

# FTC Proposes Rule Banning Noncompete Clauses with Workers

On January 5, 2023, the Federal Trade Commission (“FTC”) voted 3–1 to issue a notice of proposed rulemaking (“NPRM”) that, if adopted, would broadly ban noncompete clauses with workers (the “Proposed Rule”) as an “unfair method of competition” under Section 5 of the FTC Act.<sup>1</sup> The NPRM follows the FTC’s November 2022 statement articulating an expansive view of the scope of its authority to challenge “unfair methods of competition” under Section 5,<sup>2</sup> President Biden’s July 2021 executive order encouraging the FTC to use its “statutory rulemaking authority” to curtail noncompete clauses<sup>3</sup> and FTC enforcement actions announced the day before the NPRM, which challenged three companies’ noncompete clauses as violating Section 5.<sup>4</sup> The FTC intends the Proposed Rule to have a profound impact and to further its stated goal of using antitrust to address labor concerns. The NPRM estimates that at least one in five American workers (~30 million people) is bound by a noncompete clause and that the Proposed Rule would increase workers’ total earnings by up to \$296 billion per year.<sup>5</sup>

Several key takeaways from the Proposed Rule are:

- The Proposed Rule would make it illegal for an employer to enter into, attempt to enter into or maintain a noncompete clause with a worker (including unpaid employees and independent contractors) or to represent to a worker that the worker is subject to a noncompete clause. It would also require employers to rescind any existing noncompete clauses and inform workers that they are no longer in effect. Although the Proposed Rule does not automatically apply to other types of employment restrictions, like non-disclosure agreements, such restrictions could be subject to it if they are “so broad in scope that they function as *de facto* non-compete clauses”.<sup>6</sup>
- Issuing the NPRM is the first step in the FTC’s rulemaking process. The Proposed Rule is subject to a 60-day public comment period. The FTC is seeking comments on all aspects of the Proposed Rule, as well as several possible alternatives that the Commission has proposed.<sup>7</sup>
- The FTC has not yet provided a timeline for when a Final Rule may be implemented. After the 60-day comment period, the FTC may vote to implement the Proposed Rule or may update or revise it in light of the public’s comments.
- Commissioner Wilson’s dissent previews several anticipated legal challenges to a rule, should the Commission decide to promulgate one.<sup>8</sup>

The Proposed Rule, the accompanying NPRM and the FTC's recent enforcement actions on noncompete clauses provide insights into how the FTC views such provisions. The Proposed Rule will also likely be the first test of the Commission's use of its claimed authority to fashion antitrust regulations. The effort is likely to face significant legal challenges and it remains to be seen whether and to what extent the FTC's claim of antitrust regulatory authority will be upheld by the courts.

### FTC'S PROPOSED RULE BANNING NONCOMPETE CLAUSES & RECENT ENFORCEMENT ACTIONS.

#### *Proposed Rule Banning Noncompete Clauses.*

The Proposed Rule would make it a violation of Section 5 of the FTC Act for an employer to enter into, attempt to enter into or maintain a noncompete clause with a worker or to represent to a worker that the worker is subject to a noncompete clause.<sup>9</sup> It would also require employers to rescind any existing noncompete clauses and inform current and former workers that they are no longer in effect.<sup>10</sup> The Proposed Rule provides "model language" that can be used to implement the notice requirement, although "different language" may be used as long as it communicates that the noncompete clauses is no longer in effect and may not be enforced.<sup>11</sup> Under the Proposed Rule, an employer complies with the recission requirement where it provides the required notice to current and former employees.<sup>12</sup>

Some key additional points follow:

- The Proposed Rule, if adopted, would apply to all employers who hire or contract with workers<sup>13</sup> and to any paid and unpaid employees as well as independent contractors.<sup>14</sup>
- The Proposed Rule carves out noncompete clauses that meet two requirements: (1) they must be entered into by a person "selling a business entity", disposing of "all of the person's ownership interests in the business entity" or selling "all or substantially all of a business entity's operating assets"; and (2) the person restricted by the noncompete clause must be a "substantial" owner, member or partner in the business entity

