RETAIL INDUSTRY LEADERS ASSOCIATION

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Submitted via www.regulations.gov

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Ave. NW
Suite CC-5610 (Annex C)
Washington, DC 20580

**Re: FTC Request for Information Regarding Employer Noncompete Agreements
FTC-2025-0463-0001**

Dear Commissioners:

The Retail Industry Leaders Association (RILA) appreciates the opportunity to submit comments on the Federal Trade Commission's (FTC's or the Commission's) Request for Information Regarding Employer Noncompete Agreements. *See* FTC-2025-0463-0001 (Sept 4, 2025).

By way of background, RILA is a trade association of the world's largest, most innovative, and recognizable retail companies and brands. We convene decision-makers, advocate for the retail industry, and promote operational excellence and innovation. Our aim is to elevate a dynamic retail industry by transforming the environment in which retailers operate. RILA members include more than two hundred retailers, product manufacturers, and service suppliers, who together employ over 42 million Americans and account for $2.7 trillion in annual sales and hundreds of thousands of stores, manufacturing facilities, and distribution centers domestically and abroad.

RILA members support the Administration's efforts to promote competition and dynamic labor markets in the American economy. Vigorous competition is the bedrock of the U.S. retail industry. Retailers not only compete for a share of consumers' pocketbooks by providing innovative products and services; they also compete for skilled talent to strengthen and expand retail organizations, drive innovation and enhance customer experience.

RILA members agree that overbroad and anticompetitive noncompete clauses in employment agreements are not appropriate and should not be enforced. However, appropriately tailored and properly crafted noncompete agreements serve important purposes and provide benefits to employees and employers. Employees gain additional pay, other compensation, benefits and/or professional development opportunities. Employers are encouraged to innovate and develop new creative products and services and invest in employees' professional development, while protecting their confidential business information (CBI).

In 2023, RILA submitted extensive comments[1] on the FTC's prior proposal to ban almost all noncompetes. RILA's comments detailed how some retailers use narrowly tailored noncompete agreements that contain reasonable guardrails to minimize anticompetitive impact to foster innovation and protect their CBI. Now as the FTC reviews the use of noncompete agreements across a wide range of industries and scenarios for purposes of developing guidance and enforcement policies, RILA wishes to highlight below many of the key considerations raised in those prior comments and urge the FTC to continue to use case-by-case analysis to permit reasonable, tailored noncompete agreements that provide clear benefits to employees, employers and the U.S. economy.[2]

I. Narrowly Tailored & Time-Limited Noncompete Clauses are Appropriate and Important for Fostering Business Innovation

National and large regional retailers are subject to a variety of state restrictions on the use of noncompete agreements ranging from outright bans to limiting use in specific industries or for employees making less than a specified salary. In addition to strict adherence to any applicable state restrictions, those RILA members that utilize noncompete agreements carefully craft narrow noncompete clauses tailored to individual employees designed to provide financial benefits and opportunities as well as minimize any anticompetitive impact.

A. Retailers' Noncompete Clauses Are Limited to a Narrow Scope of Covered Employees

Retailers are in constant competition for talent at all levels but especially at the competitive entry-level job market. As a result, RILA members do not use noncompete clauses with front-line hourly or lower wage workers and do not restrict the mobility of these workers. Instead, those retailers that use narrow noncompete clauses do so only for a small number and limited categories of employees—namely, executives, senior business leaders and skilled employees who have access to CBI and trade secrets. Some examples of where retailers may use reasonable noncompete agreements are detailed below.

- **Executive and Senior Level Noncompete Agreements** – It is common for some businesses and retailers to negotiate noncompete agreements with executive and senior level executives who are intimately involved with leading the organization, developing and executing the company's strategic business plan or have direct insights into the company's sensitive confidential information (e.g., strategic initiatives, operations,

[1] RILA's comments to the FTC re: Docket No. FTC-2023-007: Non-compete Clause Rule, Matter No P201200, (April 19, 2023), pp 4-9. A copy of RILA's comments is available by accessing the following link - https://www.rila.org/getmedia/764bdbe6-175c-4373-9414-05f8b6e0c4f6/RILA-4-18-23-Comments-to-FTC-on-Proposed-Non-Compete-Rule.pdf?ext=.pdf

[2] The FTC's Request for Information is focused on solely noncompete agreements, and therefore, we will not discuss other commonly used restrictive covenants (e.g., non-disclosure, confidentiality, non-solicitation of customers or employees, tiered repayment requirements for specialized skill training, and forfeiture clauses) here. If the Commission is interested in understanding the retail industry's position on these issues, RILA's previous comments on noncompete agreements included discussion detailing the rationale why companies use these types of restrictive covenants either paired with noncompete agreements or on a standalone basis and the benefits to employees and companies of doing so. Id. at 9-14.

products, pricing, marketing, talent pools and trade secrets). In these situations, companies negotiate with sophisticated and well-resourced employees able to assess and evaluate any potential downside related to a restrictive contract clause. Additionally, at this most senior level of compensation, employees are also more likely to have the resources to obtain and consult with outside counsel to advise on their agreement negotiations, including evaluating any noncompete clauses, if they choose to do so. Consider the example of Fast Shoe Company which is in negotiations with a prospective CEO. Fast Shoe Company is concerned about protecting its CBI and wants to prevent its disclosure, intentional or not, to a key competitor, Breakneck Shoes. In turn, Fast Shoe Company and its incoming CEO negotiate a noncompete clause in the CEOs employment contract restricting his movement to Breakneck Shoes, for a defined period of time. In exchange for agreeing to time limited restriction on a potential employment opportunity the CEO negotiates additional salary, compensation and severance pay.

