E: 6750-01-P

FEDERAL TRADE COMMISSION

[File No. 211 0182]

Glass Container Non-Compete Restrictions; Analysis of Agreements Containing Consent Orders to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair methods of competition. The attached Analysis of Proposed Consent Orders to Aid Public Comment describes both the allegations in the complaint and the terms of the consent orders—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Interested parties may file comments online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Please write: "Glass Container Non-compete Restrictions; File No. 211 0182" on your comment and file your comment online at *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, please mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex Q), Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Kathleen Clair (202-326-3435), Bureau of Competition, Federal Trade Commission, 400 7th Street SW, Washington, DC 20024.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of 30 days. The following Analysis of Agreement Containing Consent Orders to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC website at this web address: *https://www.ftc.gov/news-events/commission-actions*.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Write "Glass Container Non-compete Restrictions; File No. 211 0182" on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

Due to protective actions in response to the COVID-19 pandemic and the agency's heightened security screening, postal mail addressed to the Commission will be delayed. We strongly encourage you to submit your comments online through the *https://www.regulations.gov* website.

If you prefer to file your comment on paper, write "Glass Container Non-compete Restrictions; File No. 211 0182" on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex Q), Washington, DC 20580.

Because your comment will be placed on the publicly accessible website at *https://www.regulations.gov*, you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment

should not include sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "trade secret or any commercial or financial information which . . . is privileged or confidential"—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on *https://www.regulations.gov* – as legally required by FTC Rule 4.9(b) – we cannot redact or remove your comment from that website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC Website at *https://www.ftc.gov* to read this document and the news release describing this matter. The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments it

receives on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy*.

Analysis of Agreements Containing Consent Orders to Aid Public Comment

I. Introduction

The Federal Trade Commission has accepted, subject to final approval, two consent agreements with, respectively, Ardagh Group S.A., Ardagh Glass Inc., and Ardagh Glass Packaging Inc. (collectively, "Ardagh") and O-I Glass Inc. ("O-I"). Ardagh and O-I (collectively, "the Manufacturers") each manufacture and sell in the United States glass containers used for food and beverage packaging and employ workers at multiple facilities within the United States for this purpose. The consent agreements settle charges that the Manufacturers violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, through their use of post-employment covenants not to compete ("Non-Compete Restrictions"). A Non-Compete Restriction is a term that, after a worker has ceased working for an employer, restricts the worker's freedom to accept employment with a competing business, to form a competing business, or otherwise to compete with the employer. The complaints allege that each of these companies imposed Non-Compete Restrictions on employees across a variety of positions, including workers whose labor is an important input in the glass container manufacturing process. The complaints allege that this conduct has a tendency or likelihood to limit workers' mobility, to impede rivals' access to the restricted employees' labor, and thus to harm workers, consumers, competition, and the competitive process. As such, the complaints allege that each company has engaged in an unfair method of competition in violation of section 5 of the FTC Act. The proposed orders have been placed on the public record for 30 days in order to receive comments from interested persons. Comments received during this period will

become part of the public record. After 30 days, the Commission will again review the consent agreements and the comments received and will decide whether it should withdraw from the consent agreements and take appropriate action or make the proposed orders final. The purpose of this analysis is to facilitate public comment on the proposed orders. It is not intended to constitute an official interpretation of the complaints, the consent agreements, or the proposed orders, or to modify their terms in any way.

II. The Complaints

The complaints make the following allegations. The glass containers that Ardagh and O-I manufacture and sell are purchased primarily by companies that sell food, beer, non-alcoholic beverages, and wine and spirits. The glass container industry in the United States is highly concentrated and is characterized by substantial barriers to entry and expansion. Among these barriers, it is difficult to identify and employ personnel with skills and experience in glass container manufacturing.

Each of the Manufacturers has imposed Non-Compete Restrictions on employees across a variety of positions. These restrictions typically required that, for either one or two years following the conclusion of the worker's employment with the Manufacturer, the worker may not be employed by a competing business in the United States. At the outset of the Commission's investigation, over 700 employees of Ardagh and over 1,000 employees of O-I were subject to such restrictions, including employees who work with the glass container plants' furnaces and forming equipment and in other glass production, engineering, and quality assurance roles.

The complaints further allege that each company's use of the challenged Non-Compete Restrictions has the tendency or likely effect of harming competition, consumers, and workers, including by: (i) impeding the entry and expansion of rivals in the glass container industry, (ii) reducing employee mobility, and (iii) causing lower wages and salaries, reduced benefits, less favorable working conditions, and personal

hardship to employees.

