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October 14, 2018

Chair Joseph Simons and Members of the Commission
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

Re: Hearing #1 on Competition and Consumer Protection in the 21st Century, Docket ID FTC-2018-0074

Via Online Submission

Dear Chairman Joseph Simons and Members of the Commission:

We write to supplement our comment of August 20, 2018 (on the topic of “Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201”) and to respond to Commissioner Chopra’s comment of September 6, 2018 in which he called upon the Federal Trade Commission (FTC or Commission) to begin rulemakings under section 5 of the FTC Act. In this comment, we discuss our support of the FTC’s ability to make rules in this area, and suggest a few potential rules that we believe the FTC should consider which would curb specific anti-competitive behaviors difficult to address through adjudication.

I. The Federal Trade Commission Possesses Rulemaking Authority Under Section 5 of the Federal Trade Commission Act.

For far too long, there has been a fundamentally mistaken, yet pervasive, belief that the FTC’s duty to identify and prohibit “unfair methods of competition” under Section 5 of the FTC Act could best be accomplished through enforcement actions and adjudications rather than through prospective rules established under Section 5 rulemaking. Public Citizen applauds Commissioner Chopra for refocusing the attention of the public and the commission on the potential for FTC rulemaking under Section 5. Public Citizen fully agrees with Commissioner Chopra that the FTC’s legal authority to issue through Section 5 rulemaking is clear and undisputed.

This conclusion follows from the extensive legislative history underlying Congressional enactment of section 5 of the FTC Act, as well as amendments to that Act that followed enactment. The FTC was established by the FTC Act in 1914, largely in response to Congressional concern regarding under-enforcement of the antitrust laws by the Department of Justice, and Supreme Court jurisprudence that invoked the “rule of reason” when determining

antitrust violations,¹ which was viewed by Congress as a weakening of its intended standard regarding antitrust violations. In fashioning Section 5 of the Act, the legislative history makes clear that Congress deliberately chose to delegate broad authority to the FTC to define what would constitute “unfair methods of competition” rather than attempting to define or enumerate “unfair methods of competition” itself.²

The Supreme Court has repeatedly affirmed this reading of the legislative history, stating “Congress intentionally left development of the term ‘unfair’ to the Commission rather than attempting to define ‘the many and variable unfair practices which prevail in commerce.’”³ While Congress has revisited the portion of Section 5 that prohibits “unfair or deceptive acts or practices” and amended that portion to impose rulemaking procedural requirements under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, it has left the authority to prohibit “unfair methods of competition” undisturbed and free of any similar rulemaking procedural requirements.

Congress’ delegation of authority to the Commission to define unfair methods of competition is also justified by the Commission’s institutional strengths with respect to experience and expertise. As the Supreme Court stipulated regarding the Commission, it was the “express intention of Congress to create an agency whose membership would at all times be experienced, so that its conclusions would be the result of an expertness coming from experience.”⁴ This broad delegation of authority, left intentionally vague by Congress in order to be defined by the FTC using its experience and expertise, provides a solid foundation for courts to grant the Commission considerable deference in the exercise of its Section 5 “unfair methods of competition” rulemaking authority. Courts accord such deference, known as *Chevron* deference, to affirm agency rulemakings when courts find that the statutory authority underlying the rulemaking is ambiguous, and the agency’s interpretation of the statute is reasonable. Here, the Commission’s rulemaking authority to prohibit “unfair methods of competition” under Section 5 is ripe for *Chevron* deference due to the inherent and intentional ambiguity of the terms “unfair methods of competition” and the responsibility Congress placed on the Commission to exercise its expertise and experience in defining and prohibiting such “unfair methods of competition.” Much of the reluctance and resistance to accepting the Commission’s evident authority to issue rules on “unfair methods of competition” stems from a basic misunderstanding of the scope of the Commission’s authority with respect to the antitrust laws. Both Congress and the courts have made clear that Section 5 is broader than the antitrust laws, in that conduct can be an unfair method of competition even if it would not have violated the Sherman Act or the Clayton Act. Indeed, the Supreme Court has declared that Section 5 covers “not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons.”⁵ Public Citizen encourages the Commission to follow Commissioner Chopra’s lead in both clarifying the authority to issue rules that prohibit “unfair

¹ *Standard Oil Co. of N.J. v. United States* 221 U.S. 1 (1910).

