraw its proposed prohibition of non-compete clauses in employment contracts, and, before advancing proposals inhibiting

¹ 88 FR 3482, <https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule>

² ACT | The App Association, State of the U.S. App Economy: 2020 (7th Edition) (Apr. 2020), available at <https://actonline.org/wp-content/uploads/2020-App-economy-Report.pdf>

the use of non-compete clauses in employment contracts to (1) carefully reevaluate whether it has authority to advance its rules as proposed and (2) to ensure that its efforts fully consider the concerns of affected stakeholders on the protection of startups and small business' trade secrets.

i. The Federal Trade Commission Should Reevaluate its Authority to Advance Rules Prohibiting the Use of Non-Compete Clauses in Employment Contracts

The proposed rule raises uncertainties as to the FTC's authority to pursue such a comprehensive ban on all utilization of non-compete clauses in employment contracts under Section 6(g), which should be fully resolved before the FTC proceeds. While the Commission is authorized to address "unfair methods of competition,"³ Section 6(g) does not indicate that the FTC has the authority to wield such broad rulemaking power. Located in a part of the FTC Act that holds investigative powers, Section 6(g) is best read as permitting limited rulemaking powers, rather than broad substantive authority to ban specific types of conduct.⁴ Only select powers are given to the Commission via amendments to Section 6 and they are limited to examining, reporting, and advisory functions.⁵ This interpretation is supported by the recent unanimous Supreme Court decision *AMG Capital Management, LLC v. FTC*, where the Court unanimously rejected the FTC's previous interpretation of its curative authority.⁶

The FTC's authority in this matter should also be fully resolved with respect to the major question doctrine, which rejects agency claims for regulatory authority when (1) the claim involves an issue of "vast economic and political significance" and (2) Congress has not clearly empowered the agency with authority over the issue. Here, about one in five American workers—approximately 30 million people's employment—are subject to a non-compete clause,⁷ making the proposed ban of major significance to the flow of an American labor norm and subsequently, the workforce and economy as a whole. Furthermore, the powers afforded to the Commission from Section 6(g) are delineated to include examining, reporting, and advising. Section 6(g) does not include allowance to issue comprehensive bans on commonplace business practices used in employer-employee contracts. Therefore, the App Association urges the FTC to reevaluate its authority to issue such a broad ban of "vast economic and political significance" without

³ 15 U.S.C. 45(a)(2).

⁴ See Congressional Research Service, *The FTC's Competition Rulemaking Authority* (Jan 11, 2023), available at <https://crsreports.congress.gov/product/pdf/LSB/LSB10635>

⁵ 15 U.S.C. § 46 (2018). Section 6(g) provides: "(g) Classification of corporations; regulations. From time to time classify corporations and (except as provided in section 57a(a)(2) of this title) to make rules and regulations for the purpose of carrying out the provisions of this subchapter."

⁶ *AMG Capital Management v. FTC*, 141 S. Ct. 1341 (2021).

⁷ Non-Compete Clause Rulemaking, Federal Trade Commission (January 5, 2023), available at <https://www.ftc.gov/legal-library/browse/federal-register-notice/non-compete-clause-rulemaking#:~:text=About%20one%20in%20five%20American,from%20pursuing%20better%20employment%20opportunities>.

explicit permission from Congress, as it is unclear whether the Commission was granted authority to issue broad rules addressing contractual relationships between most American employers and employees.

ii. A Broad Prohibition on Non-Compete Agreements in Employment Contracts Stands to Adversely Affect Small Business' Ability to Protect Their Intellectual Property

The proposed rule disrupts a business norm on which enterprises of all sizes have come to rely. Non-compete clauses are commonplace mechanisms that small businesses across the digital economy rely on to preserve key interests, such as the protection of trade secrets, strategies, and information, and we appreciate that the FTC acknowledges in the request for input that the “primary justification” for allowing the use of non-compete clauses is to protect trade secrets because it incents employers to further invest in the success and development of their employees.

We urge the FTC to consider the financial uncertainty that small businesses will undergo without the protection of non-compete agreements. Without non-compete agreements, businesses will expend more resources to secure IP rights, including trade secrets. If current and former employees are not beholden to non-compete agreements, they may provide competitors with proprietary information, including critical formulas, processes, devices, methods, techniques, client lists, or other financially valuable information. While patented, trademarked, and copyrighted assets may be protected, important mental processes, including a software programmer's notes on unprotected, but potentially executable software codes are at risk of exposure. Even if a business owner sues for the exposure of their trade secrets, such information has already been shared and a significant loss in revenue has likely been incurred. Most small businesses will not be able to financially sustain litigation on top of their financial loss. Neither will small businesses invest in training and ancillary employee resources and education if the potential outcome is exposing their trade secrets to competitors. If a small business cannot utilize non-compete clauses, many innovators and entrepreneurs will forgo business opportunities. The United States economy will reflect this change.

Congress has established that protection of trade secrets is of great importance as evidenced by the enactment of the Defend Trade Secrets Act (DTSA), which created a federal, private, and civil cause of action for trade-secret misuse where “[a]n owner of a trade secret that is misappropriated may bring a civil action . . . if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce.”⁸ We urge the FTC to consider the confusion that this conflicting proposed ban would cause for businesses across the country due to its inevitable conflict with the

⁸ Defend Trade Secrets Act of 2016, S. 1890, 114th Cong. § 2 (2016).

DTSA, and the broader impacts on small business innovators' ability to compete and innovate.

In the FTC's own assessment, approximately 3 million small businesses utilize non-compete clauses and will be affected by the proposed rule.⁹ Our small business technology developer community is fast-moving and competitive, and our members have limited resources to alter widely-accepted business practices such as the use of reasonable non-compete clauses. While the Commission asserts that the cost of implementing this rule would be nominal for our community, we fervently disagree. Roughly 20 percent of startups already fail in the first year largely due to scarcity in monetary resources.¹⁰ Non-compete clauses bring a temporary, yet effective, solution for small tech businesses to ensure their intellectual property isn't shared with competitors. Banning these agreements and applying a functional test that effectively eliminates many other confidentiality and restrictive provisions, will lead to a surge in trade secret litigation (which tends to be lengthy and costly), hurting the American workforce and businesses alike. If the FTC chooses to move forward with the proposed rule as is, we implore the Commission to do all it can to support the small technology developer community.

iii. Conclusion

The App Association strongly encourages the FTC to withdraw its proposed prohibition of non-compete clauses in employment contracts, and, before advancing these proposals to (1) carefully reevaluate whether it has authority to advance its rules as proposed and (2) ensure that its efforts fully consider the concerns of affected stakeholders on the protection of tech startup and small business trade secrets. The App Association appreciates the opportunity to share our perspective on this matter and we look forward to working with the Commission to promote a fair, competitive, pro-innovation marketplace that enables small businesses innovators to grow and continue to create American jobs.

Sincerely,

A handwritten signature in black ink, appearing to be 'R. D. [unclear]', written in a cursive style.

⁹ 88 FR at 3531-3532.

¹⁰ Camberato, Joe, *2019 Small Business Failure Rate: Startup Statistics by Industry*, National Business Capital (Jan. 24, 2020).

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