(i.e., holding at least 25% ownership interest) at the time she enters into the noncompete clause.<sup>15</sup> Noncompete clauses between franchisors and franchisees are also excepted.<sup>16</sup>

- The Proposed Rule purports to supersede any state statute, regulation, order or interpretation that may be inconsistent with the Proposed Rule, unless it affords greater protection to workers than the Proposed Rule.<sup>17</sup>
- Compliance with the Proposed Rule would be required within 180 days of publication of the final rule.<sup>18</sup> Notice to current and former employees would be required within an additional 45 days.<sup>19</sup>

In the NPRM, the FTC claims that Sections 5 and 6(g) of the FTC Act, 15 U.S.C. §§ 45, 46(g), taken together, allow the Commission to issue regulations declaring practices to be "unfair methods of competition".<sup>20</sup> The NPRM applies the FTC's new standards for determining whether conduct constitutes an "unfair method of competition" articulated in its November 10, 2022 Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act.<sup>21</sup> The FTC asserts under this new rubric that noncompete clauses are: (1) a "method of competition" (i.e., conduct in a marketplace that implicates competition);<sup>22</sup> (2) that is "unfair" because, *inter alia*, noncompete clauses constitute restrictive conduct that is "exploitative and coercive" to workers and that negatively affects competition not only in labor markets but also in markets for underlying products and services.<sup>23</sup> Finally, the FTC ultimately concludes that the common business justifications for noncompete clauses do not overcome its determination that they are an "unfair method of competition" because (1) employers have reasonable alternatives;<sup>24</sup> and (2) in the FTC's view, the asserted benefits do not outweigh the harm from noncompete clauses.<sup>25</sup>

#### *Recent Noncompete Clause Enforcement Actions.*

The FTC's issuance of the NPRM immediately follows enforcement actions taken against companies for noncompete practices.<sup>26</sup> Last week, the FTC challenged noncompete clauses by two glass container manufacturers and two security firms and

their co-owners as constituting unfair methods of competition in violation of Section 5 of the FTC Act, and entered into consent orders with the defendants.<sup>27</sup> While they are subject to final approval, each consent order requires the respondents to:

- Not enforce, threaten to enforce or otherwise use the noncompete clauses at issue;
- Void and nullify the challenged noncompete clauses without penalizing the affected employees;
- Provide copies of the order to current and past employees subject to the challenged clauses;
- Provide a copy of the complaint and order to current and future directors, officers and employees of the companies who are responsible for hiring and recruiting; and
- Provide a clear and conspicuous notice to any new relevant employees that they may freely seek or accept a job with any company or person, run their own business or compete with them at any time following their employment.<sup>28</sup>

These cases challenge noncompete clauses in two distinct factual contexts. In one, the noncompete clauses imposed significant financial penalties on low-wage security guards that the companies required employees to sign *even after* the clauses had been declared unreasonable and unenforceable by a Michigan state court.<sup>29</sup> In the others, glass manufacturers imposed noncompete clauses across a variety of highly specialized positions from furnace workers to engineers, which, according to the FTC, had the potential to deny potential entrants access to a “critical talent pool” thereby “impeding entry into a relatively consolidated industry”.<sup>30</sup>

#### *Commissioner Wilson’s Dissents.*

In dissent, Commissioner Wilson criticizes the Proposed Rule for “represent[ing] a radical departure from hundreds of years of legal precedent that employs a fact-specific inquiry into whether a non-compete clause is unreasonable in duration and scope, given the business justification for the restriction.”<sup>31</sup> Among other things, she argues the NPRM failed to establish the requisite harm to workers or competitive conditions to trigger a violation of Section 5.<sup>32</sup> Commissioner Wilson asserts

that, rather than a blanket ban, noncompete clauses should continue to be evaluated under state law on a fact-specific, case-by-case basis that considers the legitimate business justifications that support the use of noncompete clauses.<sup>33</sup>