² Neil W. Averitt, *The Meaning of “Unfair Methods of Competition” in Section 5 of the Federal Trade Commission Act*, 21 *BOSTON COLLEGE L. REV.* 227, 234 (1980).

³ *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 367 (1965).

⁴ *FTC v. Cement Institute*, 333 U.S. 683, 720 (1948).

⁵ *FTC. Indiana Fed’n of Dentists*, 476 U.S. 447, 454 (1986).

methods of competition” and by taking action to assert that authority to protect competition in the marketplace.

II. The Federal Trade Commission Should Commence Rulemakings Under Its Section 5 Authority to Prohibit “Unfair Methods of Competition”

Commissioner Chopra’s comment elaborates the case for unfair methods of competition rulemaking, as opposed to relying solely on enforcement actions. Rules afford greater certainty to market participants. Particularly given the difficulty and cost of bringing public and especially private antitrust enforcement actions, rulemaking will often be far more efficient at establishing and implementing appropriate market norms than enforcement will be. Rather than review these arguments, with which we wholeheartedly agree, we present two illustrative areas where we believe the Commission should act immediately to being rulemaking. The first is the use of noncompete employment agreements. The second concerns widespread anticompetitive practices in the brand-name pharmaceutical market; we propose rules to address two particular abuses.

A. The Federal Trade Commission Should Undertake Rulemaking to Prohibit the Use of Noncompete Employment Agreements

Noncompete clauses in employment contracts are increasingly pervasive in the economy, including among lower-income workers who possess no trade secret or proprietary information. Although their precise terms vary significantly, these clauses unfairly disadvantage workers and impose damaging restrictions on the employment market, with the effect of locking workers, including lower-wage employees, in to their current place of employment and diminishing their bargaining power.

Employers typically include noncompete clauses in the take-it-or-leave-it terms newly hired employees are required to sign when accepting a job offer. Almost certainly, many workers are unaware of the terms they are forced to accept. But awareness makes no difference; most workers are scared that if they try to negotiate the clause out of their contract, the job offer will be rescinded.⁶

The prevalence of noncompetes is startling. A University of Michigan study found that 20 percent of workers currently are bound by a noncompete clause in their employment contracts and that nearly 40 percent of workers report that they have during their working lives been bound by these restrictive terms, including 12 percent who earn \$20,000 or less per year.⁷ A 2016 report by the U.S. Treasury Department found that 15 percent of workers who lack a four-year

⁶ Evan Starr, J.J. Prescott and Norman Bishara, "Noncompetes in the U.S. Labor Force," University of Michigan Law School, Law and Economics Research Paper Series (Sept. 12, 2018), Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714

⁷ Evan Starr, J.J. Prescott and Norman Bishara, "Noncompetes in the U.S. Labor Force," University of Michigan Law School, Law and Economics Research Paper Series (Sept. 12, 2018), Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714

college degree are bound by the clauses, as are 14 percent of workers who with salaries of \$40,000 or lower.⁸

Public attention and state attorney general pressure on the issue has led a number of low-wage employers to commit to ending the use of noncompete clauses. Jimmy Johns, a fast food chain, required its minimum-wage workforce to accept a noncompete clause in the terms of its employment contracts until the New York state attorney general sued the company in 2016.⁹ Pressure from state attorneys general has led other fast-food giants, such as McDonald's, Carl's Jr. and Cinnabon, to end the practice.¹⁰ Public outrage following news reports about Amazon's widespread use of the clauses -- even for temporary warehouse workers -- spurred the company to cut the clause from hourly workers' contracts.¹¹

