The Implications of a Whole-of-Government Approach: Why Financial Services Companies Ignore the FTC's Proposed Rule Banning Non-Competes at Their Peril

Emme Tyler and Katrina Robson[1]

The regulatory landscape for financial services companies ("FSCs") is complicated, with a panoply of federal regulatory agencies, including the Federal Deposit Insurance Corporation (FDIC), Federal Reserve Board ("FRB"), Office for the Comptroller of the Currency ("OCC"), Department of Justice and Consumer Finance Protection Bureau ("CFPB"), taking responsibility for the oversight and enforcement of a sophisticated network of statutes and regulations. But the administration's emphasis on a Whole-of-Government approach to competition policy has added a new dimension of complexity that FSCs must take seriously.

FSCs have long been subject to Section 5 of the FTC Act. One node in the FSC regulatory structure is found in the authorizing legislation that created the Federal Trade Commission ("FTC"). Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition" and "unfair or deceptive acts or practices" in or affecting commerce, and it empowers the FTC to prevent such conduct.[2] But the statute expressly exempts banks, savings and loan institutions, and federal credit unions from FTC jurisdiction. The exemption does not render FSCs immune, however, as the banking agencies, specifically the FDIC, FRB, and OCC, have asserted authority to enforce Section 5 for the institutions that they supervise and other institution-affiliated parties ("IAPs").[3] Those agencies have used standards consistent with those of the FTC in assessing violations of Section 5, albeit with a focus on the prohibition against "unfair or deceptive acts or practice" and consumer

---

[1] Emme Tyler, a graduate of Stanford University and UCLA School of Law, joined O'Melveny & Myers as an associate in 2022 after serving as law clerk in the Southern District of New York (and pending her service as law clerk in the Ninth Circuit). Katrina Robson is a globally recognized Chambers-ranked trial lawyer whose antitrust litigation experience has been recognized by both Legal 500 US and Global Competition Review.

[2] Federal Trade Commission Act of 1914, § 5(a), *codified at* 15 U.S.C. § 45(a).

[3] *See, e.g.*, Federal Deposit Insurance Corporation, *FDIC Consumer Compliance Examination Manual*, at VII-1.1 (June 2022).

unfairness.[4] That focus is understandable given the Department of Justice's ("DOJ's") role in using other competition laws, like the Sherman Act, "to police the financial markets"[5] for unfair methods of competition that also would be prohibited under Section 5. Working together, the banking agencies and DOJ have enforced consumer protection and competition principles of Section 5 and the Sherman Act against any FTC-exempt FSCs without notable gaps.

Under the Biden administration, that kind of agency collaboration has not merely continued—it is policy. In his July 2021 Executive Order ("EO"),[6] President Biden announced a Whole-of-Government Competition Policy, calling on executive departments and agencies "to protect conditions of fair competition," including by "promulgating rules that promote competition, including the entry of new competitors."[7] A Whole-of-Government Competition Policy is "necessary," he explained, "to address overconcentration, monopolization, and unfair competition in the American economy."[8]

Notably, the EO defines the statutory basis for the policy to include not only the Sherman Act, the Clayton Act, and the Federal Trade Commission Act, but also the Acts that correspond to the entities exempted under Section 5 from FTC jurisdiction, including the Packers and Stockyards Act, the Bank Merger Act, the Telecommunications Act of 1996, and the Dodd-Frank Wall Street Reform and Consumer Protection Act.[9] Further, the EO specifically calls out the Department of the Treasury, the Federal Reserve System, and the

---

[4] *See, e.g.*, *id.* ("The FDIC applies the same standards as the FTC in determining whether an act or practice is unfair."); Office of Comptroller for the Currency, OCC Advisory Letter AL 20-02-3, *Guidance on Unfair or Deceptive Acts or Practices* (Mar. 22, 2002) ("These principles are derived from the Policy Statement on Unfairness, issued by the Federal Trade Commission on December 17, 1983."); Board of Governors of the Federal Reserve System & Federal Deposit Insurance Corporation, *Statement on Unfair or Deceptive Acts or Practices by State-Chartered Banks* (Mar. 11, 2004) ("In analyzing a particular act or practice, the agencies will be guided by the body of law and official interpretations for defining unfair or deceptive acts or practices developed by the courts and the FTC. The agencies will also consider factually similar cases brought by the FTC and other regulators to ensure that these standards are applied consistently.").

[5] Deputy Assistant Attorney General Michael Murray, *The Muscular Role for Antitrust in Fintech, Financial Markets, and Banking: The Antitrust Division's Decision to Lean In* (October 14, 2020).

[6] *See* Exec. Order No. 14036, *Promoting Competition in the American Economy* (July 9, 2021), *published at* 86 Fed. Reg. 36987 (July 14, 2021).

[7] 86 Fed. Reg. at 36989.

[8] *Id.*

[9] *Id.*

Federal Deposit Insurance Corporation as "agencies that administer such or similar authorities . . . ."[10]

As a result, FTC-exempt businesses that are "policed" by some complement of these agencies must be attuned to any changes in the FTC's Section 5 guidance, particularly when it appears that an enforcement gap may be emerging counter to the administration's directives.

