April 17, 2023

By Electronic Submission to https://www.regulations.gov

Honorable April Tabor
Secretary
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex C)
Washington, DC 20580

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

Dear Secretary Tabor:

The AMC Institute is pleased to provide comments on the Federal Trade Commission's ("FTC") Non-Compete Clause Rule Notice of Proposed Rulemaking ("NPRM"), published at 88 Fed. Reg. 3482 (January 19, 2023).

The AMC Institute

Founded in 1963, the AMC Institute is a non-profit trade association focused on advancing professionalism and high industry standards for association management companies. The AMC Institute represents over 180 association management companies that collectively provide full-service management to over 3,000 associations and provide project support to 900 additional associations. The total budget for associations managed by AMC Institute members is more than $1.9 billion annually, and the associations represent 2.8 million members.

Association Management Companies

Association management companies ("AMCs") are for-profit businesses that manage nonprofit associations. AMCs provide their association clients with full-service management for all operating disciplines and day-to-day operations. The relationship between an AMC and its clients is typically long term, ranging from an average of 10 years to as many as 30 years or more. AMCs spend considerable amounts of financial and other resources attracting and retaining association clients. This includes material, ongoing investments in technology, personnel, strategic planning and branding intended to directly benefit the association clients AMCs serve.

Central to the AMC model is the AMC staff, i.e., executives, managers, and others who are experts in the critical areas of association management and operations.

These individuals are employees of the AMC, not the association client. AMCs dedicate significant resources to the training and education of their employees so that they may grow as professionals and provide exceptional value to the clients for whom they serve. An AMC's staff, in particular their professionalism, experience, knowledge, and competence, is a defining asset of any AMC.

Further, most AMC employees in client service roles have direct, ongoing contact with one or more of the AMC's association clients, including with the clients' board of directors and members. The investments an AMC makes in its people, along with the direct contact those people have with its client key stakeholders, is a combination that enables AMCs to build and solidify their most critical business asset, the relationships they enjoy with their clients. As professional service companies, there is no asset more material to their sustainability as businesses.

AMC Staff Post-Employment Restrictions

Many AMCs require their executive and management level employees to agree that, for a period of time after leaving the AMC, they will not solicit the AMC's clients, nor will they work for the AMC's clients. The typical time period for these restrictions is 12 to 18 months. They remain free to engage in association management and compete directly with their former employer. What they cannot do, in effect, is leverage the knowledge and experience in association management they gained from the AMC, nor their special knowledge of, and familiarity and relationship with, clients of the AMC, to lure those clients away from the AMC with respect to the services the AMC provided them. It is two factors in particular – signification investment in their employees' training and education, and the close contact between AMC employees and the AMC's association clients – that make post-employment restrictions vital to the AMC model and the economic well-being of AMCs.

Comments on FTC Rule

1. Types of Restrictions Not Covered by the Definition of a "Non-Compete Clause" in Proposed §910.1(b)

AMCI endorses and supports the FTC's position expressed in the Federal Register notice that "many … types of covenants that restrict what a worker may do after the worker leaves their job, including, among others, NDAs; non-solicitation agreements; and TRAs" are not non-competition clauses or agreements as defined in Proposed §910.1(b) and therefore are entirely outside of this proposed Non-Compete Clause Rule.[1] As stated by the FTC, while these other restrictions "may affect the way a worker competes with their former employer after the worker leaves their job…they do not generally prevent a worker from competing with their former employer altogether; and

[1] 88 Fed.Reg. at 3509.

they do not generally prevent other employers from competing for that worker's labor."[2] The AMC Institute urges the FTC not only to include this same position and explanation about these other types of restrictions in the Preamble to the Final Rule, but in fact to expand it, in two ways.

First, we recommend that the FTC expressly acknowledge, in the Preamble to the Final Rule, that reasonable restrictions on the ability of an employee to solicit or work for clients of their former employer are also among the kinds of restrictions that, in general, are not prohibited non-competition agreements for the same reasons, i.e., they do not generally prevent a worker from competing with their former employer altogether; and they do not generally prevent other employers from competing for that worker's labor. In fact, a non-solicitation/non-business agreement or clause related to the former employer's customers or clients forges a connection between the prohibition and the interest to be protected—preventing the former employee from usurping the rapport with clients facilitated by the affiliation with the employer and established during their employment to take the employer's clients with them when they leave. The AMC Institute does not oppose a rule designed to ensure individuals can continue to work in their chosen profession/industry upon leaving an employer. However, we respectfully request clarity that such individuals cannot do so in a manner that impairs the prior employer's most critical business asset, at least in accordance with reasonable terms of an employment agreement or other contract.

Second, we recommend that the Preamble in the Final Rule state that these non-solicitation/non-business restrictions may be especially reasonable and appropriate for professional services firms that have long-standing client relationships.

2. Definition of a "Substantial Owner" in §910.1(e).

AMCI believes the 25% threshold to constitute a "substantial" owner, member, or partner is too high and does not reflect the reality of most small businesses. In fact, a 5% equity/ownership stake is highly significant in AMCs, and we believe in most small businesses. That level of ownership is achieved only by a few employees, typically high level, after several years of service and often conditioned on a material financial investment. The example cited in the Proposed Rule in support of the 25% floor is "a few entrepreneurs sharing ownership interest in a startup sell their firm."[3] That may be a common scenario in the tech industry, but in many companies, including professional services firms, persons who achieve an ownership stake, other than a founder, are top performers who are experienced business persons.

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[2] Id.

[3] 88 Fed.Reg. at 3510.

AMCI recommends that the definition of "Substantial Owner, Substantial Member, and Substantial Partner" in §910.1(e) either be reduced to 5%, or not tied to any particular percentage and instead left to an interpretation on a case-by-case adjudication based on what is reasonable and customary for the particular industry or field.

3. Rescission of Non-Compete Clauses as Required by Proposed §910.2(b).

Proposed §910.2(b) would require an employer that entered into an impermissible non-compete clause with an employee prior to the compliance date to rescind the non-compete clause and so notify the employee. The Model Language for such a notification set forth in Proposed §910.2(b)(iii) includes the statement: "The FTC's new rule does not affect any other terms of your employment contract." While that language references an "employment agreement" specifically, it recognizes that when a non-compete clause is included in an agreement that addresses other issues as well, rescission of a non-compete clause does not necessarily invalidate other provisions of an agreement. That would be determined by the provisions of a particular agreement and applicable State contract law. The AMC Institute endorses this position, and recommends that the Model Language be amended in this regard to state: "The FTC's new rule does not affect any other terms of your employment or other contract."

Thank you in advance for your consideration of the AMC Institute's comments. Please do not hesitate to contact the AMC Institute's President & CEO Tina Wehmeir, CAE, CMP, at (703) 570-8953 or twehmeir@amcinstitute.org, with any questions.

Sincerely,



Mark Engle
Chairman