But voluntary employer-by-employer improvements have not fundamentally altered national labor market practices. Recent New York Times reports¹² document camp counselors, exterminators, factory workers, construction workers and magazine marketers facing unexpected lawsuits from past employers seeking to prevent them from being hired by competing businesses. A recent survey found that 20 percent of hair stylists are bound by a noncompete clause.¹³ One employment lawyer in New York observed, "Companies are spending money, hiring lawyers, to go after people — just to put the fear of death in them."¹⁴

Noncompete clauses restrict worker mobility and depress wages. A 2009 University of Michigan study found that after the state of Michigan allowed noncompete clauses to become enforceable in 1985, worker mobility fell by 8 percent.¹⁵ A 2011 study found that nearly a third of technology sector workers who are required by noncompete clauses to wait one or two years before joining a competing firm wind up taking "career detours." After leaving a job that bound them with a noncompete clause, these workers also had to leave the industry within which they'd

⁸ "Non-compete Contracts: Economic Effects and Policy Implications," U.S. Department of the Treasury Office of Economic Policy, March 2016, available at: <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf>

⁹ Sarah Whitten, "Jimmy John's drops noncompete clauses following settlement," CNBC, June 22, 2016, available at: <https://www.cnbc.com/2016/06/22/jimmy-johns-drops-non-compete-clauses-following-settlement.html>

¹⁰ "AG Ferguson Announces Fast-Food Chains Will End Restrictions on Low-Wage Workers Nationwide," Washington State Office of the Attorney General, July 12, 2018, available at: <https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers>

¹¹ Jana Kasperkevic, "Amazon to remove non-compete clause from contracts for hourly workers," The Guardian, March 27, 2015, available at: <https://www.theguardian.com/technology/2015/mar/27/amazon-remove-noncompete-clause-contracts-hourly-workers>

¹² Steven Greenhouse, "Noncompete Clauses Increasingly Pop Up in Array of Jobs," The New York Times, June 8, 2014, available at: <https://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html>; Conor Dougherty, "How Noncompete Clauses Keep Workers Locked In," The New York Times, May 13, 2017, available at: <https://www.nytimes.com/2017/05/13/business/noncompete-clauses.html>

¹³ Koby Levin, "As non-compete agreements proliferate, so do lawsuits," Associated Press, March 23, 2018, available at: <https://www.apnews.com/70f0855282de4329908957fa7b1e278d>

¹⁴ Steven Greenhouse, "Noncompete Clauses Increasingly Pop Up in Array of Jobs," The New York Times, June 8, 2014, available at: <https://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html>

¹⁵ Matt Marx, Deborah Strumsky and Lee Fleming, "Mobility, Skills, and the Michigan Non-Compete Experiment," Management Science, April 15, 2009, available at: <https://pubsonline.informs.org/doi/abs/10.1287/mnsc.1080.0985>

built their experience, often requiring them to accept pay cuts.¹⁶ Wages for hourly workers in states with strong noncompete enforcement are about 4 percent lower than hourly worker wages in states that do not enforce.¹⁷ A study published by Management Science finds that the clauses stifle workers from starting their own entrepreneurial ventures,¹⁸ an effect that has damaging consequences for the economy because the emergence of new firms means the creation of new jobs.¹⁹ Another study found that strong enforcement of noncompete clauses is correlated with regions suffering regional loss of talent, or “brain drain.”²⁰ A 2017 study by academics with the US Census Bureau Center for Economic Studies finds that technology sector workers who are subject to noncompete clauses earn five percent less over time than workers in states that do not enforce noncompete clauses.²¹

Courts recognize that noncompete contractual clauses may violate the antitrust laws, commonly analyzing such provisions under rule of reason analysis, but it is apparent that that a background rule of reason rule, and public and private enforcement, has proven inadequate to curtail the widespread abuse of noncompetes in the labor market.

We recommend that the FTC issue a rule under Section 5 to remedy widespread abuse of noncompete clauses in the national labor market.

