Analysis of Agreement Containing Consent Order to Aid Public Comment

In the Matter of Prudential Security, Inc., et al., FTC File No. 221 0026

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("consent agreement") with Prudential Security, Inc. ("Prudential Security"); Prudential Command Inc. ("Prudential Command"); Greg Wier, the co-owner, President, and Director of these companies; and Matthew Keywell, the co-owner, Secretary, and Treasurer of these companies (collectively "Respondents"). Prudential Security, Inc. and Prudential Command Inc. (collectively "Prudential") are Michigan corporations that provided security guard services to clients in several states, including Michigan, Tennessee, Ohio, South Carolina, and Pennsylvania.[1]

The consent agreement settles charges that Respondents violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by imposing post-employment covenants not to compete ("Non-Compete Restrictions") on their employees. A Non-Compete Restriction is a term that, after a worker has ceased working for an employer, restricts the worker's freedom to accept employment with competing businesses, form a competing business, or otherwise compete with the employer. As explained below, the proposed complaint alleges that Respondents' conduct constitutes an unfair method of competition because it is restrictive, coercive, and exploitative and negatively affects competitive conditions. The complaint further alleges that Respondents' imposition of Non-Compete Restrictions took advantage of the unequal bargaining power between Respondents and their employees, particularly low-wage security guard employees, and thus reduced workers' job mobility, limited competition for workers' services, and ultimately deprived workers of higher wages and more favorable working conditions.

As further described below, the consent agreement contains a proposed order remedying the Section 5 violation alleged in the complaint. Under the terms of the proposed order, Respondents—including any companies that Greg Wier and Matthew Keywell control or come to control in the future—must cease and desist from entering, maintaining, enforcing, or attempting to enforce any Non-Compete Restriction, or communicating to any employee or other employer that the employee is subject to a Non-Compete Restriction.

The proposed order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of

[1] Respondents sold and transferred the bulk of Prudential's security guard assets, including security guard employees, to another company in August 2022. As described below, the transferred employees are not subject to Non-Compete Restrictions with the buyer, and the buyer is not charged in the complaint.

the public record. After 30 days, the Commission will again review the consent agreement and the comments received and will decide whether it should make the proposed order final or take other appropriate action.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the complaint, the consent agreement, or the proposed order, and the analysis does not modify their terms in any way.

II. The Complaint

The complaint includes the following allegations:

Prior to August 2022, Prudential employed security guards who worked at facilities in several states. These security guards, who accounted for the vast majority of Prudential's workforce, typically earned hourly wages equal to or slightly above the minimum wage. Prudential imposed Non-Compete Restrictions on each of these security guard employees as a condition of employment. Among other limitations, these Non-Compete Restrictions require the following:

- For two years after ceasing to work for Prudential, the employee must not work for any competing business within 100 miles of the employee's primary jobsite.
- The employee also must not join, form, or "in any manner whatsoever help" any competing business for two years within 100 miles of the employee's primary jobsite.
- The employee must pay $100,000 to Prudential as "liquidated damages" if the employee violates the terms of the Non-Compete Restriction.

Respondents' security guard employees were not permitted to negotiate the terms of the Non-Compete Restrictions and very few, if any, security guards consulted an attorney before the restrictions were imposed by Respondents. The security guard employees were not offered any monetary compensation or job security in exchange for being subject to the Non-Compete Restrictions.

The complaint alleges that Respondents repeatedly and actively relied on these Non-Compete Restrictions to discourage, delay, and prevent current and former security guard employees from seeking or accepting alternative employment. Respondents threatened individual employees with enforcement of their Non-Compete Restrictions, including the liquidated damages provision, to discourage them from accepting positions with competing employers. Respondents also contacted competing security guard companies to notify them of the Non-Compete Restrictions and to threaten lawsuits if the competitor hired Respondents' former employees. And Respondents ultimately filed multiple lawsuits seeking to enforce Non-Compete Restrictions against individual employees and related lawsuits against competing

security guard companies.