III. Legal Analysis

Section 5 of the FTC Act prohibits "unfair methods of competition."[1] Congress empowered the FTC to enforce section 5's prohibition on "unfair methods of competition" to ensure that the antitrust laws could adapt to changing circumstances and to address the full range of practices that may undermine competition and the competitive process.[2] The Commission and federal courts have historically interpreted section 5 to prohibit conduct that is inconsistent with the policies or the spirit of the antitrust laws, even if that conduct would not violate the Sherman or Clayton Acts.[3]

The Commission's recent Section 5 Policy Statement describes the most significant general principles concerning whether conduct is an unfair method of competition.[4] A person violates section 5 by (1) engaging in a method of competition (2) that is unfair—i.e., conduct that "goes beyond competition on the merits."[5] A method of competition is "conduct undertaken by an actor in the marketplace" that implicates

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[1] 15 U.S.C. 45(a).

[2] *E.g.*, *Atl. Refining Co. v. FTC*, 381 U.S. 357, 367 (1965) ("The Congress intentionally left development of the term 'unfair' to the Commission rather than attempting to define the many and variable unfair practices which prevail in commerce.") (internal citations and quotation marks omitted); *see also* Fed. Trade Comm'n, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, Commission File No. P221202 (Nov. 10, 2022) [hereinafter "FTC Section 5 Policy Statement (2022)"], at 5 ("Congress struck an intentional balance when it enacted the FTC Act. It allowed the Commission to proceed against a broader range of anticompetitive conduct than can be reached under the Clayton and Sherman Acts, but it did not establish a private right of action under Section 5, and it limited the preclusive effects of the FTC's enforcement actions in private antitrust cases under the Sherman and Clayton Acts.").

[3] *E.g.*, *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394–95 (1953) ("The 'Unfair methods of competition', which are condemned by [Section] 5(a) of the [FTC] Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act. Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business.") (internal citations omitted); *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 463 (1941) (Commission may "suppress" conduct whose "purpose and practice . . . runs counter to the public policy declared in the Sherman and Clayton Acts"); *FTC v. Brown Shoe*, 384 U.S. 316, 321 (1966) (Commission's power reaches "practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws"); *E.I. du Pont de Nemours & Co. v. FTC (Ethyl)*, 729 F.2d 128, 136–37 (2d Cir. 1984) (Commission may bar "conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit"); *see also FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972); *FTC v. R.F. Keppel & Bros., Inc*., 291 U.S. 304, 309–10 (1934).

[4] FTC Section 5 Policy Statement (2022), *supra* note 2.

[5] *Id.* at 8–10.

competition, whether directly or indirectly.[6] Conduct is unfair if (a) it is "coercive, exploitative, collusive, abusive, deceptive, predatory," "involve[s] the use of economic power of a similar nature," or is "otherwise restrictive and exclusionary," and (b) "tend[s] to negatively affect competitive conditions" for "consumers, workers, or other market participants"—for example by impairing the opportunities of market participants, including potential entrants; interfering with the normal mechanisms of competition; limiting choice; reducing output; reducing innovation; or reducing competition between rivals.[7] The two parts of this test for unfairness "are weighed according to a sliding scale": where there is strong evidence for one part of the test, "less may be necessary" to satisfy the other part.[8] In appropriate circumstances, conduct may be condemned under section 5 without defining a relevant market, proving market power, or showing harm through a rule of reason analysis.[9]

In addition, the Commission may consider any asserted justifications for a particular practice.[10] Any such inquiry would focus on "[t]he nature of the harm" caused by the method of competition: "the more facially unfair and injurious the harm, the less likely it is to be overcome by a countervailing justification of any kind."[11] Unlike "a net efficiencies test or a numerical cost-benefit analysis," this analysis examines whether "purported benefits of the practice" redound to the benefit of other market participants rather than the respondent.[12] Established limits on defenses and justifications under the Sherman Act "apply in the Section 5 context as well," including that the justifications must be cognizable, non-pretextual, and narrowly tailored.[13]

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[6] *Id.* at 8.
[7] *Id.* 8–10.
[8] *Id*. at 9.
[9] *Id.* at 10.
[10] *Id.* at 10–12 ("There is limited caselaw on what, if any, justifications may be cognizable in a standalone Section 5 unfair methods of competition case, and some courts have declined to consider justifications altogether.").
[11] *Id.* at 11.
[12] *Id.*
[13] *Id.* at 11–12.

As described below, the factual allegations in the complaints would support concluding that each Respondent's use of the challenged Non-Compete Restrictions is an unfair method of competition under section 5. First, each Respondent's use of Non-Compete Restrictions is a method of competition. The challenged Non-Compete Restrictions are not mere "condition[s] of the marketplace, not of the respondent's making."[14] Rather, these are contract provisions that each Respondent required its employees to enter into, which, by their terms, restricted the employment options available to affected workers and therefore implicated competition for labor.