- **Promoting Innovation and Collaboration** – Some retailers may also use tailored time-limited noncompete agreements with highly skilled employees leading company innovation projects or new business opportunities. For example, Tabby & Canine Pet Supply uses noncompete clauses in retention agreements with several of its highly skilled employees, such as the project leader responsible for developing a new line of gluten free pet food and the head of Tabby's strategic artificial intelligence initiatives. Another example involves Cool Clothes Company's joint venture with Green Rags to develop a new joint store concept in a new geographic market. Both Cool Clothes and Green Rags use reasonable noncompete agreements with their employees participating in the joint venture project to facilitate information sharing, foster innovation, and promote new business opportunities. In both the Tabby and Cool Clothes/Green Rags examples, employees participate in unique professional development opportunities and receive additional compensation such as bonuses, equity grants, and long-term incentives in exchange for a time-limited restriction on employment mobility.

B. Other Ways Retailers Tailor Reasonable Noncompete Agreements

Retailers using noncompete agreements carefully define the term "competitor" and typically restrict the employee's employment by one or more of the company's key competitors or narrow competitor category.[3] Employees subject to a noncompete are free to pursue employment outside of the narrow scope of identified competitors or competitor category. For example, a convenience store chain CEO subject to a noncompete could leave that company and become CEO of a jewelry retailer. In addition, the CEO's noncompete restriction is only for a limited time period (e.g., 1 year). Following the expiration of the noncompete period, the CEO could choose to accept a role with another convenience store chain.

Tailored noncompete agreements generally contain specific geographic limitations which range from small geographic restrictions termed in miles, to statewide, regional or nationwide

[3] Retail "competitor" categories typically cover a specific type of retailer. *e.g.,* grocery, discount, pharmacy, apparel, shoes, accessories, jewelry, furniture, home décor, home repair, auto part supply, electronics, beauty, pet supply, convenience, big box, department store, hobby and crafts, etc.

restrictions. For example, a regional grocery store chain located in the Mid-Atlantic region of the U.S. may reasonably limit a senior level employee's movement to a grocery store chain within the Mid-Atlantic states but would not restrict the employee from moving and obtaining employment with a grocer located outside of this region.

Additionally, reasonable noncompete agreements contain limited timeframes appropriate for the position level of the employee. C-suite and senior executives typically have a longer noncompete period while lower-level employees have shorter periods. Generally, RILA members that use noncompete agreements typically have a time limit of 6 months to 1 year.

Lastly, even in those situations where a noncompete agreement could be reasonably enforced, retailers frequently demonstrate flexibility. This includes negotiating an accommodation with an employee seeking opportunities with competitors that allows the employee to move to a position at the competitor and share their general knowledge, skills and expertise while providing a limited period of protection for the original employer's CBI and trade secrets. For example, Top Game Sports may grant an accommodation for its chief merchant of running shoes to move a direct competitor in role as lead merchant for fitness equipment. Again, after the period of the original noncompete expires, the employee could take on the role of chief merchant for running shoes for the competitor company.

II. Case-by-Case Review Is Essential

As the FTC reviews the use of noncompete agreements across a wide range of industries and scenarios for purposes of developing guidance and enforcement policies, RILA urges the FTC to continue permitting reasonable, tailored noncompete agreements that provide clear benefits to both employees and employers. Any FTC's enforcement guidelines should take adequate consideration of the unique facts and circumstances underlying a particular noncompete clause, such as the above-referenced scenarios, that make it reasonable to enforce retailers' noncompete agreements for certain executives and senior business leaders, employees in key positions, and highly skilled employees.

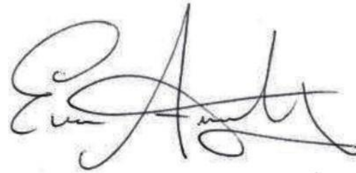
RILA strongly supports a case-by-case approach to evaluating noncompete agreements. Retailers' business models and operations are as unique and distinctive as their brands. Thus, the operations of one retailer that support a reasonable noncompete for a specific employee would not be identical to those of another retailer, even one that operates within the same product category. The need for case-by-case consideration of the competitive impact of a specific non-compete clause is even more acute when considering the breadth and range of operations and circumstances across all industries. Therefore, RILA and its members urge the FTC to maintain its longstanding approach of adjudicating noncompete clauses individually, allowing reasonable, tailored agreements that provide significant mutual and societal benefits without being overly broad or anticompetitive.

Conclusion

RILA appreciates the opportunity to provide these comments on employer use of noncompete agreements. We would welcome an opportunity to discuss our feedback with the Commission.

If you have any questions or need any additional information, please contact Kathleen McGuigan, EVP and Deputy General Counsel, at kathleen.mcguigan@rila.org / (202) 869-0106 or Evan Armstrong, SVP Government Affairs, at evan.armstrong@rila.org / (202) 869-0263.

Sincerely,



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