

# TECHFREEDOM

LAW FOR A DYNAMIC FUTURE

**Comments of**

**TechFreedom**

Berin Szóka,<sup>i</sup> Bilal Sayyed,<sup>ii</sup> and Andy Jung<sup>iii</sup>

**In the Matter of**

*Non-Compete Clause Rulemaking*

DOCKET ID: FTC-2023-0007-3959

**March 16, 2023**

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## INTRODUCTION

On March 16, 2023, three of TechFreedom’s legal scholars delivered remarks at the FTC’s March Open Commission Meeting. Their oral remarks are presented here, lightly edited for clarity.

### **I. Comments of Berin Szóka: Reply Comments Are Critical to the Open Exchange of Ideas, Especially if No Minority Commissioner Can Participate**

We all appreciate the extension of the comment deadline in the FTC’s non-compete rulemaking. But what matters most is that “interested parties” have “the opportunity to react to (and benefit from) the comments ... of others during the rulemaking process itself.”<sup>1</sup> So said a memo issued to all executive branch agencies by President Barack Obama in 2011.<sup>2</sup>

Chair Khan has said the FTC should look for guidance to the Administrative Conference of the United States, the official body charged with improving regulation.<sup>3</sup> The ACUS has recommended reply comments for “unusually complex” rulemakings since 1976.<sup>4</sup> The Federal Communications Commission has *required* reply comments in *all* rulemakings since 1958.<sup>5</sup> During the Obama Administration, FCC officials reported that reply comments improve rulemakings because they “open initial submissions up to the possibility of being challenged on factual and analytical grounds.”<sup>6</sup>

That’s exactly what the FTC needs. The non-compete rule is the most important rulemaking in the FTC’s 109-year history. It raises exceptionally complex empirical and legal questions. Only by allowing reply comments can the FTC build a complete record.

Reply comments are especially important because the Commission may well vote on this rule without the participation of any minority commissioner. For the first time since 1914, a

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<sup>1</sup> White House Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies*, 2 (Feb. 2, 2011), [https://www.whitehouse.gov/wp-content/uploads/legacy\\_drupal\\_files/omb/memoranda/2011/m11-10.pdf](https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2011/m11-10.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> FED. TRADE COMM’N, POST-COMMISSION MEETING REMARKS OF CHAIR LINA M. KHAN (2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1592378/post-commission\\_meeting\\_remarks\\_of\\_chair\\_lina\\_m\\_khan\\_0.pdf](https://www.ftc.gov/system/files/documents/public_statements/1592378/post-commission_meeting_remarks_of_chair_lina_m_khan_0.pdf).

<sup>4</sup> *Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking*, ADMIN. CONF. OF THE U.S. (June 4, 1976), <https://www.acus.gov/recommendation/procedures-addition-notice-and-opportunity-comment-informal-rulemaking>.

<sup>5</sup> 47 C.F.R. § 1.213(c) (1958). The FCC’s rule is now codified at 47 C.F.R. § 1.415(c) (2022).

<sup>6</sup> Steven J. Balla, *Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States* 12 (Mar. 15, 2011), <https://www.acus.gov/sites/default/files/COR-Balla-Report-Circulated.pdf>.

Commission designed not to be composed entirely of members of the President’s party<sup>7</sup> will be entirely monopartisan.

Having “diverse perspectives and different points of view among the commissioners,” wrote then-Judge Brett Kavanaugh in 2016, “make[s] it more likely that the costs and downsides of proposed decisions will be more fully ventilated.”<sup>8</sup> Of course commenters cannot fully compensate for the lack of minority commissioners or written dissents. But allowing us all to file reply comments after reviewing the evidence and arguments presented in the comment stage is the very least the Commission can do to facilitate the “open exchange of ideas” called for by President Barack Obama’s 2011 Executive Order.<sup>9</sup> Not allowing reply comments would be profoundly undemocratic.

