



March 20, 2023

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

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

Dear Secretary Tabor:

This letter is in reference to the Federal Trade Commission's (FTC) notice of proposed rulemaking (NPRM) on the *Non-Compete Clause Rule*.¹ The proposed rule will ban the use of non-competes clauses in employment contracts. Advocacy is concerned about the economic impact of the NPRM on small entities and encourages the FTC to implement an approach that reflects the various needs of small entities in the marketplace.

Advocacy Background

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration, so the views expressed by Advocacy do not necessarily reflect the views of the Small Business Administration or the Administration. The Regulatory Flexibility Act (RFA),² as amended by the Small Business Regulatory Enforcement Fairness Act,³ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁴ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.⁵

¹ 88 FR 3482, January 19, 2023.

² 5 U.S.C. § 601 et seq.

³ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

⁴ Small Business Jobs Act of 2010 (PL 111-240) § 1601.

⁵ Id.

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁶

The Office of Advocacy performs outreach through roundtables, conference calls and other means to develop its position on important issues such as this one. The Office of Advocacy held a roundtable with small entities on February 28, 2023 to discuss the potential impact of this NPRM and less burdensome alternatives to the rule as proposed. Advocacy also attended a forum on the proposed rule held by the FTC for the public on February 16, 2023. Advocacy's comments reflect the feedback that it received from the organizations about the potential impact of the proposal on their small members.

The Proposed Rule

On January 19, 2023, the FTC published a notice of proposed rulemaking for the Non-Compete Clause Rule. The proposed rule would, among other things, provide that it is an unfair method of competition for an employer to enter or attempt to enter into a non-compete clause with a worker; to maintain with a worker a non-compete clause; or, under certain circumstances, to represent to a worker that they are subject to a non-compete clause.⁷ The proposed rule will require employers to rescind current non-compete clauses.⁸ The proposed rule will not apply to franchisees.⁹

Currently, 47 states have laws to address non-compete clauses.¹⁰ The proposal will supersede any State statute, regulation, order, or interpretation that is inconsistent with the proposed rule. It is not deemed inconsistent if State law provides the worker with greater protection than the proposed rule.¹¹

Impact on Small Entities

Even though the FTC states that it does not believe that the proposed rule will have a significant economic impact on a substantial number of small entities, the FTC prepared an initial regulatory flexibility analysis for the proposal. In their analysis, the FTC estimates that 2.94 million small firms, comprising of 3.08 million small establishments, use non-compete clauses and therefore will be impacted by the proposed rule.¹² The FTC estimates that the direct costs of the rule would be limited to updating contractual practices, and estimates those costs at between \$317.88 to \$563.84 for single establishment firms.¹³

⁶ Id.

⁷ 88 FR 3535.

⁸ Id.

⁹ Id.

¹⁰ 88 FR at 3494.

¹¹ 88 FR at 3536.

¹² 88 FR at 3531-3532.

¹³ 88 FR at 3531.

Advocacy does not agree that the costs of this rule are limited to the costs of altering the contracts. The FTC has ignored certain costs of the proposed rule that could be detrimental to small firms that use non-compete clauses to protect their businesses. The FTC has ignored potential important small business impacts to consider, such as the costs of hiring additional legal resources if the proposed rule went into effect. There may also be increased costs of hiring and retaining workers, which some small entities are currently struggling with.

Small businesses use non-compete clauses to protect assets such as client lists, business practices, teaching techniques, technology, intellectual property, and others. If the critical competitive information they have built and created is not protected adequately, some small businesses could face a serious risk of loss and potential closure. Although there may be other legal avenues to protect assets like technology, the legal process often involves protracted proceedings and astronomical legal fees which small entities may not be able to afford. FTC should estimate the full costs associated with complying with the proposed rule for directly affected small entities such as increased costs for legal services; process changes; and changes to training, hiring, and retaining workers.

In some instances, employment contracts compensate employees who must abide by non-compete clauses. As such, many small entities at the FTC's forum stated that they opposed the proposed rule. An attendee at Advocacy's roundtable also raised the issue of the potential impact of the proposed rulemaking on procurement contracts. He asserted that blanket elimination of non-compete clauses could eliminate millions of dollars of opportunities for small and disadvantaged firms. By law, 8(a) companies are in a business development program. They have a set number of years to grow their business before they graduate to compete in the open market. As a business development company, their most valuable asset is their talent. If they cannot control this asset, then the billions of dollars the Federal government has spent on trying to help these fledging companies to grow and become competitive in the marketplace has been wasted. This proposed rule conflicts with the Congressional law creating the 8(a) program.

Conversely, some of the attendees at the FTC's forum were in the medical profession. They supported the rulemaking because non-compete clauses can prevent them from working in their fields. Similarly, franchisees who attended the FTC's forum and Advocacy's roundtable stated that they wanted to be included in the rulemaking. They stated that non-compete clauses are problematic when the franchise agreement ends. The franchisor may make unreasonable demands when renegotiating the contract and a non-compete clause may limit the franchisee's options.

The Current Approach Is Not Appropriate

In the discussion of alternatives, the FTC pondered whether the rule should apply uniformly to all workers or whether there should be exemptions or different standards for different categories of workers.¹⁴ As noted above, small entities have different views on non-compete clauses depending on the industry and the reason for usage. Because of the wide range of industries and the nature of the economic impacts, Advocacy asserts that a universal ban on non-compete

¹⁴ 88 FR at 3516.

clauses is inappropriate. Accordingly, Advocacy encourages the FTC to adopt an approach that addresses the different concerns of small entities in the marketplace. Alternative approaches should be considered, analyzed, and tailored to the size and type of entity to minimize adverse impacts to small entities.

Conclusion

Thank you for the opportunity to comment on this important proposal and for your consideration of Advocacy's comments. If you have any questions regarding this request or if Advocacy can be of any assistance, please do not hesitate to contact me or Jennifer Smith at (202) 205-6943.

Sincerely,

/s/

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Jennifer A. Smith
Assistant Chief Counsel
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