solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

During the comment period for this proposal, a copy of the proposed PRA OMB submission, including the draft reporting form and instructions, supporting statement (which contains more detail about the information collection and burden estimates than this notice), and other documentation, will be made available on the Board's public website at *https://www.federalreserve.gov/apps/reportingforms/review* or may be requested from the agency clearance officer, whose name appears above. On the page displayed at the link above, you can find the supporting information by referencing the collection identifier, FR 2231. Final versions of these documents will be made available at *https://www.reginfo.gov/public/do/PRAMain,* if approved.

Request for Comment on Information Collection Proposal

The Board invites public comment on the following information collection, which is being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Board's functions, including whether the information has practical utility;

b. The accuracy of the Board's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the proposal.

Proposal Under OMB Delegated Authority To Extend for Three Years, Without Revision, the Following Information Collection

Collection title: Computer-Security Incident Notification.

Collection identifier: FR 2231.

OMB control number: 7100–0384.

General description of collection: A banking organization is required to notify its primary Federal banking regulator of any ''computer-security incident'' that rises to the level of a ''notification incident,'' as soon as possible and no later than 36 hours after the banking organization determines that a notification incident has occurred (see 12 CFR 225.301(b)). A bank service provider is required to notify each affected banking organization customer as soon as possible when the bank service provider determines that it has experienced a computer-security incident, that has caused, or is reasonably likely to cause, a material service disruption or degradation for four or more hours.

Frequency: Event generated.

Respondents: U.S. bank holding companies, U.S. savings and loan holding companies, state member banks, U.S. operations of foreign banking organizations, Edge or agreement corporations, and bank service providers.

Total estimated number of respondents: 95.

Total estimated annual burden hours: 285.

Board of Governors of the Federal Reserve System, December 2, 2024.

Benjamin W. McDonough,

Deputy Secretary and Ombuds of the Board.

[FR Doc. 2024–28523 Filed 12–5–24; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

[File No. 241 0082]

Guardian Service Industries, Inc.; Analysis of Agreement Containing Consent Order To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of Federal law prohibiting unfair methods of competition. The attached Analysis of Proposed Consent Order to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before January 6, 2025.

ADDRESSES: Interested parties may file comments online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Please write: ''Guardian; File No. 241 0082'' on your comment and file your comment online at *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, please mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Mail Stop H–144 (Annex H), Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Erik Herron (202–326–3535), Bureau of Competition, Federal Trade Commission, 400 7th Street SW, Washington, DC 20024.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule § 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of 30 days. The following Analysis of Agreement Containing Consent Order to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC website at this web address: *https://www.ftc.gov/news-events/commission-actions.*

The public is invited to submit comments on this document. For the Commission to consider your comment, we must receive it on or before January 6, 2025. Write ''Guardian; File No. 241 0082'' on your comment. Your comment—including your name and your State—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

Because of the agency's heightened security screening, postal mail addressed to the Commission will be delayed. We strongly encourage you to submit your comments online through the *https://www.regulations.gov* website. If you prefer to file your comment on paper, write ''Guardian; File No. 241 0082'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Mail Stop H–144 (Annex H), Washington, DC 20580.

Because your comment will be placed on the publicly accessible website at *https://www.regulations.gov,* you are

solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other State identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule § 4.10(a)(2), 16 CFR 4.10(a)(2)—including competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule § 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule § 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on *https://www.regulations.gov*—as legally required by FTC Rule § 4.9(b)—we cannot redact or remove your comment from that website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule § 4.9(c), and the General Counsel grants that request.

Visit the FTC website at *https://www.ftc.gov* to read this document and the news release describing this matter. The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments it receives on or before January 6, 2025. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

Analysis of Agreement Containing Consent Order To Aid Public Comment

I. Introduction

The Federal Trade Commission (''Commission'') has accepted for public comment, subject to final approval, an Agreement Containing Consent Order (''Consent Agreement'') with Guardian Service Industries, Inc. (''Guardian'' or ''Respondent''). The proposed Decision and Order (''Order''), included in the Consent Agreement and subject to final Commission approval, is designed to remedy the anticompetitive effects that have resulted from Guardian's use of restrictive covenants in some of its contracts with building owners and managers that limit the ability of those building owners and managers to solicit or hire Respondent's employees (''No-Hire Agreements''). The term No-Hire Agreement refers to a term in an agreement between two or more companies that restricts, imposes conditions on, or otherwise limits a company's ability to solicit, recruit, or hire another company's employees, during employment or afterwards, directly or indirectly, including by imposing a fee or damages in connection with such conduct, or that otherwise inhibits competition between companies for each other's employees' services.

