April 18, 2023

Ms. April Tabor
Acting Secretary of the Commission
U.S. Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW Ste. CC-5610
Washington, DC 20580

Re: Comments Regarding the Federal Trade Commission's Non-Compete Clause Rule RIN: 3084-AB74

Dear Secretary Tabor:

The National Small Business Association submits the following comments regarding a proposed rule that would significantly reduce the ability of many business owners to protect key operating information through the adoption of non-compete agreements with key employees, contractors, and advisors.

The proposed rule does not consider important distinctions that exist among business sectors, employee classifications, or company sizes. Losing an employee who possesses proprietary business information or controls customer goodwill to a competitor could be more readily managed by a large company while being devastating for a much smaller business. hile we recognize that there may be some reasonable ways that non-competes could be circumscribed to prevent their over-use or abuse, this proposed rule does not even attempt to make those distinctions, and therefore risks damaging the competitive positions of smaller companies across the country.

The Commission's proposed rule essentially bans non-compete agreements and defines them as unfair methods of competition. Yet these agreements are essential to the ability of many businesses to protect their confidential information, trade secrets, and critical business processes. This proposed rule would up-end many current business practices, jeopardize key business information, discourage information-sharing within companies, and be a disincentive for companies to invest in key employees. The result would be a stifling of innovation and economic growth.

The proposed rule also stands to create a disproportionate burden on smaller businesses. In some cases, non-disclosure and non-solicitation agreements can be seen as alternatives to non-compete agreements. However, discovering and establishing a violation of these agreements can be difficult, time-consuming, and expensive--making the meaningful enforcement of such agreements more difficult and resource-intensive for the smallest businesses.

Broad Application

The proposed rule would apply to a broad range of "workers," including interns, independent contractors and even volunteers. The inclusion of independent contractors is particularly significant. Firms could no longer maintain exclusivity clauses with independent contractors, which means that a contractor could be working with competitors—accessing key data at each firm—simultaneously. This fact will limit the willingness and ability of companies to utilize independent contractors, having a distinctly negative impact on the small business community. Small companies often use independent contractors when they do not have the resources to hire additional full-time staff. Correspondingly, many small firms begin as independent contractors and grow into larger multi-employee firms. This rule would limit opportunities for both sectors.

Mergers and Acquisitions

The proposed rule purports to create an exception for non-compete clauses that are created as part of the sale of a business. Such an exception is critical, since any buyer of a company would want to create an agreement (as part of the purchase) restricting the previous owner from simply starting a new company in the mold of the sold company. However, the exception to the proposed rule only applies to "substantial" owners, defined as owning at least 25 percent of the company. This definition sets a very high bar, as owners of even 20 percent of a company are likely to have deep knowledge of the workings of the business, but still could not freely enter into a non-compete with a buyer. This rule seems short-sighted and is likely to have a chilling effect on many mergers and acquisitions.

Employee Training

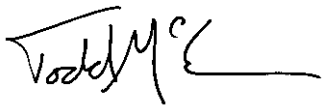
Many companies invest heavily in training employees and therefore seek re-payment of many of these training costs if the employment is terminated within a specified time-frame. Under the proposed rule, a repayment provision that is not related to "costs incurred" by the employer could constitute an unallowable non-compete clause. Given that on-the-job-training (where a fixed outlay of costs is difficult to determine) is much more prevalent in smaller firms, that requirement is likely to disproportionately burden smaller businesses. Furthermore, we have a clear national need to invest more resources in training a more advanced workforce, and this provision undercuts incentives for companies to invest in their employees.

Compliance Burden

As part of its analysis, the Commission conducted an initial regulatory flexibility analysis for this proposal, finding that about 3 million small businesses would be affected. However, the Commission estimated that the costs to these firms would be limited to the costs of updating contracts, which it placed in the range of $317-$564 per business. However, these companies will almost certainly need to invest in legal expertise to examine their options and consider appropriate ways to protect critical business information, and the FTC estimates pale in comparison to those likely costs. Moreover, advocates of restricting non-compete agreements argue that these agreements hold down wages; if that is true, then small companies will also be faced with escalating compensation costs. And of course, there is the risk of the loss of significant market share and revenue if key employees take internal business information and know-how to a competitor.

Accordingly, on behalf of the National Small Business Association and the interests of the millions of small businesses it represents, we ask that the Commission withdraw the current proposed rule.

Yours truly,



Todd McCracken
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