Second, each Respondent's use of the challenged Non-Compete Restrictions "goes beyond competition on the merits"[15] because it is coercive, exploitative, exclusionary, and restrictive as these terms are used in the FTC Section 5 Policy Statement. Non-Compete Restrictions typically result from employers' outsized bargaining power compared to that of employees. And, by reducing workers' negotiating leverage vis-à-vis their current employers, Non-Compete Restrictions tend to impair workers' ability to negotiate for better pay and working conditions.[16] The complaints here also allege that the challenged Non-Compete Restrictions had a tendency or likely effect of impeding the entry and expansion of rivals, as discussed below. As such, they are

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[14] *See id.* at 8.
[15] *See id.* at 8.
[16] *See, e.g.*, Dep't of the Treasury, Report, *Non-compete Contracts: Economic Effects and Policy Implications* (Mar. 2016) at 10, https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf ("When workers are legally prevented from accepting competitors' offers, those workers have less leverage in wage negotiations [with their current employer.]"). The strength of a worker's negotiating position with their current employer is largely based on the suitability of their next-best alternative employer (*i.e.*, the alternative employer that would offer the employee the best combination of wages and working conditions, net of any switching costs). Competing employers who fall within the scope of a Non-Compete Agreement, typically employers in the same industry and geographic area—are often the strongest competitor to a worker's current employer for that worker's labor. Such employers typically place the highest value on the worker's industry-specific skills, and workers generally face lower switching costs when moving to such employers. *See, e.g.*, David J. Balan, *Labor Non-Compete Agreements: Tool for Economic Efficiency, or Means to Extract Value from Workers?* 15 (2021), https://equitablegrowth.org/working-papers/labor-non-compete-agreements-tool-for-economic-efficiency-or-means-to-extract-value-from-workers/ (noting that workers often "are barred by the non-compete from [switching to] the[ir] best available alternative jobs").

exclusionary in a manner that violates the spirit and policies of the Sherman Act.[17] Finally, while competition on the merits "may include, for example . . . attracting employees and workers through the offering of better employment terms,"[18] Non-Compete Restrictions, by contrast, create a legal impediment that restricts workers from leaving their employment even if they find more attractive employment terms elsewhere. For this reason, Non-Compete Restrictions have long been considered proper subjects for scrutiny under the nation's antitrust laws.[19]

Third, the factual allegations in the complaints support a finding that each Respondent's challenged conduct has the tendency or likely effect of negatively affecting competition in the U.S. glass container industry. Specifically, the complaints allege that (i) each of the Respondents required employees across a variety of positions, including salaried employees who work with the glass container plants' furnace and forming equipment and in other glass production engineering, and quality assurance roles, to refrain from working for competing glass manufacturing companies for at least one year after the conclusion of their employment, (ii) the ability to identify and employ personnel with skill and experience in glass container manufacturing is a substantial barrier to entry and expansion, and (iii) the challenged restrictions have a tendency or likely effect of impeding the entry and expansion of rivals.

Fourth, the factual allegations in the complaints support a finding that each Respondent's challenged conduct has the tendency or likely effect of negatively affecting competitive conditions affecting workers in the U.S. glass container industry. In well-

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[17] *See generally, e.g.*, *ZF Meritor v. Easton Corp.*, 696 F.3d 254, 278–79 (3d Cir. 2012); *McWane, Inc. v. Fed. Trade Comm'n*, 783 F.3d 814, 835 (11th Cir. 2005); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 328 (1961); *Geneva Pharms. Tech. Corp. v. Barr Labs.*, 386 F.3d 485, 509 (2d Cir. 2004); *see also* FTC Section 5 Policy Statement (2022), at 8, 9, 12.

[18] FTC Section 5 Policy Statement (2022), *supra* note 2, at 8–9.

[19] *See, e.g.*, *U.S. v. Am. Tobacco Co.*, 221 U.S. 106 (1911); *Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057, 1082 (2d Cir. 1977); *Bradford v. N.Y. Times Co.*, 501 F.2d 51 (2d Cir. 1974); *Golden v. Kentile Floors, Inc.*, 512 F.2d 838 (5th Cir. 1975); *U.S. v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976); *Aydin Corp. v. Loral Corp.*, 718 F.2d 897 (9th Cir. 1983); *Consultants & Designers, Inc. v. Bulter Serv. Grp., Inc.*, 720 F.2d 1553 (11th Cir. 1983).

functioning labor markets, workers compete to attract employers, and employers compete to attract workers. For example, workers may attract potential employers by offering different skills and experience levels. Employers may attract potential employees by offering higher wages, better hours, a more convenient job location, more autonomy, more benefits, or a different set of job responsibilities. Because factors beyond price (wages) are important to both workers and employers in the job context, labor markets are "matching markets" as opposed to "commodity markets."[20]