Commissioner Wilson also issued dissenting statements concerning the consent orders.<sup>34</sup> She articulates her “concern that the [Section 5 Statement] would be used to condemn conduct summarily as an unfair method of competition based on little more than the assignment of adjectives.”<sup>35</sup> Commissioner Wilson sharply criticizes the FTC’s approach, which “foreshadows how the Commission will apply the new Section 5 Policy Statement. Practices that three unelected bureaucrats find distasteful will be labeled with nefarious adjectives and summarily condemned, with little to no evidence of harm to competition.”<sup>36</sup>

#### FTC SOLICITING COMMENTS ON ALL ASPECTS OF THE PROPOSED RULE AND ALTERNATIVE RULES.

The FTC is seeking public comment on the Proposed Rule for 60 days beginning on the date the NPRM is published in the *Federal Register* on “all aspects” of the Proposed Rule and the NPRM.<sup>37</sup> It calls for comment on, *inter alia*, (1) the extent to which employers use choice-of-law provisions to evade the laws of states where noncompete clauses are less enforceable and the extent to which a federal standard would promote certainty for workers, (2) the FTC’s determination that noncompete clauses are “unfair”, including calling for comments and additional data regarding its finding that noncompete clauses harm competition in labor markets and in the markets for the relevant products and services; (3) whether employers have reasonable alternatives to noncompete clauses; and (4) whether the Proposed Rule should also ban non-contractual provisions in workplace policies that state employees are prohibited from working for competitors after their employment ends. The FTC is also seeking comment on several alternatives to the Proposed Rule, including (1) a rebuttable presumption of unlawfulness, and what the test for rebutting that presumption should be, in lieu of a categorical ban; and (2) whether there should be exemptions or

different standards for different categories of workers, including whether different regulatory standards should apply to senior executives or a broader category of highly paid or highly skilled workers.

The current solicitation for public comment may be the only opportunity concerned stakeholders will have to provide input on the Proposed Rule and the proposed alternatives.<sup>38</sup>

#### LEGAL CHALLENGES TO THE PROPOSED RULE AND THE FTC'S CLAIMED STATUTORY RULE-MAKING AUTHORITY EXPECTED.

The FTC has not disclosed a timeline for any final decision or action on the Proposed Rule. However, if it is adopted in any form, we expect it will face significant legal challenges in short order.<sup>39</sup>

In her dissenting statement, Commissioner Wilson notes that the Proposed Rule and NPRM are “vulnerable to meritorious challenges”, including that (1) “the Commission lacks authority to engage in ‘unfair methods of competition’ rulemaking”;<sup>40</sup> (2) “the major questions doctrine addressed in *West Virginia v. EPA* applies, and the Commission lacks clear Congressional authorization to undertake this initiative”;<sup>41</sup> and (3) “assuming [the FTC] does possess the authority to engage in this rulemaking, it is an impermissible delegation of legislative authority under the non-delegation doctrine, particularly because the Commission has replaced the consumer welfare standard with one of multiple goals”.<sup>42</sup> Commissioner Wilson predicts that the Proposed Rule “will lead to protracted litigation in which the Commission is unlikely to prevail”.<sup>43</sup>

These criticisms mirror those of prior commissioners and others who question whether the FTC has statutory rulemaking authority under Section 6(g) of the FTC Act; and, if so, whether that authority is constitutional.<sup>44</sup> The NPRM points to Section 6(g) and the D.C. Circuit’s 1973 decision in *National Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), as clear precedent supporting its unfair methods of competition rulemaking authority.<sup>45</sup> Section 6(g) provides that “[t]he Commission shall also have power . . . to make rules and regulations for

the purpose of carrying out the provisions of this subchapter”.<sup>46</sup> Skeptics of the FTC’s unfair method of competition rulemaking authority<sup>47</sup> argue that several aspects of the structure of the FTC Act and legislative history do not support a claim to substantive rulemaking authority. They contend that *National Petroleum Refiners* is inconsistent with modern administrative law jurisprudence, especially for a rule likely to trigger the major questions doctrine.<sup>48</sup> They also argue that, if it did exist, the scope of the regulatory authority would be so vast as to violate the separation of powers embedded in the U.S. Constitution.<sup>49</sup>

