

*D. Does this action have any incremental economic impacts or paperwork burdens?*

No.

## II. Statements of Findings Under TSCA Section 5(a)(3)(C)

In this unit, EPA provides the following information (to the extent that such information is not claimed as Confidential Business Information (CBI) on the PMNs, MCANs and SNUNs for which, during this period, EPA has made findings under TSCA section 5(a)(3)(C) that the new chemical substances or significant new uses are not likely to present an unreasonable risk of injury to health or the environment:

The following list provides the EPA case number assigned to the TSCA section 5(a) submission and the chemical identity (generic name if the specific name is claimed as CBI).

- J-22-0019-0020, *Saccharomyces cerevisiae*, chromosomal integration modification (Generic Name).
- J-22-0022-0025, Microorganisms stably transformed to manufacture PHA (Generic Name).
- J-23-0002, Microorganism stably transformed to express a recombinant protein (Generic Name).
- P-22-0017, 1-Eicosanol, manuf. of, distn., residues; CASRN: 2682937-26-2 (Specific Name).

To access EPA's decision document describing the basis of the "not likely to present an unreasonable risk" finding made by EPA under TSCA section 5(a)(3)(C), look up the specific case number at <https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/chemicals-determined-not-likely>.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: March 14, 2023.

**Madison Le,**

Director, New Chemicals Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2023-05680 Filed 3-20-23; 8:45 am]

**BILLING CODE 6560-50-P**

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## FEDERAL TRADE COMMISSION

[File No. 211 0182]

### Anchor Glass Container Corporation; 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 Orders to Aid Public Comment describes both the allegations in the complaint and the terms of the consent orders—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before April 20, 2023.

**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: "Anchor Glass Non-compete Restrictions; File No. 211 0182" 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, Suite CC-5610 (Annex Q), Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:**

Kathleen Clair (202-326-3435), 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 Orders 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>.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before April 20, 2023. Write "Anchor Glass Non-compete Restrictions; File No. 211 0182" 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 "Anchor Glass Non-compete Restrictions; File No. 211 0182" 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, Suite CC-5610 (Annex Q), 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 April 20, 2023. 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 has accepted, subject to final approval, a consent agreement with Anchor Glass Container Corporation ("Anchor"), Lynx Finance GP, LLC ("Lynx GP"), and Lynx Finance, L.P. ("Lynx LP") (collectively, "Respondents"). Anchor manufactures and sells in the United States glass containers used for food and beverage packaging and employs workers at multiple facilities within the United States for this purpose. Lynx LP is the indirect owner of 100% of the outstanding shares of Anchor, and Lynx GP is the general partner of Lynx LP.

The consent agreement settles charges that Anchor violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, through its use of post-employment covenants not to compete ("Non-Compete Restrictions"). 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 a competing business, to form a competing business, or otherwise to compete with the employer.

The complaint alleges Anchor imposed Non-Compete Restrictions on employees across a variety of positions, including workers whose labor is an important input in the glass container manufacturing process. The complaint alleges this conduct has a tendency or likelihood to limit workers' mobility, to impede rivals' access to the restricted employees' labor, and thus to harm workers, consumers, competition, and the competitive process. As such, the complaint alleges Anchor has engaged in an unfair method of competition in violation of Section 5 of the FTC Act. 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.

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

### II. The Complaint

The complaint makes the following allegations. The glass containers Anchor manufactures and sells are purchased primarily by companies that sell food, beer, non-alcoholic beverages, and wine and spirits. The glass container industry in the United States is highly concentrated and is characterized by substantial barriers to entry and expansion. Among these barriers, it is difficult to identify and employ personnel with skills and experience in glass container manufacturing.

Anchor has imposed Non-Compete Restrictions on employees across a variety of positions. These restrictions typically required that, for one year following the conclusion of the worker's employment with the Anchor, the worker may not be employed by a competing business in the United States. At the outset of the Commission's investigation, over 300 employees of Anchor were subject to such restrictions, including employees who work with the glass container plants' furnaces and forming equipment and in other glass production, engineering, and quality assurance roles.

The complaint further alleges Anchor's use of the challenged Non-Compete Restrictions has the tendency or likely effect of harming competition, consumers, and workers, including by: (i) impeding the entry and expansion of rivals in the glass container industry, (ii) reducing employee mobility, and (iii) causing lower wages and salaries, reduced benefits, less favorable working conditions, and personal hardship to employees.