In general, in matching markets, higher-quality matches tend to result when both sides—here, workers and employers—have more options available to them.[21] Having more options on both sides could, for example, allow for matching workers with jobs in which their specific skills are more valued, the hours demanded better fit their availability, or their commutes are shorter and more efficient. Matches could also be better in that various employers' compensation packages, which differ in terms of pay and benefits, are coupled with employees who value those offerings more and will, for example, tend to stay at those jobs longer as a result. Competition for labor allows for job mobility and benefits workers by allowing them to accept new employment, create or join new businesses, negotiate better terms in their current jobs, and generally pursue career advancement as they see fit.[22]

By preventing workers and employers from freely choosing their preferred jobs and candidates, respectively, Non-Compete Restrictions tend to impede and undermine competition in labor markets.[23] Research suggests that Non-Compete Restrictions

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[20] *See generally* David H. Autor, *Wiring the Labor Market*, 15 J. OF ECON. PERSPECTIVES 25–40 (2001); Enrico Moretti, *Local Labor Markets*, in 4b HANDBOOK OF LABOR ECONOMICS 1237–1313 (2011).
[21] *See, e.g.*, Dep't of the Treasury, Report, *The State of Labor Market Competition* (Mar. 7, 2022) at 5–7, https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf; Dep't of the Treasury, Report, *Non-compete Contracts: Economic Effects and Policy Implications*, *supra* note 16, at 3–5, 22–23.
[22] *See, e.g.*, Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants As A Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 407 (2006).
[23] *See, e.g.*, Dep't of the Treasury, Report, *The State of Labor Market Competition*, *supra* note 21, at 5–7.

measurably reduce worker mobility,[24] lower workers' earnings,[25] and increase racial and gender wage gaps.[26] At the individual level, a Non-Compete Restriction can force a worker who wishes to leave a job into a difficult choice: stay in the current position despite being able to receive a better job elsewhere, take a position with a competitor at the risk of being found out and sued, or leave the industry entirely. In this way, Non-Compete Restrictions tend to leave workers with fewer and lower-quality competing job options,[27] thereby reducing workers' bargaining leverage with their current employers and resulting in lower wages, slower wage growth, and less favorable working conditions.[28]

Here, the complaints allege that the challenged Non-Compete Restrictions have the tendency or likely effect of reducing employee mobility and causing lower wages and salaries, reduced benefits, less favorable working conditions, and personal hardship to employees.

Finally, as the complaints allege, any legitimate objectives of Respondents' use of the challenged Non-Compete Restrictions could be achieved through significantly less restrictive means, including, for example, by entering confidentiality agreements that prohibit employees and former employees from disclosing company trade secrets and other confidential information. Indeed, each of the Respondents nullified the challenged Non-Compete Restrictions after learning of the Commission's investigation, apparently

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[24] Matthew S. Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* 2 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381; Evan Starr, J.J. Prescott, & Norm Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J. L., ECON., & ORG. 633, 652 (2020); Evan Starr, Justin Frake, & Rajshree Agarwal, *Mobility Constraint Externalities*, 30 ORG. SCI. 961, 963–65, 977 (2019); Matt Marx, Deborah Strumsky, & Lee Fleming, *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55 MGMT. SCI. 875, 884 (2009).

[25] Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, 68 MGMT. SCI. 143, 144 (2021); Johnson, Lavetti, & Lipsitz, *supra* note 24.

[26] Johnson, Lavetti, & Lipsitz, *supra* note 24.

[27] *See, e.g.*, Jessica Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship* 21–22 (Dec. 24, 2019), https://ssrn.com/abstract=3040393.

[28] *See, e.g.*, Johnson, Lavetti, & Lipsitz, *supra* note 24; David J. Balan, *Labor Practices Can be an Antitrust Problem Even When Labor Markets are Competitive*, CPI ANTITRUST CHRONICLE (May 2020) at 8.

without incurring any notable impediment to their ability to achieve any legitimate business objectives.

IV. Proposed Orders

The proposed orders seek to remedy the Respondents' unfair methods of competition. Section II of each proposed order prohibits the Respondent from entering or attempting to enter, maintaining or attempting to maintain, or enforcing or attempting to enforce a Non-Compete Restriction with an Employee, or communicating to an Employee or a prospective or current employer of that Employee that the Employee is subject to a Non-Compete Restriction.[29] Paragraph IV.A requires the Respondent to take all steps necessary to void and nullify all existing Non-Compete Restrictions with Employees within 30 days after the date on which the proposed order is issued.[30]

The proposed orders also contain provisions designed to ensure compliance. Paragraph III.A of each proposed order requires the Respondent to provide written notice to Employees that have or recently had a Non-Compete Restriction that (i) the restriction is null and void, and (ii) the Employees may, after they stop working for Respondent, seek or accept jobs with any other company or person, run their own businesses, and compete with the Respondent.[31] Paragraph III.B requires Respondents to notify new Employees that they will not be subject to Non-Compete Restrictions by including a specified notice in the documentation provided to new Employees upon hire.[32]

Other paragraphs contain standard provisions regarding compliance reports, notice of changes in Respondents, and access for the FTC to documents and personnel.[33] The proposed orders' prohibitions apply only to Respondents' Employees within the United States, and the term of each proposed order is twenty years.[34]

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[29] *See* Decision & Order ¶ II.
[30] *Id.* ¶ IV.A.
[31] *Id.* ¶ III.A; App'x B.
[32] *Id.* ¶ III.B.
[33] *Id.* ¶¶ IV–VII.
[34] *Id.* ¶ IX.