We believe that the experience in California, the tech-heavy economy where noncompete clauses are unenforceable, shows that the belief that noncompete clauses serve justifiable interests in protecting confidential business information is mistaken. The implication is that the antitrust analysis should lean decisively against the validity of noncompete agreements.

Accordingly, we propose that the FTC issue a rule establishing that noncompete agreements are a per se violation of Section 5 of the FTC Act.

Alternatively, the Commission might consider a rule establishing that noncompete agreements are a per se violation of Section 5 for employees paid less than \$50,000 per year or some alternative threshold. Noncompete agreements for employees paid above the threshold could be held to presumptively violate Section 5, with the presumption rebuttable by a showing of

¹⁶ Matt Marx, "The Firm Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals," *American Sociological Review*, Aug. 24, 2011, available at:

<http://journals.sagepub.com/doi/abs/10.1177/0003122411414822>

¹⁷ Evan Starr, "Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete," *Industrial and Labor Relations Review*, May 24, 2018, available at:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2556669

¹⁸ Evan Starr, Natarajan Balasubramanian and Mariko Sakakibara, "Screening Spinouts? How Noncompete Enforceability Affects the Creation, Growth, and Survival of New Firms," *Management Science*, Jan. 12, 2017, available at: <https://pubsonline.informs.org/doi/abs/10.1287/mnsc.2016.2614>

¹⁹ Noah Smith, "Noncompete Agreements Take a Toll on the Economy," *Bloomberg*, March 22, 2018, available at: <https://www.bloomberg.com/view/articles/2018-03-22/noncompete-agreements-take-a-toll-on-the-economy>

²⁰ Matt Marx, Jasjit Singh and Lee Fleming, "Regional disadvantage? Employee non-compete agreements and brain drain," *Research Policy*, March 2015, available at:

<https://www.sciencedirect.com/science/article/pii/S0048733314001814>

²¹ Natarajan Balasubramanian, Jin Woo Chang, Mariko Sakakibara, et al., "Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers," *US Census Bureau Center for Economic Studies*, Jan. 25, 2017, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2905782

legitimate business interest in protection trade secrets or other proprietary information. The rule could establish specifically that mere knowledge of a company's general business practices is not enough to overcome the presumption against noncompete clauses.

B. The Federal Trade Commission Should Undertake Rulemaking to Prohibit Anticompetitive Practices in the Brand-Name Pharmaceutical Market

There is a widely held belief among the public, rooted in both experience and data, that prescription drug prices are out of control. Drug companies' ability to charge unreasonably high prices stems from patent monopolies and various government-granted exclusivities and monopolies, on the one hand, and the unique features of prescription drugs and the prescription drug market – non- or limited substitutability, the lifesaving or pain and illness-reducing nature of the goods, and the large role of indirect purchasers. On their own, high prices even against this backdrop do not constitute antitrust violations, at least under current understandings of the law.

However, as we explained in our earlier comment to the Commission, these product and market features are exacerbated by widespread anti-competitive practices among brand-name drug manufacturers. These include: the practice of paying to delay the entry of new or generic drugs into the market; "product hopping" and "evergreening;" anti-competitive joint ventures and cross-licensing arrangements; anti-competitive practices surrounding combination products and refusals to license to competitors; illegal obstacles to the launch of biosimilars; and anti-competitive and other abuses by pharmacy benefit managers, including failure to pass on cost savings and discounts to employers and patients.

We believe these abuses violate Section 5 of the FTC Act and could be prevented or at least diminished by FTC issuance of proscriptive rules. By way of illustration, we highlight two possible rules that the Commission might consider.