The risk of liability under Section 5 recently has increased for FSCs due to changes in FTC policy, enforcement, and regulation. As part of its well-publicized effort to more robustly enforce competition and consumer protection laws, the FTC issued a statement in November 2022 to "make[] clear" that Section 5 "extends beyond" the Sherman Act to reach "unfair conduct ***with a tendency*** to negatively affect competitive conduct."[11] Notably, the FTC specified that "[e]ven when conduct is not facially unfair, it may violate Section 5"[12] because Section 5 was intended to "create a new prohibition broader than, and different from" the Sherman Act.[13]

Under that authority, in early January 2023, the FTC "crack[ed] down" on non-compete agreements.[14] On January 4th, it announced that it had taken legal action and entered consent orders[15] against three companies and two individuals for imposing non-compete restrictions that barred workers—from security guards to employees working in produc-

---

[10] *Id.*

[11] *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, Commission File No. P221202, at 1–2 (Nov. 10, 2022) (emphasis added) [hereinafter, "Policy Statement"].

[12] *Id.* at 9.

[13] *Id.* at 3. The FTC further claimed authority under Section 5 to police not only conduct that violates the Sherman or Clayton Acts, but also incipient violations of the antitrust laws—"that has the tendency to ripen into violations"—and "[c]onduct that violates the spirit of the antitrust laws"—"conduct that tends to cause potential harm similar to an antitrust violation, but that may or may not be covered by the literal language of the antitrust laws or that may or may not fall into a 'gap' in those laws." *Id.* at 12–13.

[14] Federal Trade Commission, *FTC Cracks Down on Companies that Impose Harmful Noncompete Restrictions on Thousands of Workers* (hereinafter, "FTC Cracks Down") (Jan. 4, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers.

[15] *See* 88 Fed. Reg. 2618 (Jan. 17, 2023) (Proposed Consent Order against Ardagh Packaging Inc. and O-I Glass Inc.); 88 Fed. Reg. 3737 (Jan. 20, 2023) (Proposed Consent Order against Prudential Security, Inc.).

tion, engineering, and quality assurance—from accepting employment elsewhere or "operating a competing business."[16] The FTC alleged that this conduct "***has a tendency*** or likelihood to impede rivals' access to the restricted employees' labor, to limit workers' mobility, and thus to harm workers, consumers, competition, and the competitive process."[17] The FTC deemed this an "unfair method of competition," offering a link to its November Policy Statement.[18]

The next day, again citing the November Policy Statement, the FTC issued a Notice of Proposed Rulemaking (the "NPRM"),[19] laying out a rule that would largely ban the use of non-compete agreements between workers and employers. The proposed rule categorizes virtually all non-compete agreements[20] as "unfair methods of competition" prohibited by Section 5 of the FTC Act, making it unlawful for an employer to enter or attempt to enter into a non-compete clause, maintain such a clause, or represent that a worker is subject to such a clause where the employer lacks a good faith basis to believe that the worker is subject to an enforceable non-compete clause.

The rule is broad in several notable respects. ***First***, it bans both explicit and *de facto* non-compete clauses. *De facto* non-compete clauses are those that have the effect of a non-compete—precluding a worker from working in the same field on similar contractual terms. Examples of *de facto* non-competes include:

- broad nondisclosure or confidentiality agreements that prohibit disclosing or using certain information;
- nonsolicitation agreements that prohibit soliciting clients or customers of the employer;

---

[16] *See FTC Cracks Down, supra* note 14.

[17] *See* Federal Trade Commission, Notice of Proposed Rulemaking, *Non-Compete Clause Rule* (hereinafter "NPRM Non-Compete Clause Rule"), 88 Fed. Reg. 3482, 3498 (Jan 19. 2023).

[18] *FTC Cracks Down*, *supra* note 14.

[19] *See* Federal Trade Commission, *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition* (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, published at 88 Fed. Reg. 3482 (Jan. 19, 2023).

[20] The proposed rule defines a noncompete agreement to mean "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." *See NPRM Non-Compete Clause Rule*, 88 Fed. Reg. at 3482 (citing proposed 16 C.F.R. § 910.1(b)). Notably, the proposed rule would apply to all "workers," paid or not. *See id.* The term worker would include employees, independent contractors, externs, interns, volunteers, apprentices, or sole proprietor service providers. *See id.* (citing proposed 16 C.F.R. § 910.1(f)).

- no-business agreements that prohibit doing business with former clients or customers of the employer, regardless of whether solicited by the worker;
- no-recruit agreements that prohibit recruiting or hiring the employer's workers;
- liquidated damages provisions; and
- training-repayment agreements, where a required payment is not reasonably related to the costs incurred for training a worker.[21]

Second, the proposed rule would preempt all inconsistent state laws and regulations. State laws are not inconsistent if they offer greater protections to workers.

Third, the proposed rule not only would prohibit companies from using non-compete agreements moving forward but also would require them to rescind current agreements and provide notice to current and former employees that any existing agreements are unenforceable.