By direction of the Commission, Commissioner Wilson dissenting.

April J. Tabor,

Secretary.

Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya

Today the Commission announced actions against several companies and their executives for imposing noncompete restrictions on their workers. As noted in the complaints, the Commission finds that the use of noncompetes by these firms constituted an unfair method of competition and violated Section 5 of the FTC Act. I am deeply grateful to our talented staff in the Bureau of Competition for their thorough and lengthy efforts to investigate and resolve these matters. The relief secured through these actions will benefit both workers and competition. Though all three actions target the unlawful use of noncompetes, they also reveal the distinct grounds on which noncompetes can be found to violate Section 5.

The Commission's action against Prudential and its two owners alleged that the firm's use of noncompetes against the security guards it employed was coercive, exploitative, and tended to negatively affect competitive conditions. As stated in the complaint, Prudential required its 1,000+ security guards to sign noncompetes as a condition of employment, preventing them from working for a competitor within a 100-mile radius and for two years after departing. The security guards earned low wages, with many earning slightly above minimum wage, and received minimal training from Prudential. The company also included in its employees' contract a "liquidated damages" clause, which required that employees pay Prudential a $100,000 penalty for violating the noncompete. Although a Michigan state court held that these noncompetes were unreasonable and unenforceable,[1] Prudential continued to repeatedly impose them. It also

[1] *Prudential Security, Inc. v. Pack*, No. 18-015809-CB (Mich. Cir. Ct. Dec. 13, 2018).

sued both former employees who had departed for jobs with rivals as well as the rival firms themselves, ultimately blocking workers from switching to jobs with higher wages.

The FTC's order requires Prudential to terminate its noncompetes with all the security guards it had hired and to actively notify all employees that these noncompete clauses are now null and void. Notably, Prudential recently exited the security guard business and sold nearly all of its assets. Although the new owner of Prudential's assets does not use noncompetes, the relief that FTC has secured is critical for addressing the harmful effects of Prudential's practices. For one, Prudential's history of aggressive enforcement could be reasonably expected to chill former employees' efforts to work in the security business and to dissuade rivals from hiring them.[2] Workers earning minimum wage would be rational to avoid even the slightest risk of facing a $100,000 penalty and associated lawsuits, and there is no guarantee that Prudential's former employees would even know that Prudential had exited the market and that the new owner states it has no plans to enforce the prior noncompetes. The order also covers Prudential's former owners, Greg Wier and Matthew Keywell, as well as any future business that they control— ensuring that they cannot repeat their coercive and exploitative tactics.

The Commission's actions against Owens-Illinois and Ardagh, meanwhile, target noncompetes in the highly concentrated glass manufacturing sector. Three firms dominate nationally, and these incumbents imposed noncompete restrictions on, collectively, thousands of employees, including those working in key glass production, engineering, and quality assurance roles. As the FTC's complaint notes, these noncompetes locked up highly specialized workers, tending to impede the entry and expansion of rivals and tending to negatively affect competitive conditions in violation of Section 5. While I cannot disclose confidential information uncovered through this

[2] In fact, there is considerable evidence that noncompetes hinder worker mobility even in states that do not enforce them. See, e.g., Evan Starr, J.J. Prescott & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J.L. ECON. ORG. 633 (2020).

investigation, the noncompetes used by Owens-Illinois and Ardagh had the potential to deprive aspiring entrants of access to a critical talent pool, thereby impeding entry into a relatively consolidated industry that has experienced tight supply and unmet customer demand. Moreover, when a small number of dominant players engage in the same restrictive practices, the negative effects can compound. Section 5 of the FTC Act is uniquely designed to address this type of conduct, where the cumulative effect of parallel actions can in the aggregate tend to negatively affect competitive conditions.[3] The relief secured by the FTC prohibits the firms from imposing, attempting to impose, enforcing, or threatening to enforce a noncompete with covered workers. The firms must also provide written notice that the noncompetes are null and void.

My colleague Commissioner Wilson dissents from these actions, claiming that they mark a "radical departure" from precedent.[4] Respectfully, I disagree.[5] The Supreme Court has affirmed the Commission's authority to challenge "inherently coercive" practices like those alleged against Prudential.[6] And it is clear that the widespread use of noncompetes in a highly concentrated industry—to the point where labor mobility is so

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[3] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022) [hereinafter "Section 5 Policy Statement"], *https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf*.

