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# The FTC Proposes Banning Noncompete Restrictions

The Federal Trade Commission (“FTC”) has proposed a rule prohibiting employers from imposing noncompete restrictions on their employees and requiring employers to rescind existing noncompete restrictions. The FTC is basing this proposed rule on its preliminary finding that noncompete restrictions are an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act (the “FTC Act”).<sup>1</sup> If adopted, subject to likely judicial challenges, this rule would invalidate noncompete restrictions imposed by employers across the country, many of which have been in place and deemed enforceable for decades. It would likely impact almost every American company and reshape how they engage with current and future employees.

The proposed rule follows a July 9, 2021 Executive Order, in which President Biden called for curtailing the use of noncompete restrictions.<sup>2</sup> It also follows two FTC consent orders announced on January 4, 2023 that found three companies and two individuals had violated the FTC Act’s prohibition on unfair methods of competition by imposing noncompete restrictions on thousands of workers.<sup>3</sup> These are the first standalone Section 5 actions since the FTC announced a revised policy that extends Section 5’s scope beyond other antitrust laws to include conduct that tends to negatively affect competition.<sup>4</sup> The FTC has stated that the proposed rule and orders align with the revised policy to “reinvigorate” Section 5.<sup>5</sup> The FTC is increasingly likely to continue using standalone Section 5 actions to challenge allegedly unfair methods of competition.

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## I. Proposed Ban on Noncompete Restrictions

The FTC’s proposed rule would prohibit employers from entering into, attempting to enter into, or maintaining noncompete agreements with employees, or representing to employees that they are subject to noncompete restrictions.

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<sup>1</sup> 15 U.S. Code § 45 (2020); Fed. Trade Comm’n, Proposed Rule on Non-Compete Clause Rulemaking (Jan. 5, 2023), <https://www.ftc.gov/legal-library/browse/federal-register-notice/non-compete-clause-rulemaking>; *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>.

<sup>2</sup> Exec. Order No. 14036, 86 FR 36987 (2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

<sup>3</sup> *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?utm\\_source=govdelivery](https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers?utm_source=govdelivery). The FTC voted 3–1 to issue the consent orders with Commissioner Christine Wilson dissenting.

<sup>4</sup> Dissenting Statement of Christine Wilson Regarding O-I Glass, Inc. and Ardagh Group S.A., FTC File No. 211-0182 (Jan. 4, 2013), [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); see Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, Fed. Trade Comm’n, at 8 (Nov. 10, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyStatement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf).

<sup>5</sup> *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition>.

The proposed rule would apply to all employees and includes independent contractors and paid and unpaid employees, with only minimal carve-outs. It also would require employers to terminate existing noncompete restrictions and inform employees that they are no longer in effect within 180 days of the rule being adopted. However, the proposed rule would not apply to noncompete agreements entered into by a person who is selling a business so long as the person restricted by the noncompete clause owns at least 25% of the business. Further, the proposed rule would generally not apply to other types of employment restrictions, such as nondisclosure agreements, but may prohibit such employment restrictions if they are broad in scope and essentially function as noncompete restrictions.<sup>6</sup>

The proposed rule is subject to a 60-day public comment period, which is open through March 20, 2023, before the FTC can adopt the proposed rule as a regulation, and it may be revised based on comments received prior to adoption in final form. Specifically, the FTC is seeking comments regarding alternative proposals, including:

- whether franchisees should be covered by the rule;
- whether senior executives should be exempt from the rule, or subject to a rebuttable presumption rather than a ban; and
- whether low- and high-wage workers should be treated differently under the rule.<sup>7</sup>

The current rule does not cover noncompete restrictions between franchisors and franchisees. Additionally, as the FTC has noted, senior executives may be less susceptible to coercion than lower-paid workers, although noncompete restrictions may prevent competitors from hiring for leadership positions. The FTC has also suggested several ways for employers to protect investments without using noncompete restrictions, including trade secrets law and confidentiality agreements. According to the FTC, businesses in California, Oklahoma, and North Dakota, where noncompete restrictions are prohibited, have found ways to protect trade secrets and valuable investments that are less harmful to workers and consumers.<sup>8</sup>

The FTC's commissioners voted 3–1 to publish the Notice of Proposed Rulemaking, which was published in the Federal Register on January 19, 2023.<sup>9</sup> The majority found that noncompete restrictions prevented employees from obtaining new, higher-paying opportunities and other employers from expanding their workforce, which hinders innovation, competition, job mobility, earnings potential, and consumer welfare.<sup>10</sup> Dissenting Commissioner Christine

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<sup>6</sup> *Id.*; Fed. Trade Comm'n, Proposed Rule on Non-Compete Clause Rulemaking (Jan. 5, 2023), <https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking>; 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, Fed. Trade Comm'n (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) ("Khan Statement on Proposed Rulemaking"); Dissenting Statement of Christine Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule, Fed. Trade Comm'n (Jan. 5, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p201000noncompetewilsondissent.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf).

<sup>7</sup> *FACT SHEET: FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, Fed. Trade Comm'n, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/noncompete\\_nprm\\_fact\\_sheet.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete_nprm_fact_sheet.pdf).

<sup>8</sup> *Id.*; *Khan Statement on Proposed Rulemaking*, [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).

<sup>9</sup> Non-Compete Clause Rule, 88 Fed. Reg. 12,3482 (Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910), <https://www.govinfo.gov/content/pkg/FR-2023-01-19/pdf/2023-00414.pdf>.

<sup>10</sup> *Id.*; several states, including California, have determined that noncompete clauses are unenforceable in employment contracts. California, for example, has an exception for agreements not to compete in the same business entered into by members of a partnership or LLC. Cal. Bus. & Prof. Code § 16602.5 (West). Similar to the FTC proposal, California also has an exception for non-compete agreements entered into by a seller in the sale of a business, including seller-employees. Cal. Bus. & Prof. Code § 16601 (West).

