



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of Policy
Planning

April 13, 2023

MEMORANDUM

FROM: Zachary Kaplan

TO: April Tabor

SUBJECT: Summary of Listening Session with Chair Lina Khan and Small Business Majority

EXECUTIVE SUMMARY:

On April 13, 2023, Federal Trade Commission Chair Lina Khan participated in a listening session hosted by Small Business Majority (“SBM”) about the Federal Trade Commission’s (“FTC”) proposed Non-Complete Clause Rule, 88 Fed. Reg. 3482 (Jan. 19, 2023) (“Proposed Rule”). The listening session was moderated by Quintin Reed, SBM’s Government Affairs Coordinator. Other participants in the webinar were John Arensmeyer, Tracy duCharme, and Leo Carr. Viewers had the opportunity to submit questions to Chair Khan. The webinar is publicly available.¹ This memorandum is to be placed on the public record pursuant to 16 C.F.R. § 1.26(b)(5) and the Notice of Proposed Rulemaking (“NPRM”), under which summaries or transcripts of oral communications respecting the merits of the proposed rulemaking from any outside party to any Commissioner or Commissioner advisor are to be placed in the public record. This executive summary does not summarize the entire listening session, but rather focuses on information concerning the Proposed Rule that is not already included in the rulemaking record.

The listening session began with a statement from John Arensmeyer, founder and CEO of SBM, expressing support for the Proposed Rule based on a view that non-compete clauses make it harder for individuals to start and grow new businesses, stifle innovation, and contribute to corporate concentration. Then, Arensmeyer presented the results in a survey of small businesses, broadly showing that the majority of survey respondents support the Proposed Rule, and that the majority of respondents believe they could achieve the same trade secrets protection provided by non-competes through nondisclosure agreements.

Following Arensmeyer’s statement, Chair Khan began her remarks by discussing the FTC’s mandate to ensure fair competition, which includes addressing business practices that prevent small businesses from succeeding. Chair Khan added that a key part of the FTC’s efforts to address conduct

¹ Small Business Majority, *Small Businesses Support FTC’s Proposed Rule to Ban Non-Compete Agreements* (Apr. 13, 2023), available at <https://smallbusinessmajority.org/press-release/small-businesses-support-ftcs-proposed-rule-ban-non-compete-agreements#:~:text=Washington%2C%20D.C.%20%E2%80%93%20Today%2C%20Lina%20M.%20Khan%2C%20Chair,negative%20impact%20of%20non-compete%20agreements%20on%20small%20businesses.>

that is harmful to small businesses is the Proposed Rule. Chair Khan reiterated several policy arguments included in the NPRM, adding that the rule is not final, and that the FTC is eager to hear from as many small business owners as possible. Chair Khan concluded her remarks by thanking SBM for its role in protecting America's small entrepreneurs.

After the Chair's remarks, two small business owners offered comments on the Proposed Rule. First, Tracy duCharme, the owner of a Color Me Mine franchise in Colorado Springs, Colorado shared that she supports the Proposed Rule, in part, based on her experience when a former employee violated a non-compete agreement. DuCharme discussed how the former employee subject to a non-compete left duCharme's franchise and started a competing business nearby, but duCharme felt it would have been unreasonable to enforce the non-compete clause because competition is inherently part of running a retail business. DuCharme added that she is bound by a non-compete in her franchise agreement, and strongly encouraged the FTC to prohibit non-competes for franchisees.

Second, Leo Carr, Executive President, Elite Group in Southfield, Michigan shared his views on the Proposed Rule. Carr expressed support for the Proposed Rule, and shared stories about two instances in which his business struggled to hire candidates because they were subject to non-compete agreements. In one instance, Carr explained that he decided to leave a role vacant for the duration of a candidate's non-compete agreement, burdening the business. Carr added that he thinks NDAs are adequate for the purpose of protecting proprietary information and trade secrets.

Finally, Chair Khan responded to a question from the audience, selected by Quintin Reed. Reed asked whether franchisees can expect a rule targeting non-competes in franchise agreements. Chair Khan started her response by discussing the FTC's ongoing work on franchises, including the Franchise Rule, which the FTC recently enforced for the first time in more than a decade, and a recently issued RFI related to the franchisee/franchisor relationship. With respect to the Proposed Rule, Chair Khan explained that the FTC closely considered whether to target non-compete clauses in franchise agreements but was restricted by the empirical evidence available, as there was not enough empirical evidence for the FTC to feel confident that it had a sufficient basis for proposing a rule targeting franchisee non-competes. Chair Khan added, however, that the FTC may be able to obtain sufficient evidence to support a rule targeting franchisee non-competes depending on comments in the record related to franchises, and again encouraged those watching to submit comments.

Reed shared some additional resources that small businesses can use to engage with the FTC on the Proposed Rule, and Chair Khan added that the FTC is eager to hear from small businesses on an ongoing basis. One way Chair Khan indicated small businesses can be involved is by registering as guest speakers at the FTC's regularly scheduled open commission meetings. The listening session concluded with final remarks from Arensmeyer encouraging small businesses to directly engage with the FTC and submit comments on the Proposed Rule.