### III. Legal Analysis

Section 5 of the FTC Act prohibits "unfair methods of competition."<sup>1</sup> Congress empowered the FTC to enforce Section 5's prohibition on "unfair methods of competition" to ensure the antitrust laws could adapt to changing circumstances and to address the full range of practices that may undermine

competition and the competitive process.<sup>2</sup> The Commission and federal courts have historically interpreted Section 5 to prohibit conduct that is inconsistent with the policies or the spirit of the antitrust laws, even if that conduct would not violate the Sherman or Clayton Acts.<sup>3</sup>

The Commission's recent Section 5 Policy Statement describes the most significant general principles concerning whether conduct is an unfair method of competition.<sup>4</sup> 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."<sup>5</sup> A method of competition is "conduct undertaken by an actor in the marketplace" that implicates competition, whether directly or indirectly.<sup>6</sup> Conduct is unfair if (a) it is "coercive, exploitative, collusive, abusive, deceptive, predatory," "involves the use of economic power of a similar nature," or is "otherwise restrictive and

<sup>2</sup> *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, *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) [hereinafter "FTC Section 5 Policy Statement (2022)"], at 5 ("Congress struck an intentional balance when it enacted the FTC Act. It allowed the Commission to proceed against a broader range of anticompetitive conduct than can be reached under the Clayton and Sherman Acts, but it did not establish a private right of action under Section 5, and it limited the preclusive effects of the FTC's enforcement actions in private antitrust cases under the Sherman and Clayton Acts.").

<sup>3</sup> *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).

<sup>4</sup> FTC Section 5 Policy Statement (2022), *supra* note 2.

<sup>5</sup> *Id.* at 8–10.

<sup>6</sup> *Id.* at 8.

<sup>1</sup> 15 U.S.C. 45(a).

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, including potential entrants; interfering with the normal mechanisms of competition; limiting choice; reducing output; reducing innovation; or reducing competition between rivals.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

In addition, the Commission may consider any asserted justifications for a particular practice.<sup>10</sup> 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 by a countervailing justification of any kind.”<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

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

First, Anchor’s use of Non-Compete Restrictions is a method of competition. The challenged Non-Compete Restrictions are not mere “condition[s] of the marketplace, not of the respondent’s making.”<sup>14</sup> Rather, these are contract provisions Anchor required its employees to enter into, which, by their terms, restricted the employment options available to affected workers

and therefore implicated competition for labor.

Second, Anchor’s use of the challenged Non-Compete Restrictions “goes beyond competition on the merits”<sup>15</sup> because it is coercive, exploitative, exclusionary, and restrictive as these terms are used in the FTC Section 5 Policy Statement. Non-Compete Restrictions typically result from employers’ outsized bargaining power compared to that of employees. And, by reducing workers’ negotiating leverage vis-à-vis their current employers, Non-Compete Restrictions tend to impair workers’ ability to negotiate for better pay and working conditions.<sup>16</sup> The complaint here also alleges the challenged Non-Compete Restrictions had a tendency or likely effect of impeding the entry and expansion of rivals, as discussed below. As such, they are exclusionary in a manner that violates the spirit and policies of the Sherman Act.<sup>17</sup> Finally, while competition on the merits “may include, for example . . . attracting employees and workers through the offering of better employment terms,”<sup>18</sup> Non-Compete Restrictions, by contrast, create a legal impediment that restricts workers from leaving their employment even if they find more attractive

employment terms elsewhere. For this reason, Non-Compete Restrictions have long been considered proper subjects for scrutiny under the nation’s antitrust laws.<sup>19</sup>

Third, the factual allegations in the complaint support a finding that Anchor’s challenged conduct has the tendency or likely effect of negatively affecting competition in the U.S. glass container industry. Specifically, the complaint alleges that (i) Anchor required employees across a variety of positions, including salaried employees who work with the glass container plants’ furnace and forming equipment and in other glass production, engineering, and quality assurance roles, to refrain from working for competing glass manufacturing companies for at least one year after the conclusion of their employment, (ii) the ability to identify and employ personnel with skill and experience in glass container manufacturing is a substantial barrier to entry and expansion, and (iii) the challenged restrictions have a tendency or likely effect of impeding the entry and expansion of rivals.

Fourth, the factual allegations in the complaint support a finding that Anchor’s challenged conduct has the tendency or likely effect of negatively affecting competitive conditions affecting workers in the U.S. glass container industry. 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.”<sup>20</sup>

In general, in matching markets, higher-quality matches tend to result when both sides—here, workers and employers—have more options available

<sup>15</sup> See *id.* at 8.

