National Small Business Association

Re: "Request for Public Comment Regarding Reducing Anti-Competitive Regulatory Barriers"

The National Small Business Association (NSBA) thanks the Federal Trade Commission (FTC) for the opportunity to respond to this request for public comment on how federal regulations can harm competition in the American economy. NSBA is the nation's oldest small business advocacy organization representing the 70 million owners and employees that make up American small business, championing efforts that foster the growth, strength, and impact of small businesses.

Pursuant to its request, these comments recommend that the FTC consider and review the following:

- **Defense Acquisition Regulation Supplement: Assessing Contractor Implementation of Cybersecurity Requirements**[1] (*Proposed Rule by the Department of Defense (DoD) Defense Acquisition Regulations System*)
- **Federal Acquisition Regulation: Controlled Unclassified Information**[2] (*Proposed Rule by DoD, General Services Administration (GSA), and National Aeronautics and Space Administration (NASA)*)
- **Changes to Multiple Award Schedule Program**[3] (*announced by GSA*)
- **Draft Interagency Guidance Framework for Considering the Exercise of March-In Rights**[4] (*proposed by the National Institute of Standards and Technology (NIST)*)
- **Non-Compete Clause Rule**[5] (*Final Rule by the FTC*)

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[1] Defense Acquisition Regulations System, Department of Defense, Proposed Rule on Defense Acquisition Regulation Supplement: Assessing Contractor Implementation of Cybersecurity Requirements, 89 Fed. Reg. 66327 (proposed Aug. 15, 2024) (to be codified at 48 C.F.R. pts. 204, 212, 217, and 252).

[2] Defense Department, General Services Administration, and National Aeronautics and Space Administration, Proposed Rule on Federal Acquisition Regulation: Controlled Unclassified Information, 89 Fed. Reg. 4278 (proposed Jan. 15, 2025) (to be codified at 13 C.F.R. pts. 1, 2, 3, 4, 5, 7, 9, 11, 12, 15, 27, 33, 42, 52, and 53).

[3] General Services Administration, "GSA to Rightsize Multiple Award Schedule Program," Mar 2025, https://www.gsa.gov/about-us/newsroom/news-releases/gsa-to-rightsize-multiple-award-schedule-program-03242025#:~:text=WASHINGTON%20%E2%80%94%20Today%2C%20the%20U.S.%20General,reducing%20redundancies%20with%20other%20procurement.

[4] National Institute of Standards and Technology, Department of Commerce, Request for Information Regarding the Draft Interagency Guidance Framework for Considering the Exercise of March-In Rights, 88 Fed. Reg. 85593 (proposed Dec. 8, 2023).

[5] Federal Trade Commission, Final Rule on Non-Compete Clause Rule (May 7, 2024) (codified at 16 C.F.R. pts. 910 and 912).

Defense Acquisition Regulation Supplement: Assessing Contractor Implementation of Cybersecurity Requirements

NSBA unequivocally supports a secure defense industrial base (DIB). We are concerned, however, that in crafting the proposed amendments to the Defense Federal Acquisition Regulation Supplement (DFARS) regarding Cybersecurity Maturity Model Certification (CMMC) 2.0 contractual requirements, DoD failed to fully account for the small business impacts of its proposal.

For example, while the proposed rule delineates requirements for third-party assessments for certain levels of compliance, it does not address whether there are enough Certified Third-Party Assessor Organizations (C3PAOs) to satisfy those requirements – particularly for lesser resourced small contractors and subcontractors. If DoD fails to address this issue, the result may be "pseudo-assessments" that would be contrary to the very objectives around which CMMC 2.0 was designed.

NSBA believes that a secure defense industrial base (DIB) is both a national security and an economic security priority for entities large and small. As such, rather than unraveling the well intentioned CMMC program, we recommend amending the proposed rule to reflect the reality of the U.S.'s insufficient supply of C3PAOs. In better accounting for this insufficiency, DoD can expand opportunities for small business participation in the DIB and increase the supply of DIB innovation.

Federal Acquisition Regulation: Controlled Unclassified Information

The Federal Acquisition Regulation (FAR) Council's proposed rule seeks to advance uniformity across federal agencies in addressing what information is considered controlled unclassified information (CUI) in federal contracts and how to properly safeguard the CUI. While uniformity may benefit small businesses in the federal marketplace, NSBA is concerned that, based on the FAR Council's own analysis of the proposed rule, it will have costly and burdensome impacts that will be disproportionately felt by small federal offerors, contractors, and subcontractors.

For example, the proposed rule would force small contractors and subcontractors to cooperate with federal agency validation actions, the cost of which is estimated at more than $5.5 million *annually*, of which over $4 million is attributed to just 81 small businesses. NSBA recommends that the FAR Council closely examine the costs associated with federal agency validation actions and work with the Small Business Administration's (SBA) Office of Advocacy to minimize these costs in advance of issuing a final rule.