The FTC acknowledged in the NPRM that the majority of cases in which private plaintiffs or the federal government challenged a non-compete clause under the Sherman Act or an analogous state antitrust law have been unsuccessful.[22] In setting forth the legal basis for the FTC to issue the rule, the agency described the ambit of its authority broadly, explaining that "Section 5 reaches incipient violations of the antitrust laws—conduct that, if left unrestrained, would grow into an antitrust violation in the foreseeable future."[23] The FTC's subsequent recitation of evidence offered in support of the proposed rule was clearly intended to show more than just an "incipient" violation; it also was clear that the FTC was defending the "principles of general applicability" that it had articulated in the November Policy Statement.[24]

The question is: how far do those principles extend? Does this interpretation of "unfair methods of competition" under Section 5, in particular the illegality of non-compete clauses, apply to FSCs? And if Section 5 extends beyond the DOJ-enforceable Sherman

---

[21] *See id.* at 3483–84. The proposed rule has one exemption for noncompete agreements accompanying the sale of a business, where the worker owns at least a 25 percent interest in a business entity and with whom she signs the agreement. *See id.* at 3515 (citing proposed 16 C.F.R. § 910.1(e)). The rule does not apply to concurrent employment noncompete agreements, which limit a worker's ability to work simultaneously for another employer.

[22] *See id.* at 3496.

[23] *See id.* at 3499; *see also* Policy Statement, *supra* note 11, at 12–13.

[24] *See NPRM Non-Compete Clause Rule*, 88 Fed. Reg. at 3499 n.230.

Act but cannot be enforced by the FTC against banks,[25] will the banking agencies address that potential gap?

In public comments shortly after the proposed rule was issued, the FTC's Director of Policy Planning, Elizabeth Wilkins, conceded that the Commission lacks jurisdiction over exempted entities, including banks. Wilkins has said that she cannot speak to how other agencies might exercise their unique regulatory authority, but emphasized that the FTC's analysis of the unfairness of non-competes did not suggest any meaningful distinctions between types of businesses.[26]

Wilkins may be right that other regulatory agencies, in furtherance of the administration's Whole-of-Government mandate, will have interest in the issue. The FDIC repeatedly has reminded FSCs that Section 5 applies to them, even if enforcement jurisdiction does not lie with the FTC. The FDIC also has taken the position that Congress drafted Section 5 broadly to provide sufficient flexibility in the law to address changes in the market and emerging unfair or deceptive practices. Further, in analyzing whether a particular act or practice is unfair or deceptive, it will consider not only law but also interpretations by officials, courts, *and* the FTC. It is therefore entirely conceivable that the FDIC would consider the proposed rule in exercising oversight over FSCs.

The OCC may also have an interest in the implications of the proposed rule. In June 2022, the OCC released its Semiannual Risk Perspective for Spring 2022.[27] Among the highlights, the report noted that FSCs have faced increasing challenges recruiting and retaining talent with the desired level of knowledge and experience to protect against operational and compliance risks. To the extent that the OCC conceives noncompete agreements as relevant to the staffing issues, it too may examine the practice.

---

[25] It should also be noted the FTC has taken the position, and convinced at least one federal appellate court, that the exemption is activity- rather than status-based. Common carriers are subject to a similar exemption under Section 5, but in *Fed. Trade Comm'n v. AT&T Mobility LLC*, the FTC sued AT&T over a so-called throttling policy, whereby AT&T advertised unlimited data to customers but would slow down service if they reached a pre-determined data cap. AT&T moved to dismiss, arguing that the FTC lacked jurisdiction. An *en banc* panel of the Ninth Circuit ruled in favor of the FTC, endorsing the activity-based construction of the exemption. 883 F.3d 848 (9th Cir. 2018). The FTC could conceivably claim jurisdiction over FSCs "unfair" employment agreements using the same rationale.

[26] Christine S. Wilson, FTC Commissioner, *Dissenting Statement of Commissioner Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Rule* (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf.

[27] Office for the Comptroller of the Currency, *Semiannual Risk Perspective* (June 2022), https://www.occ.gov/publications-and-resources/publications/semiannual-risk-perspective/files/pub-semiannual-risk-perspective-spring-2022.pdf.

In short, the administration's call for a Whole-of-Government Competition Policy means that industries must monitor and analyze regulatory developments closely to assess the second-order implications of agency actions. In this case, the FTC's assertion that Section 5's prohibition on "unfair methods of competition" pushes beyond the limits of the Sherman Act could affect the enforcement decisions and policies of agencies with authority over industries traditionally exempted from FTC jurisdiction.

This article is a summary for general information and discussion only. It is not a full analysis of the matters presented, may not be relied upon as legal advice, and does not purport to represent the views of our clients or the Firm. Kati Robson, an O'Melveny partner licensed to practice law in California and the District of Columbia, and Emme Tyler, an O'Melveny associate licensed to practice law in California and New York, contributed to the content of this article. The views expressed in this newsletter are the views of the authors except as otherwise noted.