What Commissioner Slaughter said about the benefits of seeking additional comment on the vertical merger guidelines is even more true here: “the benefits .... far outweigh an immaterial delay.”<sup>10</sup>

## **II. Comments of Andy Jung: Reply Comments Are Key to Building a Record in Such an Important and Complex a Rulemaking**

The FTC should allow for reply comments on its proposed non-compete rule because it raises questions of “unusual complexity” and exceptional significance.<sup>11</sup>

A ban on non-compete clauses would apply to “one in five American workers.”<sup>12</sup> Labor market regulation is traditionally left to the National Labor Relations Board, and non-competes are traditionally matters of *state* law. They are beyond the FTC’s expertise.

The NPRM seeks to “increase workers’ total earnings by \$250 to \$296 billion per year.”<sup>13</sup> Clearly, this is an issue of “vast economic and political significance.”<sup>14</sup> It may well be one of

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<sup>7</sup> 45 U.S.C. § 41 (“Not more than three of the Commissioners shall be members of the same political party.”).

<sup>8</sup> PHH Corp. v. Consumer Financial Protection Bureau, 839 F.3d 1, 26-27 (D.C. Cir. 2016) (internal citations omitted) (declaring the Consumer Financial Protection Bureau’s single-director structure unconstitutional).

<sup>9</sup> Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

<sup>10</sup> Dissenting Statement of Commissioner Rebecca Kelly Slaughter in re FTC-DOJ Vertical Merger Guidelines, FTC File No. P810034, at 1 (June 30, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1577499/vmgslaughterdissent.pdf](https://www.ftc.gov/system/files/documents/public_statements/1577499/vmgslaughterdissent.pdf).

<sup>11</sup> *Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking*, ADMIN. CONF. OF THE U.S. (June 4, 1976), <https://www.acus.gov/recommendation/procedures-addition-notice-and-opportunity-comment-informal-rulemaking>.

<sup>12</sup> *Non-Compete Clause Rule*, Notice of Proposed Rulemaking, 88 Fed. Reg. 3482 (Jan. 19, 2023), <https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule>.

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

<sup>14</sup> *West Virginia v. EPA*, No. 20-1530, at \*37 (June 30, 2022).

those “extraordinary cases” in which the Supreme Court is “reluctant to read into ambiguous statutory text’ the delegation claimed to be lurking there.”<sup>15</sup> The majority relies entirely on the D.C. Circuit’s 1973 *National Petroleum Refiners* decision, but there is little reason to think that case “represents the current state of the law.”<sup>16</sup>

Reply comments would build a complete record on two other complex questions. First, what constitutes a method of competition? The FTC’s 2022 policy statement defines the term broadly as “conduct undertaken by an actor in the marketplace—as opposed to merely a condition of the marketplace.”<sup>17</sup> But Congress likely intended something narrower: conduct that “suppress[es] competition *by destroying rivals*,” as Justice Brandeis put it.<sup>18</sup> If so, the evidence needed for a UMC rule must focus on exclusion or foreclosure of rivals, not general effects on economic growth, labor mobility, or firm entry.

Second, *what* makes a method of competition unfair? The FTC Act does not define UMC. While the Commission recently issued a UMC policy statement, it sought no public comment, and even that statement leaves many key questions unanswered. Understanding how to define UMC requires careful analysis of case law and the legislative record behind the FTC Act.

Reply comments would allow the FTC to fully consider issuing a rule that addresses non-competes as both a UMC and a UDAP. While this would require more process, it would help ensure that the Commission does not lose entirely in court.

### **III. Comments of Bilal Sayyed: Why Non-Compete Clauses Aren’t Unfair Methods of Competition**

One hurdle to the Commission’s successful implementation of a rule prohibiting the use of non-compete agreements is whether and under what conditions the use of non-compete agreements constitutes a method of competition.

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<sup>15</sup> *Id.* at \*24 (June 30, 2022).

<sup>16</sup> 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, FTC File No. P201200, at 4 n. 12 (Jan. 5, 2023) (citing *National Petroleum Refiners Ass’n v. F.T.C.*, 482 F.2d 672 (D.C. Cir. 1973), [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>17</sup> FED. TRADE COMM’N, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT at 8, No. P221202 (2022).