In better accounting for the economic realities faced by small businesses, NSBA believes that the FAR Council can create opportunities for entry into the federal marketplace rather than increasing barriers.

Changes to Multiple Award Schedule Program

On March 25, 2025, GSA announced that it will allow for expiration of contracts under the Multiple Award Schedule (MAS) Program that fail to meet sales thresholds and elimination of items with insufficient market demand or where administrative costs outweigh procurement benefits. Under this initiative, GSA has pledged to address MAS contractor non-compliance, "including performance concerns,"[6] but has not specified what would constitute a "performance concern." Additionally, the agency is seeking to reduce redundancies "with other procurement channels across the federal government."

NSBA is concerned that these program changes may result in further diminishment of small federal marketplace participants and subject them to capricious audits without the opportunity to cure potential performance concerns. Moreover, reducing redundancies across the federal government may result in further concentration of the contractor market in the hands of a few large players with whom the federal government routinely does business.

Small federal contractors and subcontractors have already seen a myriad of contract cancellations in 2025. Increasing opportunities for small businesses to maintain and strengthen their contract performance will help to better facilitate small business participation in the federal marketplace. Accordingly, we recommend that GSA work with SBA and the Office of Advocacy to ensure that small businesses impacted by contract expirations, cancellations, or changes are administered with prudence and incorporate opportunities to cure performance concerns.

Draft Interagency Guidance Framework for Considering the Exercise of March-In Rights

NSBA urges NIST to affirmatively withdraw its Draft Interagency Guidance Framework for Considering the Exercise of March-In Rights, under which the federal government's discretion to unilaterally sublicense privately owned patents covering products developed using government funding would be expanded in an unprecedented manner.

As the Information Technology and Innovation Foundation (ITIF) wrote in its comments on the draft framework, NIST's proposal "would likely be counterproductive to a largely well-functioning technology transfer system," reasoning that the framework would disproportionately impact small businesses, "which are willing to assume the risk and expense of trying to commercialize innovations deriving from the intellectual property (IP) stemming from the federally funded research and development that often occurs at U.S. universities."[7]

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[6] General Services Administration, "GSA to Rightsize Multiple Award Schedule Program," Mar 2025, https://www.gsa.gov/about-us/newsroom/news-releases/gsa-to-rightsize-multiple-award-schedule-program-03242025#:~:text=WASHINGTON%20%E2%80%94%20Today%2C%20the%20U.S.%20General,reducing%20redundancies%20with%20other%20procurement.

[7] Stephen Ezell, "Comments to the NIST Regarding the Draft Interagency Guidance Framework for Considering the Exercise of March-In Rights," Feb 2024, https://itif.org/publications/2024/02/06/comments-nist-draft-interagency-guidance-framework-exercise-march-in-rights/.

Moreover, if implemented, the draft framework would undermine the achievements of the Bayh-Dole Act (affording contractors – including small businesses – rights to IP generated from federal funding), under which U.S. academic technology transfer activities have produced nearly half a million invention disclosures, over 100,000 U.S. patents issued, and tens of thousands of startups formed, with nearly three quarters of university licenses flowing to startups and small companies.[8]

By affirmatively withdrawing the draft framework, NIST would clarify that price cannot be a factor in the federal government's unprecedented exercise of march-in rights, thus sustaining and bolstering the system of free and competitive innovation that small businesses have historically leveraged – thanks to policies like Bayh-Dole.

Non-Compete Clause Rule

Under the FTC's noncompete rule, which was struck down by a federal court, the agency sought to adopt a comprehensive ban on new noncompetes with all workers, including senior executives, providing that entry into noncompetes was an unfair method of competition. The rule upheld existing noncompetes for senior executives, but rendered existing noncompetes with non-senior executives unenforceable.

NSBA believes that the noncompete rule would, if enforced, impose administrative burdens on smaller entities and reduce protections on workforce pipelines, internal processes, and IP for high-innovation small businesses already under pressure from larger firms. Additionally, expanding the definition of "unfair method of competition" to include common workplace practices such as noncompetes represented a significant departure from more traditional interpretations of FTC authority.

As such, we recommended that the FTC affirmatively repeal the final rule and further cease taking individual actions penalizing the use of noncompetes. Through repeal, the agency can return to its traditional statutory responsibilities and ensure that it does not unduly interfere with small innovators' business practices.

Conclusion

NSBA stands ready to help the FTC as it reduces anti-competitive barriers across the federal government. We believe that considering the recommendations outlined in this letter will help to bolster this initiative.

Please do not hesitate to reach out to rgrey@nsbaadvocate.org if you have any questions.

Sincerely,

[8] AUTM, "Driving the Innovation Economy: Academic Technology Transfer in Numbers, https://autm.net/AUTM/media/Surveys-Tools/Documents/AUTM-Infographic-22-for-uploading.pdf.

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