<sup>16</sup> 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\\_Economic\\_Effects\\_and\\_Policy\\_Implications\\_MAR2016.pdf](https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Economic_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.]”). The strength of a worker’s negotiating position with their current employer is largely based on the suitability of their next-best alternative employer (*i.e.*, the alternative employer that would offer the employee the best combination of wages and working conditions, net of any switching costs). Competing employers who fall within the scope of a Non-Compete Agreement, typically employers in the same industry and geographic area—are often the strongest competitor to a worker’s current employer for that worker’s labor. Such employers typically place the highest value on the worker’s industry-specific skills, and workers generally face lower switching costs when moving to such employers. See, e.g., David J. Balan, *Labor Non-Compete Agreements: Tool for Economic Efficiency, or Means to Extract Value from Workers?* 15 (2021), <https://equitablegrowth.org/working-papers/labor-non-compete-agreements-tool-for-economic-efficiency-or-means-to-extract-value-from-workers/> (noting workers often “are barred by the non-compete from [switching to] the[ir] best available alternative jobs”).

<sup>17</sup> See generally, e.g., *ZF Meritor v. Easton Corp.*, 696 F.3d 254, 278–79 (3d Cir. 2012); *McWane, Inc. v. Fed. Trade Comm’n*, 783 F.3d 814, 835 (11th Cir. 2005); *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 328 (1961); *Geneva Pharms. Tech. Corp. v. Barr Labs.*, 386 F.3d 485, 509 (2d Cir. 2004); see also FTC Section 5 Policy Statement (2022), *supra* note 2, at 8, 9, 12.

<sup>18</sup> FTC Section 5 Policy Statement (2022), *supra* note 2, at 8–9.

<sup>19</sup> See, e.g., *U.S. v. Am. Tobacco Co.*, 221 U.S. 106 (1911); *Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057, 1082 (2d Cir. 1977); *Bradford v. N.Y. Times Co.*, 501 F.2d 51 (2d Cir. 1974); *Golden v. Kentile Floors, Inc.*, 512 F.2d 838 (5th Cir. 1975); *U.S. v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976); *Aydin Corp. v. Loral Corp.*, 718 F.2d 897 (9th Cir. 1983); *Consultants & Designers, Inc. v. Bulter Serv. Grp., Inc.*, 720 F.2d 1553 (11th Cir. 1983).

<sup>20</sup> 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).

<sup>7</sup> *Id.* 8–10.

<sup>8</sup> *Id.* at 9.

<sup>9</sup> *Id.* at 10.

<sup>10</sup> *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.”).

<sup>11</sup> *Id.* at 11.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 11–12.

<sup>14</sup> See *id.* at 8.

to them.<sup>21</sup> 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.<sup>22</sup>

By preventing workers and employers from freely choosing their preferred jobs and candidates, respectively, Non-Compete Restrictions tend to impede and undermine competition in labor markets.<sup>23</sup> Research suggests Non-Compete Restrictions measurably reduce worker mobility,<sup>24</sup> lower workers' earnings,<sup>25</sup> and increase racial and gender wage gaps.<sup>26</sup> At the individual level, a Non-Compete Restriction can force 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,<sup>27</sup> thereby reducing workers' bargaining leverage with their current employers and resulting in lower wages, slower wage growth, and less favorable working conditions.<sup>28</sup>

Here, the complaint alleges the challenged Non-Compete Restrictions have the tendency or likely effect of reducing employee mobility and causing lower wages and salaries, reduced benefits, less favorable working conditions, and personal hardship to employees.

Finally, as the complaint alleges, any legitimate objectives of Anchor's use of the challenged 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. Indeed, Anchor nullified the challenged Non-Compete Restrictions after learning of the Commission's investigation, apparently without incurring any notable impediment to their ability to achieve any legitimate business objectives.

#### IV. Proposed Order

The proposed order seeks to remedy the Anchor's unfair methods of competition. Section II of the proposed order prohibits the Respondents from entering or attempting to enter, maintaining or attempting to maintain, or enforcing or attempting to enforce a Non-Compete Restriction with an Employee, or communicating to an Employee or a prospective or current employer of that Employee that the Employee is subject to a Non-Compete Restriction.<sup>29</sup> Paragraph IV.A requires the Respondents to take all steps necessary to void and nullify all existing Non-Compete Restrictions with Employees within 30 days after the date on which the proposed order is issued.<sup>30</sup>

The proposed order also contains provisions designed to ensure compliance. Paragraph III.A of the proposed order requires the Respondents to provide written notice to Employees that have or recently had a Non-Compete Restriction that (i) the

restriction is null and void, and (ii) the Employees may, after they stop working for Anchor, seek or accept jobs with any other company or person, run their own businesses, and compete with the Anchor.<sup>31</sup> Paragraph III.B requires Respondents to notify new Employees that they will not be subject to Non-Compete Restrictions by including a specified notice in the documentation provided to new Employees upon hire.<sup>32</sup>

Other paragraphs contain standard provisions regarding compliance reports, notice of changes in Respondents, and access for the FTC to documents and personnel.<sup>33</sup> The proposed order's prohibitions apply only to Respondents' Employees within the United States, and the term of the proposed order is twenty years.<sup>34</sup>

By direction of the Commission, Commissioner Wilson dissenting.

