



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

THE CHAIRMAN

April 21, 2011

MEMORANDUM

FROM: Jon Leibowitz
TO: All FTC Staff
SUBJECT: Small Business Non-Retaliation Policy

Small Business Comment Non-Retaliation Policy

The Small Business Regulatory Enforcement Fairness Act (“SBREFA”) provides small businesses with a statutory right to comment to the National Small Business Ombudsman about agency compliance and enforcement activities. 15 U.S.C. § 657(b). One goal of SBREFA is to permit small businesses to raise concerns about the conduct of agency personnel with the Ombudsman, without fear of reprisal.

The FTC has a longstanding commitment to ensuring the proper treatment of all subjects of agency compliance or enforcement activities, including small businesses. It is the policy of the FTC to provide a non-retaliatory environment in which small businesses can exercise their right to comment to the National Small Business Ombudsman on the agency’s compliance and enforcement actions, without fear of reprisal. FTC staff are expected to conduct investigations in a fair and professional manner and must make every effort to continue to avoid even the appearance of unfairness or retaliatory action.

A staff member will not take an action against a subject of a compliance or enforcement activity in retaliation for the subject’s comments to a higher agency official or to the Ombudsman, rather than because the action is appropriate based on the needs of the matter. (Note that “retaliation” does not encompass every action that might follow a comment. If, for example, a small business attempts to use an opportunity to comment to delay the progress of a matter, actions to avert such delay may be appropriate based on the needs of the matter. If the subject of a compliance or enforcement activity or the subject's attorney seeks to file a complaint with a staff member’s supervisor, staff must provide the necessary information to do so.)

Supervisors will handle any specific complaints as appropriate in the particular circumstances. If an employee is found to have taken an action against a small business in retaliation for exercising its right to comment, the employee would be subject to discipline as

appropriate, which could affect performance evaluations and/or involve discipline for misconduct.

Information About Opportunities to Comment

Staff also should provide information as appropriate about opportunities for a small business to comment on the manner in which compliance and enforcement activities are conducted. Agency procedures currently provide for staff to inform subjects of compliance or enforcement activities of their opportunities to raise issues at high levels within the agency before any complaint issues. (This procedure does not apply in instances in which such notice may be prejudicial to the matter, such as where the agency anticipates that the target of the investigation may flee or may hide or dissipate assets.) *See* Operating Manual Sec. 3.3.6.1. Staff also should furnish to firms that appear to be small businesses, or to their attorneys, written notice of their right to comment to the Small Business Ombudsman, no later than the time the staff forwards a complaint recommendation against the small business. (Again, this procedure does not apply where such notice may be prejudicial to the matter.) If compulsory process issues against the small business, staff should provide the information no later than with the process. Staff may provide the notice at any earlier time.

The following or something similar is recommended language for a notice of opportunity to comment:

Your Opportunity to Comment

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency's responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to www.sba.gov/ombudsman.