First, the Commission might focus attention on the brand name drug makers' anti-competitive abuse of the Food and Drug Administration's Risk Evaluation and Mitigation Strategy (REMS) program to delay generic competition. In 2007, Congress passed the Food and Drug Administration Amendments Act (FDAAA), which included new requirements to provide additional safeguards for use of certain high-risk prescription drugs through REMS programs. While REMS programs can help ensure safety with certain drugs, brand name companies at times abuse REMS programs to prevent potential competitors from attaining FDA approval for generic and biosimilar products that, once approved, would compete with the originator's drug. These abuses from brand-name drug companies take several forms, including: invoking the existence of a REMS program as a rationale for denying a generic company access to a sample they require to pursue an abbreviated new drug application (ANDA); and refusing to negotiate a shared REMS with a generic firm to prevent launch of a competing generic product that is otherwise ready for FDA approval.²² These actions pervert rather than carry out Congressional intent in passing the FDAAA; Congress specified that REMS requirements should not "block or delay" generic entry. We believe that the REMS abuses described here constitute an illegal

²² Sarpatwari A, Avorn J, Kesselheim AS. Using a drug-safety tool to prevent competition. *N Engl J Med.* 2014;370(16):1476-1478. Available at: <http://www.nejm.org/doi/pdf/10.1056/NEJMp1400488>.

refusal to deal, have no pro-competitive or legitimate business rationale, and violate Section 5 of the FTC Act.

Our recommendation is that the Commission consider issuing a rule under Section 5 to proscribe such actions. We believe a per se rule would be appropriate, but the Commission might instead establish a presumption rebuttable with a showing of a legitimate business interest.

A second example of where the Commission might focus rulemaking attention is on the brand-name manufacturer practice of repeatedly raising prices for drugs after market entry. In recent years, brand-name companies have commonly scheduled two significant price increases a year for many of their products, often at or exceeding 10 percent price jumps in each instance. Over time and compounded, these price jumps are staggering. Consumers have long suffered, but the issue was thrown into sharp relief with the Epipen scandal in 2016: accumulated price jumps for the product, which has a patent-protected injector to deliver a generic medicine, spiked the price for a two-pack from \$100 to \$600 over a decade. The Epipen persistent price increases were and remain normal for the industry. A recent AP study found 96 price increases for each brand-name price reduction.²³

We believe this industry practice should be understood to constitute “an unfair metho[d] of competition” in violation of Section 5 of the FTC Act. We of course recognize that, under antitrust principles in the United States, monopolists are typically permitted to set prices at their choosing. We don’t believe the general deference to monopolists’ pricing should afford protection to the practice of repeated price increases, after building brand loyalty to a pharmaceutical product with potentially lifesaving or sickness- or pain-alleviating benefits and with possible withdrawal symptoms for those who stop using the product. In this context, steady price increases – far above general or any input cost inflation -- over a long period are inherently unfair. Whatever incentive rewards may reasonably be reaped by a patent or other monopoly holder, consistent price rises evidence an impermissible abuse of the monopoly position rather than a socially justifiable return to the monopolistic innovator.

We recommend that Commission consider promulgating a rule under Section 5 that would make brand-name pharmaceutical price spikes presumptively impermissible, with the presumption surmountable by a showing of proportional increases in raw material or input cost, or other legitimate business justification.

The proposal here would amount to a particularized standard for abuse of monopolistic position, based not on exclusionary conduct but unfair pricing practices for special products. It is not a standard likely to be elaborated on by the Commission or private parties through litigation, but it is a standard worthy of Commission consideration, in light of its consumer protection mandate, the pervasiveness and seriousness of brand-name drug price spiking and Congress’s purpose and intent in establishing Section 5 authority.

The proposals we outline above represent common-sense solutions to several examples of anticompetitive behavior that litigation is unlikely to address, and we believe there are many

²³ Linda Johnson and Nicky Forster, “AP Investigation: Drug Prices Going Up Despite Trump Promise,” AP, September 24, 2018, available at: <https://apnews.com/b28338b7c91c4174ad5fad682138520d>.

others the FTC could address. We are pleased the FTC is examining its Congressionally-granted rulemaking power, and we are hopeful the Commission will use that to make the marketplace more competitive and fair. We look forward to working with the FTC further on these issues.

Sincerely,

—

Robert Weissman
President