[4] Commissioner Wilson argues that our enforcement actions are in direct tension with a Seventh Circuit decision, *Snap-On Tools Corp. v. FTC*, 321 F.2d 825 (7th Cir. 1963). *Snap-On Tools* is distinguishable on several fronts, including the fact that it concerned noncompetes used in the business-to-business context, not those used by an employer to restrict its workers. Additionally, while the majority stated that it is "not prepared to say that [the termination restriction] is a per se violation of the antitrust laws," *id*. at 837, the Commission did not argue for a per se rule and so the issue was not litigated. *Id.* at 830-31; *id.* at 839 (Hastings, C.J., dissenting).

[5] It is important not to conflate recent Commission practice, which held off on enforcing the full scope of Section 5, with longstanding legal precedent, which firmly affirms that Section 5 reaches beyond the Sherman and Clayton Acts. Reactivating Section 5 and ensuring that our approach is fully faithful to the legal authorities that Congress gave us is critical for promoting the rule of law and for ensuring the democratic legitimacy of our work. *See* Section 5 Policy Statement, *supra* note 2 (reviewing and citing over 80 cases where the Commission pled violations of standalone Section 5); Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya on the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act (Nov. 10, 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/Section5PolicyStmtKhanSlaughterBedoyaStmt.pdf;* Remarks of Chair Lina M. Khan As Prepared for Delivery at Fordham Annual Conference on International Antitrust Law & Policy (Sept. 16, 2022), *https://www.ftc.gov/system/files/ftc_gov/pdf/KhanRemarksFordhamAntitrust20220916.pdf*.

[6] *Atl. Refin. Co. v. FTC*, 381 U.S. 357 (1965); *FTC v. Texaco, Inc*., 393 U.S. 223 (1968); *E.I. du Pont de Nemours & Co. v. FTC (Ethyl)*, 729 F.2d 128 (2d Cir. 1984).

reduced that entry may be thwarted—tends to negatively affect competitive conditions in ways that Section 5 is designed to prevent.[7]

Today's actions should put companies and the executives that run them on notice that using noncompetes to restrain workers and restrict competition invites legal scrutiny. We will continue to use our legal authorities to protect all Americans, including by investigating and, where appropriate, challenging restrictive contractual terms that tend to negatively affect competitive conditions.

[7] *FTC v. Motion Picture Advert. Serv. Co*., 344 U.S. 392 (1953); *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 309 (1949).

Dissenting Statement of Commissioner Christine S. Wilson

Today, the Commission announced that it has accepted, subject to final approval, consent agreements with two companies in the glass container industry. The consents resolve allegations that the use of non-compete agreements in employee contracts constitutes an unfair method of competition that violates section 5 of the FTC Act. These cases, which allege stand-alone violations of section 5, are among the first to employ the approach that the recently issued Section 5 Policy Statement[1] describes. For the reasons explained below, I dissent.

Context is important. Under current leadership, the Commission has demanded significant volumes of information from parties under investigation, but not all requested information is related to traditional competition analysis.[2] In addition, this Commission has declared its willingness to take losing cases to court.[3] When faced with the expense of complying with expansive demands for documents and other material, and the possibility of an enforcement action regardless of the merits, parties under investigation rationally may express a willingness to settle. Under these circumstances, staff's investigation typically is quite limited.

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[1] Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf.

[2] *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, *There's Nothing New Under the Sun: Reviewing Our History to Foresee the Future*, Keynote Address at GCR Live Merger Control 8-9, Virtually and Brussels, Belgium (October 7, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597798/gcr_merger_control_keynote_final.pdf.

[3] *See* Lina M. Khan, Chair, Fed. Trade Comm'n, *How FTC Chair Lina Khan wants to modernize the watchdog agency*, Marketplace interview with Kimberly Adams, https://www.marketplace.org/shows/marketplace-tech/how-ftc-chair-lina-khan-wants-to-modernize-the-watchdog-agency/, (June 17, 2022) ("We always want to win the cases that we're bringing. That said, it's no secret that in certain areas, you know, there's still work to be done to fully explain to courts how our existing laws and existing authorities, which go back over 100 years, apply in new context. . . . And I think there can be a serious cost of inaction. So we really have a bias in favor of action."); David McCabe, *Why Losing to Meta in Court May Still Be a Win for Regulators*, New York Times, https://www.nytimes.com/2022/12/07/technology/meta-vr-antitrust-ftc.html (Dec. 7, 2022) ("In April, Ms. Khan said at a conference that if 'there's a law violation" and agencies "think that current law might make it difficult to reach, there's huge benefit to still trying.' She added that any courtroom losses would signal to Congress that lawmakers needed to update antitrust laws to better suit the modern economy. 'I'm certainly not somebody who thinks that success is marked by a 100 percent court record,' she said.").