The Consent Agreement settles charges that Guardian has engaged in unfair methods of competition in violation of section 5 of the FTC Act, as amended, 15 U.S.C. 45, by entering into No-Hire Agreements with customers. Guardian's No-Hire Agreements constitute unreasonable restraints of trade that are unlawful under section 1 of the Sherman Act, 15 U.S.C. 1, and are thus unfair methods of competition in violation of section 5 of the FTC Act. Independent of the Sherman Act, Guardian's use of the No-Hire Agreements constitutes an unfair method of competition with a tendency or likelihood to harm competition, consumers, and employees in the building services industry, in violation of section 5. The proposed Order has been placed on the public record for 30 days in order to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Consent Agreement and the comments received and will decide whether it should withdraw from the Consent Agreement and take appropriate action or make the proposed Order final.

II. The Respondent

Guardian is a privately held business headquartered in New York, NY. Guardian provides facility maintenance services, including janitorial, security, engineering and operations, pest control, lighting and electric, window cleaning, concierge, front desk, and surface restoration services. Guardian employs approximately 2,800 employees throughout the Northeast, New England, and Mid-Atlantic regions. The complaint focuses on Guardian's conduct in New York City and Northern New Jersey.

III. The Complaint

The complaint alleges that Guardian sells building services to building owners and property management companies, primarily consisting of the labor of janitors, security guards, maintenance workers, and concierge desk workers who are directly employed by Guardian. These employees perform their work at residential and commercial buildings in various States, but predominantly in New York City and Northern New Jersey. The complaint also alleges that Guardian and its building owner and property manager customers are direct competitors in labor markets for building services workers. These include the markets for workers to perform concierge, security, janitorial, maintenance, and related services.

As alleged in the complaint, Guardian uses standard-form agreements with some of its customers that include No-Hire Agreements. The No-Hire Agreements restrict the ability of Guardian's customers to (1) directly hire workers employed by Guardian and (2) indirectly hire workers employed by Guardian through a competing building services contractor after the competitor wins the customers' business away from Guardian. These restrictions apply during the term of Guardian's contracts and for six months to one year thereafter. The No-Hire Agreements apply not just to those Guardian employees identified by Guardian and staffed to provide services for a customer, but to all Guardian building services employees.

The complaint alleges that Guardian's No-Hire Agreements are anticompetitive because they are horizontal agreements among competitors not to compete. Guardian and its customer building owners and property managers are competitors for the labor of building services workers like Guardian's employees. The No-Hire Agreements are horizontal agreements that prohibit buildings and property management

companies from hiring building services workers, thereby undermining competition for labor, reducing worker bargaining power, and suppressing wages. For these reasons, the complaint alleges that the No-Hire Agreements constitute unreasonable restraints of trade that are unlawful under section 1 of the Sherman Act, 15 U.S.C. 1, and are thus unfair methods of competition in violation of section 5 of the FTC Act, as amended, 15 U.S.C. 45.

Independent of the Sherman Act, the complaint alleges that Guardian's conduct constitutes an unfair method of competition with a tendency or likelihood to harm competition, consumers, and employees in the building services industry, in violation of section 5 of the FTC Act. According to the complaint, the No-Hire Agreements limit the ability of building owners and managers to hire Guardian's employees. This harms Guardian's employees because it limits their ability to negotiate for higher wages, better benefits, and improved working conditions. Employees may suffer further hardship if the building they work at brings services in-house because the No-Hire Agreements force them to leave their jobs in some circumstances. The complaint further alleges that the No-Hire Agreements harm building owners and managers because they may be foreclosed from bringing services in-house due to the prospect of losing long-serving workers with extensive, building-specific experience.

