April 19, 2023

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex C)
Washington, DC 20580

RE: Non-Compete Clause Rulemaking, Matter No. P201200

Dear Chair Khan:

The National Association of Convenience Stores (NACS), NATSO, Representing America's Travel Plazas and Truckstops, and SIGMA: America's Leading Fuel Marketers (collectively, "the Associations") appreciate this opportunity to provide comments on the Federal Trade Commission's ("Commission's" or "FTC's") proposed rule on non-compete agreements.[1]

The Associations are concerned that the Proposed Rule targets non-compete agreements of all kinds and is therefore too broad. As detailed below, there are many instances in which non-compete agreements are reasonable and should not be disturbed. We urge the Commission to reconsider its Proposed Rule and either leave these decisions to private businesses and employees to decide by withdrawing the Proposal – or substantially revise the rule as set forth below.

I. Background on the Convenience, Travel Center, and Fuel Retailing Industry

NACS is an international trade association representing the convenience store industry with more than 1,500 retail and 1,600 supplier companies as members, the majority of whom are based in the United States.[2] NATSO currently represents approximately 5,000 travel plazas and truckstops nationwide, comprised of both national chains and small, independent locations. SIGMA represents a diverse membership of approximately 260 independent chain retailers and marketers of motor fuel.

The convenience and retail fuels industry employed approximately 2.44 million workers and generated more than $906 billion in total sales in 2022, representing more than 3.5 percent of

[1] *See* Fed. Trade Comm'n, Notice of Proposed Rulemaking: Non-Compete Clause Rule, RIN 3084-AB74, at 213-214 (Jan. 5, 2023) [hereinafter "Proposed Rule" or "Proposal"].
[2] Data on the industry comes from the NACS, State of the Industry Annual Report of 2022.

U.S. gross domestic product. Of those sales, approximately $603 billion came from fuel sales alone. The industry, however, is truly an industry of small business. More than 60 percent of convenience stores are single-store operators. Less than 0.2 percent of convenience stores that sell gas are owned by a major oil company and about 4 percent are owned by a refining company. More than 95 percent of the industry, then, are independent businesses.

Members of the industry process more than 165 million transactions every single day. That means about half the U.S. population visits one of the industry's locations on a daily basis. In fact, ninety-three percent of Americans live within 10 minutes of one of our industry's locations. These businesses are particularly important in urban and rural areas of the country that might not have as many large businesses. In these locations, the convenience store not only serves as the place to get fuel but is often the grocery store and center of a community.

II. Importance of Non-Compete Agreements

There are certain circumstances where non-compete clauses are necessary and can be warranted in an employment agreement. The convenience, travel center, and fuel retailing industry operates in one of the most transparent, competitive markets in the world. Small operators remain competitive with much larger businesses in the industry and utilizing non-compete agreements enable that. Due to the price transparency and fungibility of the commodities they sell, the Associations' members are forced to compete on quality of service, cleanliness, security, amenities, food, loyalty programs, and speed as well as through a variety of process innovations. Every aspect of the way these businesses operate can be a way to get ahead.

In particular, the industry employs and innovates around ways to purchase and supply their locations with motor fuels. Strategies around hedging prices, for example, differ from business to business and many of these strategies and the contractual arrangements that underlie them are considered valuable and confidential business information. A non-compete agreement can be particularly important for senior executives and those with access to trade secrets and those that oversee mergers and acquisitions, which need to be protected for businesses to be able to realize the value of their innovations.

Prohibiting all non-compete agreements therefore goes too far. Doing so would put small businesses at particular risk. Larger businesses have financial resources to bring in senior executives or those with inside knowledge or trade secrets of a small competitor's operations. Small businesses are not in a position to protect themselves against such moves, which are essentially designed to purchase competitors' confidential business information.

The Associations, however, do not believe that non-compete agreements are appropriate for hourly workers and other junior employees who do not have access to proprietary information that a business needs to protect.

III. Ineffectiveness of Non-Disclosure Agreements

While the Proposed Rule implies that non-disclosure agreements may be a more beneficial substitute for non-competes, they are not. Non-disclosure agreements are notoriously difficult to monitor. Businesses, particular small businesses, are unable to know what information a former employee has or has not passed along to a new employer. Often, the only way to learn that

information is to file a lawsuit and engage in protracted discovery. That is hardly an efficient way to learn whether proprietary information has been provided to a competitor. And, of course, the legal fees involved in discovering such information or enforcing non-disclosure agreements can be prohibitive.

The FTC's Proposed Rule also makes it difficult to know when a non-disclosure agreement may be used under the terms of the proposal. The Proposed Rule defines some non-disclosure agreements as "de facto" non-compete agreements.[3] But it is exceedingly difficult for businesses to understand where the FTC proposes to draw the line between acceptable non-disclosure agreements and those that become "de facto" non-compete agreements. Indeed, making that determination puts a large burden on this industry because the vast majority of businesses in the industry (particularly small businesses) do not have any in-house counsel. The FTC's proposal, then, would require these businesses to hire outside counsel even to enter into non-disclosure agreements with their employees.

In that way, the proposed rule leaves many businesses with no good alternatives to protect themselves against the appropriation of their hard-earned knowledge, business practices, and secrets.