If the final rule—like the current Proposed Rule—contains a categorical ban on noncompete clauses, there may also be legal challenges to whether the Commission is correct that noncompete clauses are *categorically* unfair methods of competition. Commissioner Wilson criticizes the NPRM’s determination as insufficiently predicated on “adjectives” and “little evidence” of competitive harm.<sup>50</sup> It also remains to be seen whether the courts, which have been moving increasingly toward applying the rule of reason framework to antitrust questions in recent decades, will uphold the Proposed Rule, which essentially subjects noncompete clauses to *per se* illegality.<sup>51</sup>

#### BROADER IMPLICATIONS OF FTC'S USE OF COMPETITION STATUTORY RULE-MAKING AUTHORITY.

The FTC’s move to ban noncompete clauses reflects its broader policy trajectory. As discussed in Cravath’s client memo on the Section 5 Policy Statement,<sup>52</sup> the FTC under the Biden Administration has signaled a desire to expand its authority in other areas of interest like healthcare, agriculture, private equity and “Big Tech”. As with noncompete clauses, policymakers have been previewing action in these sectors for months.

As we previewed in November, the FTC will attempt to use a variety of tools at its disposal to further this agenda including (1) rulemaking and (2) use of consent decrees to establish precedent to enforce Section 5 on a standalone basis.<sup>53</sup> The FTC followed this playbook in its actions last week against

noncompete clauses. Doing so enables the agency to bolster through enforcement actions its legal and policy case for promulgating regulations. The FTC may follow the same playbook going forward, identifying disfavored practices in areas of interest through complaints or consent orders, possibly followed by proposed rulemaking.

President Biden’s July 2021 Executive Order and the FTC’s Section 5 Statement highlight other areas where the FTC may seek to issue further rules.<sup>54</sup> The Executive Order encourages the FTC to exercise its “statutory rulemaking authority” in areas such as “unfair data collection and surveillance practices”, “unfair anticompetitive restrictions on third-party repair or self-repair. . . that prevent farmers from repairing their own equipment”, pay-for-delay settlements or agreements in the prescription drug industry, “unfair competition in major Internet marketplaces”, “unfair occupational licensing restrictions”, and tying or exclusionary practices in the brokerage or listing of real estate.<sup>55</sup> The Section 5 Statement similarly identifies categories of conduct that may be targets for further FTC rulemaking, including (1) conduct deemed to be an “incipient violation of the antitrust laws”, such as “invitations to collude”, “a series of [transactions] that . . . individually may not have violated the antitrust laws” and “loyalty rebates, tying, bundling, and exclusive dealing arrangements that have the tendency to ripen into violations of the antitrust laws by virtue of industry conditions and the respondent’s position within the industry”; and (2) conduct deemed to violate the “spirit of the antitrust laws”, such as conduct that leverages market power in one market to entrench power or impede competition in the same or related market, acquisitions of nascent competitors, discriminatory refusals to deal or “interlocking directors and officers of competing firms not covered by the literal language of the Clayton Act”.<sup>56</sup>

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Although the Proposed Rule is not yet final, the FTC has signaled its position that noncompete clauses constitute an “unfair method of competition” in violation of Section 5 of the FTC Act. Companies should consider whether to submit comments to the

agency during the notice and comment period. It remains to be seen whether the Proposed Rule will be updated or revised following the public comment period, and whether it will survive a legal challenge. We will also be watching how courts receive litigated FTC enforcement action regarding noncompete clauses under Section 5, should they be brought. For now, companies seeking to protect investments in their employees and confidential information should enlist experienced counsel to examine existing covenants in light of the rapidly changing enforcement landscape. Recent FTC enforcement actions suggest, for example, that imposing and attempting to enforce noncompete clauses not enforceable under state law, or in a concentrated industry where access to workers is important for entry, may attract particularly close agency scrutiny. Companies should examine and be prepared for increased scrutiny not only of traditional noncompete clauses but also of other restrictive covenants or company policies that the FTC may view as “de facto noncompetes”.