Noteworthy Aspects of the Complaints

There are several noteworthy aspects of the Complaints issued against O-I Glass and Ardagh. The first is the brevity of these documents; each Complaint runs three pages, with a large percentage of the text devoted to boilerplate language. Given how brief they are, it is not surprising that the complaints are woefully devoid of details that would support the Commission's allegations. In short, I have seen no evidence of anticompetitive effects that would give me reason to believe that respondents have violated section 5 of the FTC Act.

The second noteworthy aspect of these complaints is their omission of any allegations that the non-compete provisions at issue are unreasonable, a significant departure from hundreds of years of legal precedent. The first complaint alleges that O-I Glass entered into non-compete agreements with employees that prohibited them from working for competitors of O-I in the United States for one year following the conclusion of their employment with O-I.[4] And the second complaint alleges that Ardagh's contracts typically prohibited employees from performing the same or substantially similar services to those the employee performed for Ardagh for any glass container competitor of Ardagh in the United States, Canada, or Mexico for two years following the conclusion of their employment with Ardagh.[5]

Courts have long analyzed the temporal length, subject matter, and geographic scope of non-compete agreements to determine whether those agreements are unreasonable; when non-compete agreements are not found to be unreasonable, courts repeatedly have held that they do not violate the antitrust laws.[6] In the cases before us, the Commission makes no reasonableness assessment regarding the duration or scope of the

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[4] O-I Glass, Inc. Complaint ¶ 7.
[5] Ardagh Group S.A. Complaint ¶ 7.
[6] *See* United States v. Empire Gas Corp., 537 F.2d 296, 307-08 (8th Cir. 1976); Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 267 (7th Cir. 1981); Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057, 1081-83 (2d Cir. 1977); Bradford v. New York Times Co., 501 F.2d 51, 57-59 (2d Cir. 1974).

non-compete clauses. Instead, it seems to treat the non-compete clauses as per se unlawful under Section 5 of the FTC Act. But the Seventh Circuit held that under Section 5, "[r]estrictive [non-compete] clauses . . . are legal unless they are unreasonable as to time or geographic scope[.]"[7] Notably, the Seventh Circuit further found that "even if [the non-compete] restriction is unreasonable as to geographic scope," it was "not prepared to say that it is a per se violation of the antitrust laws."[8]

A third noteworthy aspect of the complaints concerns the absence of allegations that the non-compete clauses in the O-I Glass and Ardagh contracts were enforced.[9] Absent efforts to enforce a non-compete provision, courts have been unwilling to find a violation of the antitrust laws.[10]

Fourth, the complaints assert that the non-compete clauses impede entry or expansion of rivals in the glass container industry, based on a claim that barriers to entry in the glass container industry include "the ability to identify and employ personnel with skills and experience in glass container manufacturing."[11] But the Commission makes no factual allegations regarding the inability of any rival to enter or expand. Moreover, this asserted barrier to entry and expansion in the industry is newly alleged by the Commission; in 2013, the Commission challenged the proposed merger of Ardagh Group S.A. and Saint-Gobain Containers, Inc. following a lengthy and thorough investigation. The complaint described in detail the barriers to entry in the glass container industry but did not reference the difficulty of obtaining experienced employees.[12]

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[7] Snap-On Tools Corp. v. Fed. Trade Comm'n, 321 F.2d 825, 837 (7th Cir. 1963).
[8] *Id.*
[9] *Compare* O-I Glass, Inc. Complaint and Ardagh Group S.A. Complaint *with* Prudential Security, Inc. Complaint ¶¶ 18-21.
[10] O-Regan v. Arbitration Forums, Inc., 121 F.3d 1060, 1065-66 (7th Cir. 1997) ("to apply antitrust laws to restrictive employment covenants, there must be some attempted enforcement of an arguably overbroad portion of the covenant in order for there to be a federal antitrust violation."); Lektro-Vend Corp. v. Vendo Co., 660 F.2d at 267.
[11] O-I Glass, Inc. Complaint ¶ 6; Ardagh Group S.A. Complaint ¶ 6.
[12] The complaint in that merger challenge alleged that:

> "Effective entry or expansion into the relevant markets would neither be timely, likely, or sufficient to counteract the Acquisition's likely anticompetitive effects. The barriers

Continuing in this vein, the complaints here also assert that the non-compete provisions reduce employee mobility and "caus[e] lower wages and salaries, reduced benefits, less favorable working conditions, and personal hardships to employees."[13] But the complaints do not identify a relevant market for skilled labor as an input to glass container manufacturing, and fail to allege a market effect on wages or other terms of employment. Even the Analysis to Aid Public Comment relies only on academic literature that discusses the effects of non-competes, albeit not in the glass container industry.