<sup>18</sup> *FTC v. Gratz*, 253 U.S. 421, 422 (1920) (Brandeis, J.) (emphasis added).

The Commission’s statement adopts a broad definition of conduct that constitutes a method of competition.<sup>19</sup> The statement provides examples of such conduct: for example, mergers and the terms on which products are sold, or rebates offered, are methods of competition.<sup>20</sup>

The statement also identifies misuse of the regulatory process as a method of competition.<sup>21</sup> That suggests to me that the mere participation in the regulatory process is not a method of competition, and that something more is required: the conduct must be capable of an anticompetitive or unfair effect in a relevant antitrust market.

The Commission relies on two general sources for its view that non-competes have such an effect. One source—various empirical papers purporting to measure the effects of non-competes—does not, in any significant sense (or any sense), identify or define competitive effects in a relevant antitrust market. Another source is the Commission’s three recent enforcement matters: in one of those matters the Commission does not allege an effect on a relevant market;<sup>22</sup> in the other two matters the Commission does what strikes me as insufficient or the bare minimum—an identification that the use of non-competes by a single firm may impede entry into the glass container industry.<sup>23</sup>

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<sup>19</sup> A method of competition is conduct undertaken by an actor in the marketplace that implicates competition, directly or indirectly. The statement carves out certain conduct—violations of generally applicable law that merely give an actor a cost advantage. FED. TRADE COMM’N, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT at 8, No. P221202 (2022).

<sup>20</sup> *Id.* at 12-16, describing past practices that have been found inconsistent with fair methods of competition.

<sup>21</sup> *Id.* at 8. The reference of the Policy Statement at footnote 49 to the closed Google search engine investigation and its related components—scrapping, unreasonable restrictions on multi-homing—seems incorrect. *See* Statement of the Federal Trade Commission Regarding Google’s Search Practices, In the Matter of Google Inc. (Jan. 3, 2013), [https://www.ftc.gov/system/files/documents/public\\_statements/295971/130103googlesearchstmtofcomm.pdf](https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf). A citation to the Google/MMI matter appears more correct and consistent with the rest of footnote 49. *See* Complaint, In the Matter of Motorola Mobility and Google, FTC Docket No. C-4410 (Jul. 23, 2013), <https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolacmpt.pdf>.

<sup>22</sup> Complaint, In the Matter of Prudential Security, Inc., FTC Docket No. C-4787 (Feb. 23, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/c47872210026prudentialsecurityfinalconsent.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/c47872210026prudentialsecurityfinalconsent.pdf). *See also* Dissenting Statement of Commissioner Christine S. Wilson, In the Matter of Prudential Security (Jan. 4, 2023), [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).

<sup>23</sup> Complaint, In the Matter of O-I Glass, Inc., FTC Docket No. C-4786 (Feb. 21, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2110182-c-4786-o-i-glass-inc-complaint.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2110182-c-4786-o-i-glass-inc-complaint.pdf); Complaint, In the Matter of Ardagh Group, S.A. FTC Docket No. C-4785 (Feb. 21, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2110182-c4785-ardagh-complaint.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2110182-c4785-ardagh-complaint.pdf). *See also* Dissenting Statement of Commissioner Christine S. Wilson, In the Matter of O-I Glass, Inc., and In the Matter of Ardagh Group S.A. (Jan. 4, 2023), [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).

These are very thin reeds on which to base a broad prohibition on non-compete agreements, particularly given the history and practice of state courts' ability to distinguish reasonable from unreasonable non-compete agreements.

The Commission should move forward with a narrow alternative: a Magnuson-Moss rule prohibiting unfair and deceptive conduct in the use of non-compete agreements. Although this also has a hurdle—finding substantial injury to consumers in the case of unfairness—it provides an alternative path to limiting, if not eliminating, the abusive use of non-competes.

Respectfully submitted,

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March 16, 2023