The FTC’s recent steps to ban noncompete clauses—including the three complaints issued on January 4th and the NPRM—are another step in the FTC and DOJ’s movement toward their stated policy goal of using antitrust law to protect workers. The FTC has also stated as goals addressing consolidation and countering market dominance, particularly in targeted industries like technology, agriculture, healthcare and private equity. As with its newly broad Section 5 Statement and the upcoming revised merger guidelines, the FTC has signaled that it believes competition rulemaking to be a tool in its arsenal that it can and will use to accomplish this agenda. These steps also demonstrate the FTC’s intent to increase antitrust scrutiny of conduct that has not traditionally been seen as violating the antitrust laws. Companies should expect the FTC (and the Antitrust Division of the DOJ) to use these tools and explore new theories in enforcement and regulatory actions targeting conduct that was previously considered permissible. Given these fast-paced developments, companies should engage with antitrust counsel to anticipate and adapt to the agencies’ expanding antitrust enforcement agenda.



- 1 Press Release, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition, Fed. Trade Comm'n (Jan. 5, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition>; *see also* Federal Register Notice, Non-Compete Clause Rulemaking, Proposed Rule, Fed. Trade Comm'n (Jan. 5, 2023) [hereinafter "Proposed Rule"], <https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking>; Notice of Proposed Rulemaking, Non-Compete Clause Rule (proposed Jan. 5, 2023) [hereinafter NPRM] (to be codified at 16 CFR § 910), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p201000noncompetenprm.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetenprm.pdf). Chair Lina Khan and the other two Democratic Commissioners issued statements in support of the Proposed Rule. *See* Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding the Notice of Proposed Rulemaking to Restrict Employers' Use of Noncompete Clauses (Jan. 5, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/statement-of-chair-lina-m-khan-joined-by-commrs-slaughter-and-bedoya-on-noncompete-nprm.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/statement-of-chair-lina-m-khan-joined-by-commrs-slaughter-and-bedoya-on-noncompete-nprm.pdf); Statement of Commissioner Slaughter Joined by Commissioner Alvaro M. Bedoya on the Notice of Proposed Rulemaking on Non-Compete Clauses Rule (Jan. 5, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/statement-of-commissioners-slaughter-and-bedoya-on-proposed-rulemaking-noncompete.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/statement-of-commissioners-slaughter-and-bedoya-on-proposed-rulemaking-noncompete.pdf). The sole Republican Commissioner, Christine Wilson, issued a dissent. Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule (Jan. 5, 2023) [hereinafter Wilson Dissent], [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p201000noncompetewilsondissent.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf).
- 2 Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Fed. Trade Comm'n (Nov. 10, 2022) [hereinafter Section 5 Statement], [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyStatement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf); *see also* FTC Intends To Expand Scope of Section 5 of the FTC Act, Cravath, Swaine & Moore LLP (Nov. 22, 2022), <https://www.cravath.com/a/web/au2NFVneDX1HpftMxLunh/4HHYwi/ftc-intends-to-expand-scope-of-section-5-of-the-ftc-act.pdf>.
- 3 Exec. Order No. 14036, Promoting Competition in the American Economy, 86 Fed. Reg. 36987, 36992 (Jul. 9, 2021) <https://www.federalregister.gov/documents/2021/07/14/2021-15069/promoting-competition-in-the-american-economy>.
- 4 Press Release, FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers, Fed. Trade Comm'n (Jan. 4, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers>.
- 5 NPRM, at 76.
- 6 *Id.* at 11; *see also* Proposed Rule § 910.1(b)(1) (defining "non-compete clause" as "a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer"); *id.* § 910.1(b)(2) (articulating a "functional test for whether a contractual term is a non-compete clause"; a "*de facto* non-compete clause" is one that "has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer"). The Proposed Rule provides a non-exhaustive list of two examples of "*de facto* non-compete clauses": (1) broad non-disclosure agreements and (2) contracts that require workers to pay employers for training costs if the worker's employment terminates within a specified time period, where such payments are not "reasonably related to the [training] costs the employer incurred". *Id.* § 910.1(b)(2).