IV. Problems with Breadth of the Rule

The sweeping breadth of the Proposed Rule introduces additional difficulties. For example, the Proposal does not just prohibit non-competes, but even prohibits attempts to enter non-compete agreements.[4] It is not clear, however, what may be deemed an attempt to enter into a non-compete agreement. Any attempt at line-drawing is frustrated by the fact that the Proposal defines some non-disclosure agreements as non-competes as well. So, any attempt to enter into a non-disclosure agreement could later be determined to have been an attempt to enter into a non-compete. Realistically, the Proposed Rule then may not provide small businesses and those without sophisticated counsel any way to actually protect their strategically important proprietary information from competitors.

The Proposal's exception for owners and partners fails to cure these problems. While this would allow businesses to protect themselves with regard to the information known to a small number of owners, it is not clear for many businesses who would fall into this category. The Proposed rule creates the exception for "substantial" owners or partners.[5] Here again, however, determinations of who falls within the category of a "substantial" owner or partner may be quite difficult for many businesses to determine. Many of the Associations' members are family-owned businesses. Some have many family members (including extended family) with ownership interests. Other businesses in the industry are employee owned. In both models, there can be quite a few owners who may or may not fall into the FTC's definition of a "substantial" owner or partner.

The Associations are concerned with the retroactive nature of the proposal. Employment agreements that include a non-compete clause are signed in exchange for higher compensation, longer-term contracts, and other perks. The Proposal would effectively delete certain provisions of employment contracts while leaving intact others that were negotiated in exchange. The FTC's

[3] *See* Proposed Rule section 910.1.
[4] *See* Proposed Rule section 910.2.
[5] *See* Proposed Rule section 910.3.

proposed rule would take the benefit of these bargains away from businesses that have already provided the promised benefits to secure them. All of these contracts would need to be reopened and reexamined, which is burdensome and unnecessary. The Commission should make any rulemaking prospective rather than retroactive.

The FTC's proposal to supersede state laws on non-compete agreements also raises concerns. A number of states limit non-compete agreements (often setting a salary threshold below which they cannot be used), but only a few states and the District of Columbia have resorted to banning such agreements (with exceptions). The FTC should not override the judgments of the states that have chosen to limit non-competes in ways that they have deemed to strike the right balance between the interests of businesses and employees.

V. Legal Authority

The Associations have strong doubts about the FTC's legal authority to promulgate a rule barring non-compete agreements. While the FTC has authority to enforce the law in individual instances that run afoul of Section 5 of the Federal Trade Commission Act, it does not have authority from Congress to issue regulations in this area—and certainly not one as broad as the Proposal. In the past limited, Congress has limited the FTC to rulemaking authority regarding unfair and deceptive acts and practices, but it has not granted the Commission the authority to write rules creating new determinations of unfair competition. Congress also has not granted the FTC the authority to preempt state laws on this topic. That is a step that is within Congress' purview – but not within the ambit of powers of the FTC.

VI. Small Business Analysis

Pursuant to the Regulatory Flexibility Act ("RFA"), the FTC must minimize any significant burdens imposed on small entities by its regulatory actions.[6] Specifically, the RFA requires the FTC to provide an Initial Regulatory Flexibility Analysis ("IRFA") that includes: (1) a description of the reasons why the regulatory action is being taken; (2) the objectives and legal basis for the proposed regulation; (3) a description and estimate of compliance requirements, including any differential for different categories of small entities; (5) identification of duplication, overlap and conflict with other rules and regulations and (6) a description of significant alternatives to the rule.[7]

The analysis of the burdens on small businesses in the Proposed Rule are not adequate and do not meet the requirements of the RFA. The costs that the Proposal assumes small businesses will incur to comply with its terms are not realistic. The Proposal cites costs of $317.68 to $563.84 for single establishment firms. Those costs are not realistic for any businesses. An initial discussion with outside counsel regarding the agreements that a business has, the contracts it has in place, and its contract negotiations practices – all of which are directly impacted by the rule and must be modified to comply with the rule – would cost more than the FTC estimates. Business in the convenience and motor fuel retailing industry typically do not have in-house counsel – even when they have tens of store locations. They will all be required to hire outside counsel to help them

[6] 5 U.S.C. § 601-612, as amended.

[7] *Id.* at § 603.

comply with the proposal, particularly in light of its broad sweep impacting all agreements and non-disclosure agreements.

The FTC's analysis does not in any way consider or analyze the stronger impact the Proposal will have on small businesses' ability to retain trade secrets and proprietary information. By increasing the ability of large competitors to hire away employees simply to gain access to such proprietary information, the Proposal undermines the most straightforward way that small businesses protect such information.

And, the brief discussion by the FTC of a different bright line alternative such as setting an income level is not adequate. The Proposal dispenses with that alternative by noting that there may be more value for increasing employe mobility among senior executives, but does not look at the important reasons why small businesses in particular may have reason to limit the ability of senior people to move to competitor.

The FTC should engage in a new RFA analysis which recognizes the ways in which the Proposal creates larger costs, risks and burdens for small businesses before proceeding with any rulemaking effort.

VII. Conclusion

The Associations oppose the Proposed Rule as written because it undermines rather than protects competition. While the Associations agree that some non-compete agreements, particularly those with low-level hourly employees, cannot be justified, there are many such agreements which protect businesses and enhance the competitive landscape. This is particularly important for small businesses that may be at risk of having key executives, employees or partners lured away by larger firms to gain proprietary information and undermine competition.

Sincerely,

National Association of Convenience Stores (NACS)

NATSO, Representing America's Travel Plazas and Truckstops

SIGMA: America's Leading Fuel Marketers