IV. The Proposed Order

The proposed Order seeks to remedy Guardian's unfair methods of competition. Section II of the proposed Order prohibits Guardian from entering or attempting to enter, maintaining or attempting to maintain, enforcing or attempting to enforce, or threatening to enforce a No-Hire Agreement, or communicating to a customer or any other person that any Guardian Employee is subject to a No-Hire Agreement. Paragraph III.A of the proposed Order requires Guardian to provide written notice to customers that are subject to No-Hire Agreements that (i) the restriction is null and void, and (ii) any customer or a subsequent building services contractor for a customer is no longer subject to the restrictions or penalties related to the No-Hire Agreements in Guardian's contracts. Paragraph III.B of the proposed Order requires Guardian to provide various written notices to employees who are subject to a No-Hire Agreement. Paragraph III.C requires that Guardian post clear and conspicuous notice that employees are not subject to No-Hire Agreements and may seek or accept a job with the building directly, or any company that wins the building's business. Paragraphs IV.A and IV.B of the proposed Order provide a timeline according to which the obligations enumerated in Section III must be met. Paragraphs IV.C–E set forth Guardian's ongoing compliance obligations.

Other paragraphs contain standard provisions regarding compliance reports, requirements for Guardian to provide notice to the FTC of material changes to its business, and access for the FTC to documents and personnel. The term of the proposed Order is ten years.

The purpose of this analysis is to facilitate public comment on the Consent Agreement and proposed Order to aid the Commission in determining whether it should make the proposed Order final. This analysis is not an official interpretation of the proposed Order and does not modify its terms in any way.

By direction of the Commission, Commissioners Holyoak and Ferguson dissenting.

April J. Tabor,

Secretary.

Dissenting Statement of Commissioner Melissa Holyoak

As I have previously explained,[1] the Commission cannot issue a complaint unless it has reason to believe that the law has been violated.[2] The same requirement applies equally to complaints headed toward litigation and to complaints that accompany a consent order that simultaneously resolves the matter. Today's Complaint against Guardian Service Industries, Inc. fails to provide sufficient allegations to establish a violation of section 1 of the Sherman Act or a violation of section 5 of the FTC Act. Because the restraint at issue is between a building services contractor and its clients, it would qualify as a vertical restraint, and ''nearly every . . . vertical restraint'' should be analyzed under the rule of reason.[3] Further, this is a novel area, and the *per se* rule ''is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason.'' [4] Under the rule of reason, ''the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.'' [5] To do so, the court conducts ''an inquiry into market power and market structure designed to assess the combination's actual effect.'' [6] Today's Complaint, however, does not plead sufficient facts to make a violation

[1] Dissenting Statement of Comm'r Melissa Holyoak, *In the Matter of Chevron Corporation & Hess Corporation,* Comm'n File No. 241–0008 (Sept. 30, 2024); Joint Dissenting Statement of Comm'r Melissa Holyoak and Comm'r Andrew N. Ferguson, *In the Matter of ExxonMobil Corporation,* No. 241–0004 (May 2, 2024).

[2] 15 U.S.C. 45(b).

[3] *Ohio* v. *Am. Express Co.,* 585 U.S. 529, 541 (2018).

[4] *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.,* 551 U.S. 877, 886–87 (2007) (citation omitted). Chair Khan contends that ''some no-poach or no-hire provisions may be analyzed as *per se* restraints under Section 1 of the Sherman Act.'' Statement of Chair Lina M. Khan, In the Matter of Guardian Service Industries, Inc., Matter Number 2410082 (Dec. 3, 2024). First, to be clear, the Complaint in today's action does *not* allege a *per se* violation. Second, the Seventh Circuit case upon which she relies, *Deslandes* v. *McDonald's USA, LLC,* 81 F.4th 699, 703 (7th Cir. 2023), *cert. denied,* 144 S. Ct. 1057 (2024), does not stand for the proposition that today's conduct, or no-hire and no-poach provisions more generally, should be condemned as *per se* unlawful. To begin with, the no-poach provisions alleged in *Deslandes* were purely horizontal, *see id.* at 703, lacking the vertical component at issue in today's complaint against Guardian. Further, Judge Easterbrook, analyzing a motion for judgment on the pleadings, made clear that the district court had ''jettisoned the *per se* rule too early.'' *Id.* He did not declare that such agreements were *per se* unlawful. In fact, he went on to explain a variety of questions that needed to be considered before such a determination could be made, including, *inter alia:* ''So what was the no-poach clause doing? Was it protecting franchises' investments in training, or was it allowing them to appropriate the value of workers' own investments?'' *Id.* at 704. He explained that ''[t]hese are all potentially complex questions, which cannot be answered by looking at the language of the complaint. They require careful economic analysis. More than that: the classification of a restraint as ancillary is a defense, and complaints need not anticipate and plead around defenses.'' *Id.* at 705. Such considerations are a far cry from declaring no-poach agreements *per se* unlawful.