- 7 Federal Register Notice, Non-Compete Clause Rulemaking, FTC (Jan. 5, 2023), <https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking>.
- 8 *See generally* Wilson Dissent, at 1-2.
- 9 Proposed Rule § 910.2(a) ("It is an unfair method of competition for an employer to enter into or attempt to enter into a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause.").
- 10 *Id.* § 910.2(b) (detailing rescission and notice requirements).
- 11 *See id.* § 910.2(b)(2)(C).
- 12 *Id.* § 910.2(b)(3).
- 13 *See id.* § 910.1(c) (defining "employer" as any natural person, partnership, corporation, association or other legal entity that "hires or contracts with a worker to work for the person"). Although the Proposed Rule does not contain any text indicating that the Proposed Rule is limited to noncompete clauses that affect workers in the United States, it is worth noting that Section 5 of the FTC Act expressly does not apply to "unfair methods of competition involving commerce with foreign nations . . . unless . . . such methods of competition have a direct, substantial, and reasonably foreseeable effect—(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or (ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States". 15 U.S.C. § 45(a)(3)(A).
- 14 *Id.* § 910.1(f) (defining "worker" as any "natural person who works, whether paid or unpaid, for an employer" including without limitation "an employee, individual classified as an independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides a service to a client or customer").
- 15 *Id.* § 910.3 (exemption); *id.* § 910.1(e) (defining substantial owner, substantial member and substantial partner). The exempted noncompete clauses remain subject to federal antitrust law as well as all other applicable law. *Id.* § 910.3.
- 16 *Id.* § 910.1(f) (excluding franchisor-franchisee noncompete clauses from Proposed Rule, but including noncompete clauses that apply to persons working for franchisors or franchisees). Noncompete clauses between franchisors and franchisees remain subject to federal antitrust law as well as any other applicable law. *Id.*
- 17 *Id.* § 910.4.
- 18 *Id.* § 910.5.
- 19 *Id.* § 910.2(b)(2)(A) ("The employer must provide the notice to the worker within 45 days of rescinding the non-compete clause").
- 20 NPRM, at 67-68.
- 21 *See generally* Section 5 Statement; *see also* FTC Intends To Expand Scope of Section 5 of the FTC Act, Cravath, Swaine & Moore LLP (Nov. 22, 2022), <https://www.cravath.com/a/web/au2NFVneDX1HpftMxLunh/4HHYwi/ftc-intends-to-expand-scope-of-section-5-of-the-ftc-act.pdf>.
- 22 NPRM, at 88-89.
- 23 *See id.* at 69-88.
- 24 *Id.* at 93-101. The FTC states that these "alternatives" include trade secret law, non-disclosure agreements, and other contractual means.
- 25 *Id.* at 101-105.
- 26 According to the FTC, the Proposed Rule reflects the culmination of several years of Commission activity regarding noncompete clauses, including a January 2020 public workshop, after which the FTC sought public comment regarding the effects of noncompete clauses and whether the Commission should issue rulemaking on noncompete clauses, and President Biden's July 2021 executive order, after which the FTC solicited public comment on contract terms that may harm competition, including noncompete clauses. *See id.* at 61-67. Recent consent orders in the context of merger reviews have prohibited respondents from enforcing or entering into noncompete clauses. *See, e.g.*, Press Release, FTC Approves Final Order Requiring Divestitures of Hundreds of Retail Gas and Diesel Fuel Stations Owned by 7-Eleven, Inc., Fed. Trade Comm'n (Nov. 10, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-approves-final-order-requiring-divestitures-hundreds-retail-gas-diesel-fuel-stations-owned-7> (prohibiting 7-Eleven from enforcing any noncompete clauses against franchisees or employees working at or doing business with the divested assets); Decision and Order, *In the Matter of DaVita Inc. and Total Renal Care, Inc.*, FTC File No. 2110013 (Jan. 10, 2022) at 12-14,