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Wilson challenged the proposed rule as abandoning centuries of legal precedent that considers whether a non-compete restriction is reasonable in duration and scope after examining relevant business justifications. She also cited grounds for potential legal challenges against the rule and the FTC's asserted authority.<sup>11</sup>

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## II. January 2023 FTC Consent Orders

The proposed rule to ban noncompete restrictions comes a day after the FTC ordered a security company, its owners, and two glass manufacturers to stop enforcing, threatening to enforce, or imposing noncompete restrictions and to notify affected employees that the restrictions are no longer valid.<sup>12</sup> The consent orders also ban the companies from communicating to employees that they are subject to noncompete restrictions, and require them to void and nullify the restrictions, provide copies of the consent order to current and previous employees subject to the restrictions and to company employees in charge of hiring, current and future directors, and officers, and notify new employees that they are not subject to noncompete restrictions.<sup>13</sup> The FTC alleged that the noncompete restrictions led to lower wages and salaries, reduced benefits, and less favorable working conditions for employees and blocked competitors from expanding their businesses, negatively affecting competition under Section 5.

In its complaint against the security company, the FTC found that it imposed noncompete restrictions on minimum-wage security guards to prevent them from working for a competitor within 100 miles for two years after leaving the company. Former security guards could be subject to \$100,000 penalties for violating the restrictions. The company allegedly repeatedly sued former employees to prevent them from accepting higher paying jobs. Approximately 1,500 former employees were still subject to the restrictions.<sup>14</sup>

In complaints against the glass manufacturers, the FTC alleged that both companies illegally imposed noncompete restrictions on employees in the domestic glass food and beverage container industry. The FTC found that this industry is highly concentrated with high barriers to entry due to difficulties finding and hiring workers skilled in manufacturing glass containers.<sup>15</sup> One company had imposed noncompete restrictions banning employees from working for, owning, or being involved in another domestic business selling similar products for one year after leaving the company. The other company had banned workers from directly or indirectly performing “the same or substantially similar services” for competitors in the United States, Canada, or Mexico for two years. The companies imposed restrictions on more than 1,000 and 700 employees, respectively, including salaried employees working with furnaces and forming equipment and in other glass production, engineering, and quality assurance roles. The FTC

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<sup>11</sup> Dissenting Statement of Christine Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p201000noncompetewilsondissent.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf).

<sup>12</sup> Proposed Decision and Order, O-I Glass, Inc., FTC File No. 211-0182 (Jan. 4, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2110182o-iglassdraftorder.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2110182o-iglassdraftorder.pdf); Proposed Decision and Order, Ardagh Group S.A., et al., FTC File No. 211-0182 (Jan. 4, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2110182ardaghdraftorder.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2110182ardaghdraftorder.pdf); Proposed Decision and Order, Prudential Security, Inc., et al, FTC File 2210026 (Jan. 4, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2210026prudentialsecurityproposedorder.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2210026prudentialsecurityproposedorder.pdf).

<sup>13</sup> *Id.*

<sup>14</sup> Complaint, Prudential Security, Inc., et al, FTC File 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); *Statement of Chair Khan, Prudential Security, O-I Glass, Inc. and Ardagh Group S.A.*, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/21100262110182prudentialardaghkhanslaughterbedoyastatements.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/21100262110182prudentialardaghkhanslaughterbedoyastatements.pdf).

<sup>15</sup> Complaint, O-I Glass, Inc., FTC File No. 211-0182 (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); Complaint, Ardagh Group S.A., et al., FTC File No. 211-0182 (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).

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alleged that the restrictions locked up highly specialized workers, impeding rivals from entering the sector or expanding in an industry with tight supply and unfulfilled customer demand.<sup>16</sup>

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### III. Conclusion

If adopted, the proposed rule to ban noncompete restrictions would have a profound impact on many employers in the United States, including in those circumstances where noncompete restrictions can have procompetitive business justifications, such as protecting trade secrets and customer data and encouraging employers to invest in employee training. In addition, employers and trade associations may challenge the rule in court. The federal judiciary's recent efforts to restrain powers of federal administrative agencies<sup>17</sup> may impact the FTC's interpretation of Section 5's broad scope and authority to promulgate the proposed rule. Additional litigation and congressional oversight likely will ensue.

Along with the revised policy that extends Section 5's scope, the proposed rule heightens ongoing uncertainty about commonplace business practices that may be found to violate Section 5 and which, if any, justifications would be considered. We are available to answer any questions.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Elai Katz (partner) at 212.701.3039 or [ekatz@cahill.com](mailto:ekatz@cahill.com); Lauren Rackow (counsel) at 212.701.3725 or [lrackow@cahill.com](mailto:lrackow@cahill.com); or Ryan M. Maloney (associate) at 212.701.3269 or [ryan.maloney@cahill.com](mailto:ryan.maloney@cahill.com); or email [publications@cahill.com](mailto:publications@cahill.com).

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<sup>16</sup> Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro N. Bedoya, Prudential Security, O-I Glass, Inc. and Ardagh Group S.A., FTC File No. 211-0182, Jan. 4, 2013, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/21100262110182prudentialardaghkhanslaughterbedoyastatements.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/21100262110182prudentialardaghkhanslaughterbedoyastatements.pdf) ("Statement of Chair Khan, Prudential Security, O-I Glass, Inc. and Ardagh Group S.A.").

<sup>17</sup> *W. Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2599 (2022); *Sec. & Exch. Comm'n v. Cochran*, 142 S. Ct. 2707 (2022) (pending); *Axon Enter., Inc. v. Fed. Trade Comm'n*, 142 S. Ct. 895 (2022) (pending).

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