[5] *Leegin,* 551 U.S. at 885; *see also Am. Express Co.,* 585 U.S. at 541.

[6] *Copperweld Corp.* v. *Indep. Tube Corp.,* 467 U.S. 752, 768 (1984).

under the rule of reason plausible.[7] For this reason, I dissent.[8]

Dissenting Statement of Commissioner Andrew N. Ferguson

The Commission today issues an administrative complaint and accepts a proposed consent agreement with Guardian Service Industries, Inc. (''Guardian'').[1] Guardian is a building services contractor operating throughout the Northeast, New England, and Mid-Atlantic regions.[2] It employs about 2,800 workers who provide concierge, security, custodial, maintenance, engineering, and related services at residential and commercial buildings.[3] The Complaint alleges that some of Guardian's contracts with building-management clients contain so called ''no-hire'' provisions, also sometimes referred to as ''no-poach'' provisions.[4] As written, these provisions forbid Guardian's clients from hiring Guardian's employees directly, or by hiring them from one of Guardian's competitors.[5] This restriction applies both during the contract term and for six to twelve months beyond it.[6]

The Commission is wise to focus its resources on protecting competition in labor markets. After all, the antitrust laws protect employees from unlawful restraints of the labor markets as much as they protect any output market.[7] But, as I have warned before, we must always act within the boundaries Congress has imposed on our authority. For example, while I have no doubt that some noncompete agreements violate the Sherman Act,[8] the now-enjoined Non-Compete Clause Rule[9] wildly exceeded our authority to address noncompete agreements.[10] Today, we again exceed our authority by failing to comply with Congress's procedural requirements for issuing an administrative complaint. I therefore respectfully dissent.

The Complaint charges that Guardian's no-hire clauses are unreasonable restraints of trade under section 1 of the Sherman Act,[11] and are also therefore unfair methods of competition in violation of section 5 of the Federal Trade Commission Act.[12] The Complaint proceeds on a rule-of-reason theory, rather than a *per se* theory. That choice makes sense. The rule of reason ''presumptively applies'' to every restraint,[13] especially when, as

[7] The Commission's 2022 Policy Statement states that under section 5 of the FTC Act, ''the inquiry will not focus on the 'rule of reason.''' *See* Fed. Trade Comm'n, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act,* Comm'n File No. P221202, at 10 (Nov. 10, 2022); *id.* at 2 (''Congress passed the FTC Act to push back against the judiciary's adoption and use of the open-ended rule of reason for analyzing Sherman Act claims.''). I disagree with this conclusion and the 2022 Policy Statement in general. *See* Dissenting Statement of Comm'r Christine S. Wilson, *Regarding the Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act,* Comm'n File No. P221202 (Nov. 10, 2022). Among other problems with the statement, section 5 requires a showing of anticompetitive effects. *See Boise Cascade Corp.* v. *FTC,* 637 F.2d 573, 579 (9th Cir. 1980); *cf. E.I. du Pont de Nemours & Co.* v. *FTC,* 729 F.2d 128, 141 (2d Cir. 1984) (rejecting unfair method of competition claim because there was no ''causal connection'' between the challenged practices and adverse competitive effects); *FTC* v. *Raladam Co.,* 283 U.S. 643, 647–48 (1931).

[8] Chair Khan somehow believes that just because she, as one agent of the American government, declares her choices as helpful to ''American workers,'' that it makes it so. Khan, *supra* note 4. Good intentions do not, however, translate into tangible results. And while her rhetoric may make for good PR, the facts and the law matter. The Chair's decision to assert that the agreements are *per se* illegal in today's statement but not in the actual Complaint is just one more example where the public should rely more on the Chair's revealed preferences than her expressed preferences.

[1] *In re Guardian Serv. Indus., Inc.,* Complaint (''Complaint'') & Decision and Order (''Order'').

[2] Compl. ¶ 1; *In re Guardian Serv. Indus., Inc.,* Analysis of Agreement Containing Consent Order to Aid Public Comment (''AAPC''), at 1.

[3] AAPC at 1.

[4] Compl. ¶ 11. No-hire provisions are not non-compete clauses. No-hire provisions are agreements between two or more employers not to recruit, solicit, or hire each other's employees. Non-compete clauses are agreements between an employer and its employee in which the employee promises not to work for the employer's competitors after the termination of the employment relationship. No-hire provisions do not fall within the scope of the Commission's failed Non-Compete Clause Rule. 89 FR 38,342 (May 7, 2024).