- [https://www.ftc.gov/system/files/documents/cases/211\\_0056\\_c4752\\_davita\\_utah\\_health\\_order.pdf](https://www.ftc.gov/system/files/documents/cases/211_0056_c4752_davita_utah_health_order.pdf) (requiring DaVita to remove certain noncompete clauses and prohibiting DaVita from enforcing noncompete clauses with certain parties); Press Release, FTC Approves Final Order Restoring Competitive Markets for Gasoline and Diesel in Michigan and Ohio, Fed Trade Comm’n (Aug. 9, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-approves-final-order-restoring-competitive-markets-gasoline-diesel-michigan-ohio> (requiring roll-back of noncompete clause imposed on a company to which 60 gas stations had been sold).
- 27 Press Release, FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers, Fed. Trade Comm’n (Jan. 4, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers>; see also Complaint, at 3, In the Matter of Prudential Security, Inc. et al., FTC File No. 2210026 (Jan. 4, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2210026prudentialsecuritycomplaint.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2210026prudentialsecuritycomplaint.pdf) (alleging that Prudential Security, Inc., Prudential Command Inc. and their two co-owners exploited their superior bargaining power over employees by securing and actively enforcing a noncompete clause prohibiting employees from working for competing businesses within a 100-mile radius of their prior job site for two years after leaving Prudential); Complaint, at 2, In the Matter of O-I Glass, Inc., FTC File No. 2110182 (Jan. 4, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2110182o-iglasscomplaint.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2110182o-iglasscomplaint.pdf) (alleging that O-I imposed noncompete clauses that prohibited employees from working for, owning or being involved in any business in the U.S. selling similar products to O-I for one year after leaving O-I); Complaint, at 2-3, In the Matter of Ardagh Group, S.A. et al., FTC File No. 2110182 (Jan. 4, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2110182ardaghcomplaint.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2110182ardaghcomplaint.pdf) (alleging that Ardagh and two U.S. subsidiaries imposed noncompete clauses that prohibited employees from performing the same or substantially similar services as performed for Ardagh to any business in the U.S., Mexico or Canada that is involved in the sale, design, development, manufacture or production of glass containers).
- 28 Press Release, FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers, Fed. Trade Comm’n (Jan. 4, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers>.
- 29 *Id.* (summarizing FTC’s complaint against Prudential Security, Inc. and Prudential Command Inc.).
- 30 *Id.* (summarizing FTC’s complaints against O-I Glass, Inc. and Ardagh Group S.A.); Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya, In the Matter of Prudential Security, O-I Glass Inc., and Ardagh Group S.A. (Jan. 4, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/21100262110182prudentialardaghkhanslaughterbedoyastatements.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/21100262110182prudentialardaghkhanslaughterbedoyastatements.pdf).
- 31 Wilson Dissent, at 1.
- 32 *Id.* at 1-2.
- 33 *Id.* at 13-14.
- 34 Dissenting Statement of Commissioner Christine S. Wilson In the Matter of Prudential Security, at 1 (Jan. 4, 2023) [hereinafter Wilson Prudential Dissent], [https://www.ftc.gov/system/files/ftc\\_gov/pdf/wilson\\_dissenting\\_statement\\_-\\_prudential\\_security\\_-\\_final\\_-\\_1-3-23.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/wilson_dissenting_statement_-_prudential_security_-_final_-_1-3-23.pdf); Dissenting Statement of Commissioner Christine S. Wilson In the Matter of O-I Glass, Inc. and In the Matter of Ardagh Group S.A., at 4-5 (Jan. 5, 2023) [hereinafter Wilson O-I Glass Dissent], [https://www.ftc.gov/system/files/ftc\\_gov/pdf/wilson-dissenting-statement-glass-container-cases.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/wilson-dissenting-statement-glass-container-cases.pdf).