**April J. Tabor,**  
Secretary.

#### Dissenting Statement of Commissioner Christine S. Wilson

Today, the Commission announced that it has accepted, subject to final approval, another consent agreement with a company in the glass container industry. The consent resolves allegations that the use of non-compete agreements in employee contracts constitutes an unfair method of competition that violates Section 5 of the FTC Act. This case against Anchor Glass follows law enforcement actions announced in January 2023 involving two other industry participants, O-I Glass and Ardagh Group.<sup>1</sup> Today's case involves a similar fact pattern and suffers from the same flaws as those earlier cases. For the same reasons that I dissented in those cases,<sup>2</sup> I dissent here.

Like the January 2023 actions, this case reflects the approach of the new Section 5 Policy Statement.<sup>3</sup> It alleges

<sup>31</sup> *Id.* ¶ III.A; App'x B.

<sup>32</sup> *Id.* ¶ III.B.

<sup>33</sup> *Id.* ¶¶ IV–VII.

<sup>34</sup> *Id.* ¶ IX.

<sup>1</sup> See In the Matter of O-I Glass, Inc., FTC File No. 211–0182 (Jan. 4, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2110182o-iglasscomplaint.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2110182o-iglasscomplaint.pdf); In the Matter of Ardagh Group S.A., FTC File No. 211–0182, [https://www.ftc.gov/system/files/ftc\\_gov/pdf/2110182ardaghcomplaint.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/2110182ardaghcomplaint.pdf).

<sup>2</sup> Dissenting Statement of Commissioner Christine S. Wilson, In the Matter of O-I Glass, Inc. and In the Matter of Ardagh Group S.A., FTC File No. 211–0182 (Jan. 4, 2023), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/wilsondissenting-statement-glass-container-cases.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/wilsondissenting-statement-glass-container-cases.pdf).

<sup>3</sup> Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), <https://www.ftc.gov/system/files/>

<sup>21</sup> 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.

<sup>22</sup> 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).

<sup>23</sup> See, e.g., Dep't of the Treasury, Report, *The State of Labor Market Competition*, *supra* note 21, at 5–7.

<sup>24</sup> 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](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).

<sup>25</sup> Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, 68 Mgmt. Sci. 143, 144 (2021); Johnson, Lavetti, & Lipsitz, *supra* note 24.

<sup>26</sup> Johnson, Lavetti, & Lipsitz, *supra* note 24.

<sup>27</sup> 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>.

<sup>28</sup> See, e.g., Johnson, Lavetti, & Lipsitz, *supra* note 24; David J. Balan, *Labor Practices Can be an Antitrust Problem Even When Labor Markets are Competitive*, CPI Antitrust Chronicle (May 2020) at 8.

<sup>29</sup> See Decision & Order ¶ II.

<sup>30</sup> *Id.* ¶ IV.A.

that the use of non-compete agreements has a tendency to harm competition and workers, but fails to provide facts to support the hypothesized outcome. Similar to the Commission's complaints against O-I Glass and Ardagh Group, the complaint against Anchor Glass suffers from several omissions. It does not allege that the company's non-compete provisions are unreasonable based on their temporal length, subject matter, or geographic scope; neither does it allege that the non-compete clauses were enforced. The complaint does not make factual allegations regarding the inability of a competing rival in the glass container industry to enter or expand. While the complaint alleges that the non-compete clauses reduce employee mobility, thereby leading to lower wages, reduced benefits, and less favorable working conditions, the complaint does not identify a relevant market for particular types of labor and fails to allege a market effect on wages or other terms of employment.

For the reasons outlined here and explained in detail in my January 2023 statement, I dissent.

[FR Doc. 2023-05701 Filed 3-20-23; 8:45 am]

BILLING CODE 6750-01-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

[Docket No. CDC-2022-0044]

#### CDC Recommendations for Hepatitis B Screening and Testing—United States, 2022

**AGENCY:** Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

**ACTION:** General notice.

**SUMMARY:** The Centers for Disease Control and Prevention (CDC), within the Department of Health and Human Services (HHS), announces the availability of the final *CDC Recommendations for Hepatitis B Screening and Testing—United States, 2022*.