[5] Compl. ¶¶ 10–11; AAPC at 2.

[6] *Ibid.*

[7] *NCAA* v. *Alston,* 594 U.S. 69, 86–87 (2021) (explaining that an employee challenging a labor-market restraint need show competitive injury only in the market for labor); *Anderson* v. *Shipowners Ass'n,* 272 U.S. 359, 361–65 (1926) (agreement among group of associations that ''own[ed], operat[ed], or control[led] substantially all the merchant vessels . . . [in] the ports of the Pacific Coast'' to control employment of seamen violated the Sherman Act); *Todd* v. *Exxon Corp.,* 275 F.3d 191, 201 (2d Cir. 2001) (addressing labor market and explaining that ''[t]he Sherman Act . . . applies . . . to abuse of market power on the buyer side—often taking the form of monopsony or oligopsony. . . . Plaintiff is correct to point out that a horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers.''); Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶ 352a (rev. ed. 2024) (''employees may challenge antitrust violations that are premised on restraining the employment market.''); *id.* at ¶ 352c (''Antitrust law addresses employer conspiracies controlling employment terms precisely because they tamper with the employment market and thereby impair the opportunities of those who sell their services there. Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services.''); see also *Weyerhaeuser Co.* v. *Ross-Simmons Hardwood Lumber Co., Inc.,* 549 U.S. 312, 322 (2007) (Thomas, J.) (''The kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization.'' (citing Roger Noll, ''Buyer Power'' and Economic Policy, 72 Antitrust L.J. 589, 591 (2005) (''[A]symmetric treatment of monopoly and monopsony has no basis in economic analysis.''))); *Mandeville Island Farms* v. *Am. Crystal Sugar Co.,* 334 U.S. 219, 235 (1948) (''It is clear that the agreement is the sort of combination condemned by the [Sherman] Act, even though the price-fixing was by purchasers, and the persons specially injured under the treble damage claim are sellers, not customers and consumers.'').

[8] See Dissenting Statement of Comm'r Andrew N. Ferguson, Joined by Comm'r Melissa Holyoak, In the Matter of the Non-Compete Clause Rule, Matter No. P201200, at 18 n.142 (June 28, 2024) (hereinafter ''Ferguson Non-Compete Dissent''), *https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf* (''Noncompete agreements are contracts in restraint of trade, and therefore subject to the rule of reason under section 1 of the Sherman Act and section 5 of the FTC Act. But as is true of all agreements that do not implicate one of the few *per se* rules, whether a given noncompete agreement violates the antitrust laws will turn entirely on the particular circumstances and competitive effects of that agreement.'' (internal citations omitted)).

[9] 89 FR 38342 (May 7, 2024).

[10] Ferguson Non-Compete Dissent at 8–9; *Ryan LLC* v. *FTC,* No. 3:24–CV–00986–E, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024) (vacating the Commission's Non-Compete Clause Rule); *Properties of the Villages, Inc.* v. *FTC,* 2024 WL 3870380 (M.D. Fla. Aug. 15, 2024) (issuing a preliminary injunction prohibiting enforcement of the Commission's Non-Compete Clause Rule as to plaintiff). With the Presidential transition in full swing, the Chair has some parting shots. She argues that my dissent is part of a ''trend in matters where the Commission is protecting American workers.'' Statement of Chair Lina M. Khan, *In re Guardian Serv. Indus., Inc.,* Matter No. 2410082, at 2 (Dec. 3, 2024) (hereinafter ''Chair's Statement''). For the second time in a couple months, she cites as an example of this ''trend'' my dissent from the Non-Compete Clause Rule. *Id.* at 2 n.6; Statement of Chair Lina M. Khan, Joined by Comm'rs Rebecca Kelly Slaughter and Alvaro M. Bedoya, *In re Lyft, Inc.,* Matter No. 2223028, at 8–9 & n.35 (Oct. 25, 2024), *https://www.ftc.gov/system/files/ftc_gov/pdf/Statement-Chair-Khan-Joined-Comm-Slaughter-Comm-Bedoya-In-the-Matter-Lyft-Inc-10-25-2025.pdf.* It bears repeating once more that this rule is enjoined nationwide as unlawful, and the Biden-Harris Administration will leave office without it ever having taken effect. *Ryan LLC,* 2024 WL 3879954; Statement of Comm'r Andrew N. Ferguson, Concurring in Part and Dissenting in Part, *United States* v. *Lyft,* Matter No. 2223028, at 14 (Oct. 25, 2024) (hereinafter ''Ferguson Lyft Statement''), *https://www.ftc.gov/system/files/ftc_gov/pdf/Ferguson-Lyft-Dissent-10-25-2024.pdf.* As I said in *Lyft,* I strongly favor protecting workers to the fullest extent of our statutory authority. Ferguson Lyft Statement at 14. Promulgating failed rules and settling cases for pennies on the dollar does not protect workers, no matter how triumphant the Commission's press releases are. *Ibid.*

[11] Compl. ¶ 16.