- 35 Wilson Prudential Dissent, at 1.
- 36 *Id.* at 2.
- 37 See generally NPRM.
- 38 Wilson Dissent, at 2.
- 39 See, e.g., *Owner-Operator Indep. Drivers Ass’n, Inc. v. Fed. Motor Carrier Safety Admin.*, 656 F.3d 580, 586 (7th Cir. 2011) (“Where, as here, a petition involves purely legal claims in the context of a facial challenge to a final rule, a petition is ‘presumptively reviewable.’” (quoting *Sabre, Inc. v. Dep’t of Transp.*, 429 F.3d 1113, 1119 (D.C. Cir. 2005))); see also *Abbott Lab’s v. Gardner*, 387 U.S. 136, 149 (1967) (permitting pre-enforcement challenges to final agency rules where the claim is fit for judicial decision and delay will cause some hardship to the parties).
- 40 Wilson Dissent, at 1.
- 41 *Id.*; see also *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).
- 42 Wilson Dissent, at 1-2.
- 43 *Id.* at 2.
- 44 See, e.g., Maureen K. Ohlhausen & James Rill, *Pushing the Limits? A Primer on FTC Competition Rulemaking*, U.S. Chamber of Com. (Aug. 12, 2021), [https://www.uschamber.com/assets/archived/images/ftc\\_rulemaking\\_white\\_paper\\_aug12.pdf](https://www.uschamber.com/assets/archived/images/ftc_rulemaking_white_paper_aug12.pdf) (white paper by former FTC Commissioner Maureen K. Ohlhausen and former Assistant Attorney General of the Antitrust Division of the DOJ James Rill); Noah Joshua Phillips, *Against Antitrust Regulation*, Am. Enter. Inst. (Oct. 13, 2022), <https://www.aei.org/research-products/report/against-antitrust-regulation/>. But see Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. Chi. L. Rev. 357 (2020).
- 45 NPRM, at 68.
- 46 15 U.S.C. § 46(g).
- 47 There is clear authority for the FTC to promulgate rules concerning unfair or deceptive acts or practices under the Magnuson-Moss Warranty Act. See 15 U.S.C. § 57a(a)(1)(A).
- 48 See *supra* note 44.
- 49 *Id.*
- 50 Wilson Dissent, at 4-5; see also Wilson Prudential Dissent, at 1 (asserting that FTC complaint offered “no evidence of anticompetitive effect in any relevant market”); Wilson O-I Glass Dissent, at 2 (asserting that the FTC complaints are “woefully devoid of details” and contain “no evidence of anticompetitive effects”).
- 51 See, e.g., Noah J. Phillips, *Rules Without Reason*, Truth on the Market (May 6, 2022), <https://truthonthemarket.com/2022/05/06/rules-without-reason/> (noting that the Supreme Court has “been loath to bless per se rules” by the lower courts and that FTC rulemaking may be “tempting a similar fate”).
- 52 FTC Intends To Expand Scope of Section 5 of the FTC Act, Cravath, Swaine & Moore LLP (Nov. 22, 2022), <https://www.cravath.com/a/web/au2NFVneDX1HpftMxLunh/4HHYwi/ftc-intends-to-expand-scope-of-section-5-of-the-ftc-act.pdf>.
- 53 See *id.* at 3.
- 54 *Id.*; President Biden Signs Executive Order Promoting Competition in the American Economy and Announces Nominee for Assistant Attorney General for Antitrust, Cravath, Swaine & Moore LLP (July 20, 2021), <https://www.cravath.com/a/web/aJ6wYKSenMd9Y2AqwyuTw8/2STPmU/president-biden-signs-executive-order-promoting-competition-in-the-american-economy-and-announces-nominee-for-assistant-attorney.pdf>.
- 55 Exec. Order No. 14036, Promoting Competition in the American Economy, 86 Fed. Reg. 36987, 36992 (Jul. 9, 2021) <https://www.federalregister.gov/documents/2021/07/14/2021-15069/promoting-competition-in-the-american-economy>.
- 56 See Section 5 Statement, at 12-16.

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