For example, in 2018, a competing security guard company extended job offers to a number of security guards who worked for Prudential Security, promising significantly higher wages and more favorable working conditions. The security guards left Prudential Security and joined the competing company. Upon learning this, Prudential Security sued several of the security guards to prevent them from continuing employment with the competitor. After months of litigation, a Michigan state court dismissed the suit, finding that there was "nothing in the employment, training or knowledge of the individual defendants which would warrant enforcement of a non-compete under the circumstances."[2] The court also concluded that the Non-Compete Restrictions' two-year duration and 100-mile geographic scope were also unreasonable and unenforceable as a matter of state law. Respondents nevertheless continued to impose Non-Compete Restrictions on all incoming security guard employees that were identical to the restrictions the Michigan court had determined to be unreasonable and unenforceable.

Similarly, in 2019, a competing security guard company hired a former Prudential Security employee who had become subject to a Non-Compete Restriction upon joining Prudential Security as a security guard. Prudential Security sued the former employee and the competing company to enforce the Non-Compete Restriction, seeking injunctive and monetary relief. As a result, the competing company terminated the former Prudential Security employee.

In August 2022, Respondents sold their security guard assets to another security guard company. At present, Respondents do not provide security guard services. Former Prudential security guards who now work for the buyer of the assets are not subject to Non-Compete Restrictions with the buyer. But approximately 1,500 of Respondents' former employees are still subject to Non-Compete Restrictions with Respondents. In addition, Respondents Greg Wier and Matthew Keywell have other business interests and may launch new businesses in the future.

III. Legal Analysis

Section 5 of the FTC Act prohibits "unfair methods of competition."[3] Congress empowered the FTC to enforce Section 5's prohibition on "unfair methods of competition" to ensure that the antitrust laws could adapt to changing circumstances and to address the full range of practices that may undermine competition and the competitive process.[4] The Commission and

[2] *Prudential Security, Inc. v. Pack*, No. 18-015809-CB (Mich. Cir. Ct. Dec. 13, 2018).
[3] 15 U.S.C. § 45(a).
[4] *E.g.*, *Atl. Refining Co. v. FTC*, 381 U.S. 357, 367 (1965) ("The 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.") (internal citations and quotation marks omitted); *see also* Fed. Trade Comm'n, *Statement of the Commission On the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act*, at 3 (July 9, 2021) ("[T]he FTC Act reflects a basic tradeoff: Section 5 grants the Commission extensive authority to shape doctrine and reach conduct not otherwise prohibited by the

federal courts have historically interpreted Section 5 to prohibit conduct that contradicts the policies or the spirit of the antitrust laws, even if that conduct would not violate the Sherman or Clayton Acts.[5]

The Commission's recent Section 5 Policy Statement describes the most significant general principles concerning whether conduct is an unfair method of competition.[6] A person violates Section 5 by (1) engaging in a method of competition (2) that is unfair—i.e., conduct that "goes beyond competition on the merits."[7] A method of competition is "conduct undertaken by an actor in the marketplace" that implicates competition, whether directly or indirectly.[8] Conduct is unfair if (a) it is "coercive, exploitative, collusive, abusive, deceptive, predatory," "involve[s] the use of economic power of a similar nature," or is "otherwise restrictive and exclusionary," and (b) "tend[s] to negatively affect competitive conditions" for "consumers, workers, or other market participants"—for example by impairing the opportunities of market participants, interfering with the normal mechanisms of competition, limiting choice, reducing output, reducing innovation, or reducing competition between rivals.[9] The two parts of this test for unfairness "are weighed according to a sliding scale": where there is strong evidence for one part of the test, "less may be necessary" to satisfy the other part.[10] In appropriate circumstances, conduct may be condemned under Section 5 without defining a relevant market, proving market power, or showing harm through a rule of reason analysis.[11]

In addition, the Commission may consider any asserted justifications for a particular practice.[12] Any such inquiry would focus on "[t]he nature of the harm" caused by the method of competition: "the more facially unfair and injurious the harm, the less likely it is to be overcome

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Sherman Act, but provides a more limited set of remedies.").

