



107 Carpenter Drive, Suite 100
Sterling, VA 20164
1.800.645.7700
703.391.8400
Fax: 703.391.8416
www.iccfa.com

Via Electronic Submission
The Honorable Lina Khan Chair
Federal Trade Commission
600 Pennsylvania Avenue
NW Washington, DC 20580

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

Dear Chair Khan:

The International Cemetery, Cremation and Funeral Association (“ICCFA”) includes over 10,000 member businesses, representing over 23,000 deathcare providers in all segments of the funeral and memorialization profession. ICCFA continues to appreciate the opportunity to provide its experience and perspective through this comment process. The ICCFA opposes the Non-Compete Clause Rule (the “Non-Compete Rule”) as it relates to the sale of a business, as the general exception provided by the proposed Non-Compete Rule is too broad. As explained in more detail below, any rule should take into account all current owners of a business, at all ownership interest levels, as well as other family members of owners and additional key level employees that have the potential to affect the on-going goodwill of a business.

Funeral homes and deathcare businesses, including family-owned businesses, are built upon their goodwill and name in a community. For many funeral homes and deathcare businesses, selling outside their family is the retirement plan of choice when succession to the next generation is not an option. A large portion of the value of a deathcare business includes a compensated non-compete agreement and is many times integral to the sale. Consider the following example. Imagine a funeral home that has thrived in a community under a family name for over the last 100-years. Now, the current owner wishes to sell the business so that their family can retire and enjoy the fruits of their labor. In this example there is only one owner, but there are four children – all working at the funeral home, but none wanting to be the next owner. Also, all four of the children share the historic last name.

In this example, the new buyer will want to make sure that no one can use this coveted name and open a business that would compete with them. Under the current Rule proposed by the FTC, the new buyer could most likely have a non-compete with the owner/seller – but what about the children of the owner who all work in the profession and share the same name? No buyer would be willing to pay a premium – or arguably any amount – to an owner when the children could open a business and compete against them immediately after the purchase.

In this example, not only does the owner have an asset in the goodwill of his business and name, but so do the children of this owner. The children, as well as the buyer, should have the right to negotiate a non-compete that not only protects the buyer, but also allows the children to be compensated for their goodwill. Keep in mind that while this example focuses on children of the owner, it could also be key employees, that have become so vested in the business and have become the face of the business, that if they were to leave it could cause irreparable harm to a new buyer.

The point of this example is to show that simply proposing an exception to the proposed non-compete rule of allowing an owner of some percentage, such as 25% ownership equity, is not broad enough to protect a buyer, and

more importantly, not broad enough to allow those that have built a business to capture all the value of the goodwill they worked so hard to develop.

Funeral home and deathcare business are built on goodwill – the namesake of the business – and the purchase of a business is commonly contingent upon a compensated non-compete agreement of the selling owner to not be involved in a competing business. Non-compete agreements in deathcare serve as an asset in the sale of these businesses. The result of further limiting or banning non-competes will de-value a funeral business’s goodwill affecting future sales and will harm individuals that have built these businesses and now want to be able to sell them and serve as their retirement or family legacy plan.

The ICCFA suggests that properly compensated non-competes, related to the sale of a business, should be allowed. There should be broader guidelines for the sale of a business that include any owner – no matter what percentage – as well as family of owners, and any key-employees. Keep in mind that these other individuals have typically worked hard to create their value, and without the ability to enter a non-compete, this proposed rule takes away their asset. Also, most states have their own regulations on non-compete agreements such as requirements limiting the geographic areas and duration of the non-compete, and these should be allowed to be followed and used.

Lastly, the proposed rule considers implementing a retrospective application, meaning that all non-competes, even those entered properly would also be banned and deemed unenforceable. For those businesses that have sold, and contracts and consideration were provided for non-competes, this would have a catastrophic effect in the marketplace. In the example above, how would a buyer, that has recently paid for a non-compete to an owner and their family, handle this same family now being told they are able to compete against this new owner? Would the new owner get a return on monies paid for the non-compete? Would the new owner stop any future payments based on the non-compete? What if the former owner uses the proceeds and opens a location next door to the new owner and basically puts them out of business? Would the new owner be entitled to a return of their purchase price or lost profit based on the change in law and now violation of a non-compete? Again, there would be many unforeseen damages based on the retroactive application of a ban on non-competes as well.

The fact is that states should continue to be able to control the application of non-competes. If the FTC does proceed with a rule on non-competes, there should be a broad exclusion on the sale of a business that includes not only 25% owners, but also all individuals that are tied to the ownership by family, or by their involvement, such as key employees. Businesses, as well as consumers are best served by this exclusion as it allows those that have built goodwill to be able to control this hard-earned asset, including through a sale. ICCFA respectfully requests that if the FTC implements a Non-Compete Rule, that it takes into consideration an exclusion that is broad enough to protect all those involved in the sale of a business – not simply the 25% ownership.

Respectfully submitted,



Poul H. Lemasters, General Counsel

International Cemetery, Cremation & Funeral Association
107 Carpenter Drive, Suite 100, Sterling, VA 20164
Phone: (703) 391-8400
Email: Poul@ICCFA.com