



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioner Christine S. Wilson

In the Matter of O-I Glass, Inc. and
In the Matter of Ardagh Group S.A.
File No. 211-0182

January 4, 2023

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 Statement¹ 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 all requested information is related to traditional competition analysis.² In addition, this Commission has declared its willingness to take losing cases to court³ when faced with the expense of complying with expansive demands for documents and other material, and the possibility of an enforcement

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),

² See Christine S. Wilson, Comm'r, Fed. Trade Comm'n,

action regardless of the merits, parties under investigation rationally

The allegations imply that, conversely, many employees that were subject to

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 complaints in these matters challenge conduct of Or Glass and Ardagh that predates the November 2022 Section 5 Policy Statement. The Second Circuit explained in *Ethy* that “the Commission owes a duty to provide notice of its policies. *F/A m/s 2 (i)-65-2 (l)-2 (e)4 (ga)4uTw [(r)ov] eov4 (ga)o 1 Tf 0 Tc 7.27 0 Td 0 Tc 0 Tw 5.42 0 Td [(bus)-1 (i (s)-1 (i)-2)-2 (i)-2 (T)1 (*