[5] *E.g.*, *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 394–95 (1953) ("The 'Unfair methods of competition', which are condemned by [Section] 5(a) of the [FTC] Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act. Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business.") (internal citations omitted); *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 463 (1941) (Commission may "suppress" conduct whose "purpose and practice . . . runs counter to the public policy declared in the Sherman and Clayton Acts"); *FTC v. Brown Shoe*, 384 U.S. 316, 321 (1966) (Commission's power reaches "practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws"); *E.I. du Pont de Nemours & Co. v. FTC (Ethyl)*, 729 F.2d 128, 136–37 (2d Cir. 1984) (Commission may bar "conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit"); *see also FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972); *FTC v. R.F. Keppel & Bros., Inc*., 291 U.S. 304, 309–10 (1934).

[6] Fed. Trade Comm'n, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, Commission File No. P221202 (Nov. 10, 2022).

[7] *Id.* at 8–10.

[8] *Id.* at 8.

[9] *Id.* 8–10.

[10] *Id*. at 9.

[11] *Id.* at 10.

[12] *Id.* at 10–12 ("There is limited caselaw on what, if any, justifications may be cognizable in a standalone Section 5 unfair methods of competition case, and some courts have declined to consider justifications altogether.").

by a countervailing justification of any kind."[13] Unlike "a net efficiencies test or a numerical cost-benefit analysis," this analysis examines whether "purported benefits of the practice" redound to the benefit of other market participants rather than the respondent.[14] Established limits on defenses and justifications under the Sherman Act "apply in the Section 5 context as well," including that the justifications must be cognizable, non-pretextual, and narrowly tailored.[15]

As described below, the factual allegations in the complaint would support concluding that Respondents' use of Non-Compete Restrictions is an unfair method of competition under Section 5.

First, Respondents' use of Non-Compete Restrictions is a method of competition. Respondents knowingly imposed and enforced Non-Compete Restrictions on and against their employees. By design, this conduct restricted the employment options available to affected workers and therefore implicated competition for labor. Respondents' imposition and enforcement of Non-Compete Restrictions impeded the free movement of security guard employees who sought to work elsewhere.

Second, Respondents' conduct is restrictive, exploitative, and coercive. Respondents' actions tend to restrict the opportunity of rival security guard companies to compete for the services of the affected employees.

Respondents' imposition of Non-Compete Restrictions on their workers was also exploitative and coercive. Non-Compete Restrictions, by reducing workers' negotiating leverage vis-à-vis their current employers, tend to impair workers' ability to negotiate for better pay and working conditions.[16] Here according to the complaint, Respondents' security guard employees—who were all subject to Non-Compete Restrictions as a condition of employment—earned low wages, were not permitted to negotiate the terms of the Non-Compete Restrictions, and did not consult attorneys before joining Prudential. By contrast, Respondents were repeat players, experienced in using and enforcing Non-Compete Restrictions. These allegations support a finding of considerable imbalances in economic power and bargaining power at the time that the employees became subject to the Non-Compete Restrictions. This power imbalance is further evidenced by the fact that the employees did not receive any money, job security, or

[13] *Id.* at 11.
[14] *Id.*
[15] *Id.* at 11–12.
[16] *See, e.g.*, Dep't of the Treasury, Report, *Non-compete Contracts: Economic Effects and Policy Implications* (Mar. 2016) at 10, https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf ("When workers are legally prevented from accepting competitors' offers, those workers have less leverage in wage negotiations [with their current employer.]").

other compensation in exchange for being subject to the Non-Compete Restrictions.