**DATES:** The final document was published as an *MMWR Reports & Recommendations* on March 10, 2023.

[ftc.gov/pdf/p221202sec5enforcementpolicy\\_statement\\_002.pdf](https://www.ftc.gov/pdf/p221202sec5enforcementpolicy_statement_002.pdf); Christine S. Wilson, Dissenting Statement Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act" (Nov. 10, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyWilsonDissentStmnt.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmnt.pdf).

**ADDRESSES:** The document may be found in the docket at [www.regulations.gov](http://www.regulations.gov), Docket No. CDC-2022-0044 and at [https://www.cdc.gov/mmwr/volumes/72/rr/rr7201a1.htm?s\\_cid=rr7201a1\\_w](https://www.cdc.gov/mmwr/volumes/72/rr/rr7201a1.htm?s_cid=rr7201a1_w).

**FOR FURTHER INFORMATION CONTACT:** Erin Conners, Centers for Disease Control and Prevention, 1600 Clifton Road NE, Mailstop U12-3, Atlanta, GA 30329. Telephone: 404-639-8000; Email: [DVHpolicy@cdc.gov](mailto:DVHpolicy@cdc.gov).

**SUPPLEMENTARY INFORMATION:** In 2022, CDC determined that *CDC Recommendations for Hepatitis B Screening and Testing—United States, 2022* constituted influential scientific information (ISI) that will have a clear and substantial impact on important public policies and private sector decisions. Under the Information Quality Act, Public Law 106-554, federal agencies are required to conduct peer review of the information by specialists in the field who were not involved in the development of these recommendations. CDC solicited nominations for reviewers from the American Association for the Study of Liver Diseases (AASLD), Infectious Diseases Society of America (IDSA) and American College of Physicians (ACP). Five clinicians with expertise in hepatology, gastroenterology, internal medicine, infectious diseases, and/or pediatrics provided structured peer reviews. A list of peer reviewers and CDC's responses to peer review comments are available at CDC's Viral Hepatitis Influential Scientific Information web page at <https://www.cdc.gov/hepatitis/policy/isireview/index.htm>.

In addition, on April 4, 2022, CDC published a notice in the **Federal Register** (87 FR 19516-19517) to obtain public comment on the draft recommendations for hepatitis B screening and testing. The comment period closed on June 3, 2022. CDC received comments from 28 commenters on the draft recommendations document. Public commenters included those from academia, the health care sector, advocacy groups, professional organizations, industry, the public, and a consulting group.

Many of the comments expressed support for the recommendations. Other comments related to the 3-panel test recommendation, inclusion of hepatitis D information, the hepatitis B prevalence estimate, modifying testing and vaccination language, adding scientific references, and making other minor language modifications. CDC addressed these comments by correcting, clarifying, or updating

content in the final recommendations. A summary of public comments and CDC's response can be found in the Documents tab of the docket.

**Tiffany Brown,**

*Acting Executive Secretary, Centers for Disease Control and Prevention.*

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Medicare & Medicaid Services

[CMS-3434-FN]

#### Medicare and Medicaid Programs: Application From the Accreditation Commission for Health Care, Inc. for Continued Approval of Its End-Stage Renal Disease (ESRD) Accreditation Program

**AGENCY:** Centers for Medicare & Medicaid Services (CMS), HHS.

**ACTION:** Notice.

**SUMMARY:** This final notice announces our decision to approve the Accreditation Commission for Health Care, Inc for continued recognition as a national accrediting organization for end stage renal disease facilities that wish to participate in the Medicare or Medicaid programs.

**DATES:** The decision announced in this final notice is applicable on April 11, 2023 through April 10, 2029.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:**

#### I. Background

Under the Medicare program, eligible beneficiaries may receive covered services from an end stage renal disease (ESRD) facility provided certain requirements are met. Section 1881(b) of the Social Security Act (the Act), establishes distinct criteria for facilities seeking designation as an ESRD facility. Regulations concerning provider agreements are at 42 CFR part 489 and those pertaining to activities relating to the survey and certification of facilities are at 42 CFR part 488. The regulations at 42 CFR part 494 specify the minimum conditions that an ESRD facility must meet to participate in the Medicare program.

Generally, to enter into an agreement, an ESRD facility must first be certified by a state survey agency (SA) as complying with the conditions or requirements set forth in part 494 of our