UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

Statement of Chair Lina M. Khan
Joined by Commissioner Rebecca Kelly Slaughter and
Commissioner Alvaro M. Bedoya
In the Matters of Prudential Security,
O-I Glass Inc., and Ardagh Group S.A.
Commission File No. 2210026 & 2110182

January 4, 2023

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 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

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

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 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

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[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).

[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

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 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.

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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).

[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).