Respondents' enforcement of the Non-Compete Restrictions, as alleged in the complaint, was likewise exploitative and coercive. As described above, Respondents enforced Non-Compete Restrictions against security guards to discourage, delay, and prevent them from accepting offers of other employment. Respondents' threats and lawsuits aimed to force workers into forgoing job opportunities that offered higher pay and better working conditions as compared to Respondents' jobs. The coercive effect of these threats relied, critically, on the affected workers' relatively vulnerable economic positions. Workers subject to Respondents' enforcement actions were particularly susceptible to economic instability once they had left their prior positions: Respondents' Non-Compete Restrictions foreclosed the very job opportunities that likely would have provided the workers with the best alternatives to continued employment with Respondents—jobs in the same industry in the same broad geographic area.

Third, Respondents' use of Non-Compete Restrictions negatively affects competitive conditions. In well-functioning labor markets, workers compete to attract employers and employers compete to attract workers. For example, workers may attract potential employers by offering different skills and experience levels. Employers may attract potential employees by offering higher wages, better hours, a more convenient job location, more autonomy, more benefits, or a different set of job responsibilities. Because factors beyond price (wages) are important to both workers and employers in the job context, labor markets are "matching markets" as opposed to "commodity markets."[17]

In general, in matching markets, higher-quality matches tend to result when both sides—here, workers and employers—have more options available to them.[18] Having more options on both sides could, for example, allow for matching workers with jobs in which their specific skills are more valued, the hours demanded better fit their availability, or their commutes are shorter and more efficient. Matches could also be better in that various employers' compensation packages, which differ in terms of pay and benefits, are coupled with employees who value those offerings more and will, for example, tend to stay at those jobs longer as a result. Competition for labor allows for job mobility and benefits workers by allowing them to accept new employment, create or join new businesses, negotiate better terms in their current jobs, and generally pursue career advancement as they see fit.[19]

By preventing workers and employers from freely choosing their preferred jobs and

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[17] *See generally* David H. Autor, *Wiring the Labor Market*, 15 J. OF ECON. PERSPECTIVES 25–40 (2001); Enrico Moretti, *Local Labor Markets*, in 4b HANDBOOK OF LABOR ECONOMICS 1237–1313 (2011).
[18] *See, e.g.*, Dep't of the Treasury, Report, *The State of Labor Market Competition* (Mar. 7, 2022) at 5–7, https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf; Dep't of the Treasury, Report, *Non-compete Contracts: Economic Effects and Policy Implications*, *supra* note 16, at 3–5, 22–23.
[19] *See, e.g.*, Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants As A Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 407 (2006).

candidates, respectively, Non-Compete Restrictions like those used by Respondents impede and undermine competition in labor markets.[20] In the aggregate, Non-Compete Restrictions reduce competition for workers by limiting the choices of workers and rival employers. Research suggests that Non-Compete Restrictions measurably reduce worker mobility,[21] lower workers' earnings,[22] and increase racial and gender wage gaps.[23] At the individual level, a Non-Compete Restriction forces a worker who wishes to leave a job into a difficult choice: stay in the current position despite being able to receive a better job elsewhere, take a position with a competitor at the risk of being found out and sued, or leave the industry entirely. In this way, Non-Compete Restrictions tend to leave workers with fewer and lower-quality competing job options,[24] thereby reducing workers' bargaining leverage with their current employers and resulting in lower wages, slower wage growth, and less favorable working conditions.[25]

Here, as described above, Respondents' imposition and enforcement of Non-Compete Restrictions deprived Respondents' former employees of the benefits of competition, leaving them with lower wages, less favorable working conditions, and increased economic uncertainty. Respondents' use of Non-Compete Restrictions also deprived competing businesses of the benefits of competition by impairing their ability to employ workers, including workers they had already located and convinced to join.