[12] *Id.* ¶ 17.

[13] *Texaco Inc.* v. *Dagher,* 547 U.S. 1, 5 (2006); see also *Cont'l T.V., Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36, 58–59 (1977) (''[D]eparture from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing.''); *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.,* 551 U.S. 877, 899 (2007) (''Resort to *per se* rules is confined to restraints, . . . 'that would always or almost always tend to restrict competition and decrease output.' To justify a *per*

Continued

here, the restraint is ancillary to an otherwise lawful and primarily vertical agreement.[14] Under the rule of reason, a restraint violates section 1 if the anticompetitive effects of the restraint outweigh its procompetitive effects.[15] Put slightly differently, the rule of reason forbids restraints for which the procompetitive justifications for the restraint could have been achieved through ''less anticompetitive means'' than those imposed by the restraint.[16]

Here, the Complaint alleges that ''[a]ny legitimate objectives of Guardian's'' use of the no-hire provisions ''could have been achieved through significantly less restrictive means.'' [17] This certainly may be true of some no-hire agreements. And no-hire clauses undoubtedly can have anticompetitive effects.[18] In some circumstances, those anticompetitive effects will outweigh the procompetitive justifications for a no-hire clause.[19] When those facts obtain, the no-hire provision violates the Sherman Act.

But we cannot issue a Complaint against a company based solely on a theory about hypothetical effects of no-hire agreements. To lawfully invoke our enforcement authority, we must have a ''reason to believe'' that Guardian's no-hire provisions violate section 5, not that no-hire provisions generally could violate section 5.[20] The Commission has a ''reason to believe'' the law has been violated only if it has evidence sufficient to make the ''threshold determination that further inquiry is warranted.'' [21] That reason must be ''well-grounded'' in evidence that the Commission gleaned from its pre-filing investigation.[22]

Had the Complaint plausibly alleged anticompetitive effects outweighing procompetitive justifications, I would have voted for it. But the Complaint alleges nothing about the no-hire provisions' effects. It does not allege direct evidence of anticompetitive effects, or of indirect, economic evidence of anticompetitive effects, like market power and harm to competition. It does not even allege that Guardian has ever tried to enforce any of these agreements, nor does it allege that a single Guardian customer or worker believed Guardian would enforce any of these provisions.[23] Nor have I seen any such evidence that goes unmentioned in the Complaint. Indeed, I am at a loss about how my colleagues have formed their reason to believe that Guardian is violating the antitrust laws.

The Commission ought to protect competition in the labor markets, but it cannot bend the law to do so. We must form a ''well-grounded reason to believe'' that the law has been violated before issuing an administrative complaint. Because we have no evidence of the effects of the no-hire agreements in this case, the Commission should not have issued this Complaint.

I respectfully dissent.

[FR Doc. 2024–28720 Filed 12–5–24; 8:45 am]

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se prohibition a restraint must have 'manifestly anticompetitive' effects and 'lack . . . any redeeming virtue.''' (cleaned up)).

[14] See, *e.g., Aya Healthcare Servs., Inc.* v. *AMN Healthcare, Inc.,* 9 F.4th 1102, 1109 (9th Cir. 2021) (citing *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.,* 792 F.2d 210, 224 (D.C. Cir. 1986)). The Chair invokes *Deslandes* v. *McDonald's USA, LLC* as ''affirm[ing]'' that ''some no-poach or no-hire provisions may be analyzed as *per se* restraints under section 1 of the Sherman Act.'' Chair's Statement at 2 n.6. That is not quite right. *Deslandes* held only that a properly pleaded *per se* claim challenging no-hire clauses could survive a motion to dismiss because ''the classification of a restraint as ancillary,'' and therefore not subject to the *per se* standard, ''is a defense, and complaints need not anticipate and plead around defenses.'' 81 F.4th 699, 705 (7th Cir. 2023), *cert. denied,* 144 S. Ct. 1057 (2024). Whether a restraint is ancillary, and therefore subject to the rule of reason, ''requires discovery, economic analysis, and potentially a trial.'' *Ibid.*