Similarly, the complaints allege that more than 1,000 employees at O-I and more than 700 employees at Ardagh were subject to non-compete agreements when the Commission opened the investigation, and that some of those employees were essential to a rival's entry or expansion.[14] The allegations imply that, conversely, many employees that were subject to non-compete agreements did *not* have industry-specific skills.[15] Consider, for example, employees in the glass container industry who worked in the fields of human resources or accounting, with skills sets that are easily transferable across industries. If they were subject to non-competes following their departure from O-I or Ardagh, these employees easily could seek employment in other industries, including retailing and the services sector. It is implausible that precluding employees with easily transferable skill sets from working for rivals in glass container manufacturing would

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> facing potential entrants include the large capital investment necessary to build a glass plant, the need to obtain environmental permits, the high fixed costs of operating a glass plant, existing long-term contracts that foreclose much of the market, the need for specific manufacturing knowledge that is not easily transferred from other industries, and the molding technologies and extensive mold libraries already in place at existing manufacturers."

In the Matter of Ardagh Group S.A. and Saint-Gobain Containers, Inc., File No. 131-0087, https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130701ardaghcmpt.pdf (2013) Complaint ¶ 42.

[13] O-I Glass, Inc. Complaint ¶ 8; Ardagh Group S.A. Complaint ¶ 8.

[14] O-I Glass, Inc. Complaint ¶ 7; Ardagh Group S.A. Complaint ¶ 7.

[15] *See also* O-I Glass, Inc. Decision and Order Appendix A and Ardagh Group S.A. Decision and Order Appendix A (listing positions for which the use of non-compete agreements is prohibited, which includes positions that have general skills).

have an impact on competition in any appropriately defined relevant market.

Absent any evidence, the Commission adopts the approach of the Section 5 Policy Statement and baldly alleges that the use of non-compete agreements "has a tendency or likely effect of harming competition, consumers, and workers," offering only a hypothesized outcome.

Business Justifications

The complaints improperly discount business justifications for the non-compete provisions. First, they allege in conclusory fashion that "[a]ny legitimate objectives . . . could have been achieved through significantly less restrictive means, including . . . confidentiality agreements that prohibit employees and former employees from disclosing company trade secrets and other confidential information."[16] This assertion is unsubstantiated.

Second, the complaints do not address the business justification and procompetitive benefit of employer-provided training. The complaints allege that identifying and employing personnel with skills and experience in glass container manufacturing is a barrier to entry, which implies that employee training and experience is essential and that the desired training is not available from sources other than industry incumbents. Firm-provided training is an accepted and documented business justification for non-compete clauses; firms are less willing to invest in employee training if employees leave the firm after receiving training.[17] The complaints do not allege that there is a less restrictive alternative for non-compete provisions regarding firm-provided training. Moreover, it is ironic that the orders issued in these matters may lead to reduced firm-sponsored training, which may (1) reduce the available trained labor that would

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[16] O-I Glass, Inc. Complaint ¶ 9; Ardagh Group S.A. Complaint ¶ 9.
[17] *See* Evan Starr, *Consider This: Training, Wages, and the Enforceability of Non-Compete Clauses*, 72 I.L.R, Rev 783, 796-97 (2019); Matthew S. Johnson & Michael Lipsitz, *Why Are Low-Wage Workers Signing Noncompete Agreements?*, 57 J. Hum. Res. 689, 711 (2022).

allow entry or expansion of competing firms and (2) harm the same employees at O-I Glass and Ardagh that the cases claim to help.

Although the complaints are dismissive of business justifications, the relief obtained implicitly acknowledges the existence of legitimate business justifications for non-compete clauses. Specifically, the Agreements Containing Consent Orders prohibit the use of non-compete clauses for covered employees, which are described by a list of positions in Appendix A. Careful review of those lists reveals that senior executives and employees involved in research and development are not included. Although not acknowledged in the Analysis to Aid Public Comment, the Commission here implicitly has credited at least some business justifications for non-compete clauses.

Concerns for Due Process

I am concerned whether the respondents had notice that their conduct would be viewed as unlawful. As noted above, the allegations here depart from a centuries-long line of precedent regarding the appropriate analysis of the legality of non-compete provisions, and conflict with a Seventh Circuit holding specific to section 5 of the FTC Act. The allegations are premised on the Section 5 Policy Statement issued in November 2022, which also represents a radical departure from precedent. But the complaints in these matters challenge conduct of O-I Glass and Ardagh that predates the November 2022 Section 5 Policy Statement. The Second Circuit explained in *Ethyl* that "the Commission owes a duty to define the conditions under which conduct . . . would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability."[18] Given the state of the law for hundreds of years prior to this enforcement challenge, I believe notice was lacking.

[18] E.I. du Pont de Nemours & Co. v. F.T.C., 729 F.2d 128, 139 (2d Cir. 1984). *See also id.* at 136 ("Review by the courts was essential to assure that the Commission would not act arbitrarily or without explication but according to definable standards that would be properly applied.").

[FR Doc. 2023-00695 Filed: 1/13/2023 8:45 am; Publication Date: 1/17/2023]