Finally, as the complaints allege, any legitimate objectives of Respondents' use of Non-Compete Restrictions could be achieved through significantly less restrictive means, including, for example, by entering confidentiality agreements that prohibit employees and former employees from disclosing company trade secrets and other confidential information. As a Michigan state court concluded in 2019, there was "nothing in the employment, training or knowledge of [Respondents' security guards] which would warrant enforcement of a non-compete."[26]

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[20] *See, e.g.*, Dep't of the Treasury, Report, *The State of Labor Market Competition*, *supra* note 18, at 5–7.
[21] Matthew S. Johnson, Kurt Lavetti, & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility* 2 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455381; Evan Starr, J.J. Prescott, & Norm Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J. L., ECON., & ORG. 633, 652 (2020); Evan Starr, Justin Frake, & Rajshree Agarwal, *Mobility Constraint Externalities*, 30 ORG. SCI. 961, 963–65, 977 (2019); Matt Marx, Deborah Strumsky, & Lee Fleming, *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55 MGMT. SCI. 875, 884 (2009).
[22] Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, 68 MGMT. SCI. 143, 144 (2021); Johnson, Lavetti, & Lipsitz, *supra* note 21.
[23] Johnson, Lavetti, & Lipsitz, *supra* note 21.
[24] *See, e.g.*, Jessica Jeffers, *The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship* 21–22 (Dec. 24, 2019), https://ssrn.com/abstract=3040393.
[25] *See, e.g.*, Johnson, Lavetti, & Lipsitz, *supra* note 21; David J. Balan, *Labor Practices Can be an Antitrust Problem Even When Labor Markets are Competitive*, CPI ANTITRUST CHRONICLE (May 2020) at 8.
[26] *Supra* note 2.

IV. Proposed Order

The proposed order seeks to remedy the unfair method of competition alleged by the Commission in its complaint and to prohibit Respondents from entering, maintaining, enforcing, or attempting to enforce any Non-Compete Restriction, or communicating to any employee or other employer that the employee is subject to a Non-Compete Restriction. These injunctive provisions, contained in Section II of the proposed order,[27] are intended to ensure that Respondents' current, former, and future employees will be free to seek employment, start their own businesses, or otherwise compete with Respondents upon leaving Respondents' companies. These provisions would apply to any business that Respondents Greg Wier and Matthew Keywell own or control in the future and would also include any future business of Prudential.

Paragraph III.A of the proposed order requires Respondents to promptly send a letter describing the Commission's actions to each employee who is or was party to a Non-Compete Restriction at any point during the last two years.[28] The letters state that Respondents will not enforce any Non-Compete Restriction against the recipients and clarify that Respondents cannot prevent the recipients from "seeking or accepting a job with any company or person," "running your own business," or "otherwise competing with companies that provide security guard services."[29]

The restrictions in the proposed order apply to Respondents Greg Wier and Matthew Keywell, the co-owners and only officers of Prudential. Mr. Wier and Mr. Keywell continue to control other businesses that employ workers and may, in the future, come to control other business ventures. For these reasons, the proposed order's definition of "Respondents" extends to any companies or businesses that Mr. Wier or Mr. Keywell control.[30]

Paragraph III.B requires Respondents, for the next 10 years, to provide a clear and conspicuous notice to any new employees upon hire informing them that they may "seek or accept a job with any company or person — even if they compete with [Respondents]," "run your own business — even if it competes with [Respondents]," or "compete with [Respondents] at any time following your employment."[31] Paragraph IV.A requires Respondents to void and nullify all of their existing Non-Compete Restrictions without penalizing the affected employees.[32] In addition, Paragraph IV.B requires the Respondents to provide a copy of the complaint and order to any director, officer, or employee of a Respondent who is currently responsible for hiring and recruiting, and Paragraph IV.C requires Respondents to send the order and the complaint to any Person who becomes a director, officer, or employee with such

[27] Decision and Order § II.
[28] *Id.* ¶ III.A.
[29] *Id.* App'x A.
[30] Decision and Order ¶¶ I.C–E.
[31] *Id.* ¶ III.B.
[32] *Id.* ¶ IV.A.

responsibility.

Other paragraphs contain standard provisions regarding compliance reports, notice of changes in the Respondents, and access to documents and personnel.[33] The term of the proposed order is twenty years.[34]

[33] *Id.* §§ IV–VII.
[34] *Id.* § X.