[15] See, *e.g., GTE Sylvania Inc.,* 433 U.S. at 49 & n.15 (citing *Chi. Bd. of Trade* v. *United States,* 246 U.S. 231, 238 (1918) (Brandeis, J.)); *Atl. Richfield Co.* v. *USA Petroleum Co.,* 495 U.S. 328, 342 (1990); *Ohio* v. *Am. Express Co.,* 585 U.S. 529, 541–42 (2018).

[16] *Am. Express Co.,* 585 U.S. at 542; *Alston,* 594 U.S. at 100 (''[A]nticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits.'').

[17] Compl. ¶ 14. Potential procompetitive justifications, *i.e.,* legitimate objectives, in these circumstances could include Guardian seeking to recoup any costs for the training of and investment in its workers or for screening and background checks to employ these workers, or to protect any relevant trade secrets.

[18] Matthew Gibson, Employer Market Power in Silicon Valley, IZA Discussion Paper No. 14843 (Nov. 2021), *https://docs.iza.org/dp14843.pdf* (comparing workers' salaries at Silicon Valley firms subject to DOJ's no-poach investigation to worker salaries at other information-technology firms and concluding that the challenged no-poach agreements reduced salaries at colluding firms by 4.8%).

[19] Cf. *Eichorn* v. *AT&T Corp.,* 248 F.3d 131 (3d Cir. 2001) (challenged no-hire agreement ''not an antitrust violation under the rule of reason'' where the particular provision at issue ''did not have a significant anti-competitive effect on the plaintiffs' ability to seek employment''); *Aya Healthcare Servs.,* 9 F.4th at 1110 (challenged non-solicitation agreement, involving employee outsourcing arrangement between healthcare staffing agencies collaborating to supply traveling nurses, not unlawful under rule of reason where restraint was reasonably necessary to ensure neither would lose personnel during collaboration); *Giordano* v. *Saks Inc.,* 654 F. Supp. 3d 174, 201 (E.D.N.Y. 2023) (challenged no-poach agreement involving collaborative business arrangement not unlawful under rule of reason where luxury brands agreed not to poach Saks employees who were trained to sell brand products unless current managers consented or the employee had left Saks at least six months prior).

[20] 15 U.S.C. 45(b).

[21] *FTC* v. *Standard Oil of Cal.,* 449 U.S. 232, 241 (1980); *Boise Cascade Corp.* v. *FTC,* 498 F. Supp. 772, 779 (D. Del. 1980).

[22] *Standard Oil,* 449 U.S. at 246 n.14; see also *AMREP Corp.* v. *FTC,* 768 F.2d 1171, 1177 (10th Cir. 1985).

[23] The Chair presents this case as a choice between Guardian's no-hire provisions ''remain[ing] in place,'' ostensibly presuming anticompetitive effects from their very existence, or continuing the investigation. Chair's Statement at 2. That is not correct. I have seen no evidence of actual or threatened enforcement of these clauses. And even if Guardian did threaten or attempt to enforce such provisions, I have seen no evidence that such threatened or actual enforcement would violate the antitrust laws—the question before the Commission when deciding whether to issue a Complaint. The Chair's citation of public comments submitted in response to the Commission's separate, unrelated Non-Compete Clause Rule, *id.* at 2 n.9, does not change the facts, or lack thereof, in this matter. Moreover, I have no objection to the Commission agreeing not to bring an enforcement action so long as Guardian agrees not to enforce its no-hire provisions—akin to a non-prosecution agreement. But if the Commission invokes its power to issue a complaint, it must comply with the statute giving it that power—including the requirement that we have ''reason to believe'' that section 5 has been violated.

FEDERAL TRADE COMMISSION

[File No. 232 3023]

IntelliVision Technologies Corp.; Analysis of Proposed Consent Order To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of Federal law prohibiting unfair or deceptive acts or practices. The attached Analysis of Proposed Consent Order to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before January 6, 2025.

ADDRESSES: Interested parties may file comments online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Please write ''IntelliVision; File No. 232 3023'' on your comment and file your comment online at *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, please mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Mail Stop H–144 (Annex F), Washington, DC 20580.