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Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?

Richard J. Pierce Jr

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The new Chair of the Federal Trade Commission (FTC), Lina Khan, dislikes almost every characteristic of antitrust law. She disagrees with the consumer welfare maximization goal that enforcement agencies and courts have been attempting to further for almost half a century.[2] She believes that courts should instead attempt to further multiple economic and political goals that include keeping firms from becoming too large and powerful, protecting small firms from big firms, protecting employees, and creating open markets that function in accordance with a bill of rights that forbids many practices as unlawful in all circumstances.[3]

Chair Khan also dislikes the procedures that enforcement agencies and courts have been using to create and to implement antitrust law for over a century. Antitrust law is based on judicial interpretations of two statutes—the Sherman Act[4] and the Clayton Act.[5] Both statutes are worded so broadly, however, that the Supreme Court has long analogized its decisions that interpret the statutes to the common law decision-making process.[6] Antitrust law evolves gradually as the Court decides each case that comes before it. Moreover, with only a few exceptions, the Court uses the "rule of reason" to decide whether a firm's conduct violates antitrust law.[7] As a result, the same conduct can be legal or illegal depending on a detailed analyses of the effects of the conduct in the circumstances in which it takes place.

There is strong evidence that both President Biden and Chair Khan's Democrat colleagues on the Commission share her views and support her efforts. Shortly after Chair Khan was confirmed, President Biden held a press conference at which he signed a lengthy Executive Order on Promoting Competition in the American Economy.[8] The order expressed his support for most of the changes in law that Chair Khan wants to make. He signed the order with Chair Khan standing behind him. He then handed her the pen that he used to sign the Order. Since Chair Khan assumed the chairmanship, the FTC has issued many orders by a three-to-two vote, with the other two Democrats voting with Chair Khan on every order.

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[1] Lyle T. Alverson Professor of Law, George Washington University School of Law.

[2] Lina M. Khan, Amazon's Antitrust Paradox, 126 Yale. L. J. 710, 716-17, 738-44. (2017).

[3] Id. at 738-44.

[4] 15 U.S.C. §§1 et seq.

[5] 15 U.S.C. §§15 et seq.

[6] E.g., Leegin Creative Leather Products v. PSKS, 551 U.S. 877, 899-900 (2007).

[7] Id. at 885-87.

[8] Executive Order 14036, 86 Fed. Reg. 36987 (July 9, 2021).

Chair Khan plans to use two means to make the changes in antitrust law that she considers to be essential. She plans to increase the circumstances in which the FTC disapproves of proposed mergers and acquisitions,[9] and she plans to use the FTC's rulemaking power to transform other aspects of antitrust law.[10] I will focus on her proposed use of rulemaking in this article. Chair Khan will experience some challenges in her efforts to block the many mergers and acquisitions that she opposes, but those challenges are not nearly as formidable as the challenges that she will confront in her efforts to use rulemaking to make major changes in antitrust law in contexts other than mergers and acquisitions.

Part one of the article discusses the advantages and disadvantages of rulemaking as a potential means of reshaping antitrust law. Part two discusses the FTC's power to issue rules of various types. Part three discusses the potential for the FTC to use rulemaking to change antitrust law in four areas that Chair Khan has identified as particularly good candidates for rulemakings—creating a right to repair products, banning non-compete clauses in employment contracts, aggressively enforcing a ban on predatory pricing, and outlawing reverse payments to settle patent disputes involving prescription drugs.

I conclude that the FTC probably lacks the power to use notice and comment rulemaking to implement section five of the FTC Act. I also conclude that, even if the FTC has that power, it cannot use that power to make most of the major changes in antitrust law that Chair Khan envisions. The FTC can use rulemaking to improve antitrust law by limiting the use of non-compete clauses in employment contracts, but the FTC can accomplish that goal more rapidly and with less legal risk by using a combination of the tools that it has long used.

The Advantages and Disadvantages of Rulemaking

Chair Khan supports her proposed use of rulemaking to transform antitrust law with a long list of criticisms of the FTC's traditional near exclusive reliance on adjudication to create and implement antitrust law and a long list of advantages that rulemaking could provide. Chair Khan criticizes the FTC's reliance on adjudication on the basis that it is slow and cumbersome; it does not yield the kind of clear standards that businessmen, the private bar, and agencies need; it undermines effective enforcement by rendering it extremely expensive and cumbersome; it calls on generalist judges to analyze and apply technical economic issues that they are not equipped to evaluate; and it relies heavily on expert witnesses who are well-paid to provide testimony that favors the firms that employ them.[11] By comparison, Chair Khan praises rulemaking because it is capable of creating clear standards of conduct; it allows broader participation by members of the public in the process of shaping the law; it provides a basis for more efficient and effective

[9] Federal Trade Commission, Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Slaughter Kelly on the Withdrawal of the Vertical Merger Guidelines (Sep. 15, 2021).
[10] Rohit Chopra & Lina M. Khan, The Case For "Unfair Methods of Competition" Rulemaking, 87 U.Chi. L. Rev. 357 (2020).
[11] Id. at 359-63.

enforcement of the law; it is capable of changing the law more rapidly; and it provides a much greater opportunity for agencies with expertise in economics to shape the law.[12]

Chair Khan couples her criticism of adjudication and her praise of rulemaking with harsh criticism of the rule of reason that modern courts apply to decide whether most forms of conduct violate antitrust law.[13] She praises the per se approach that courts often used in the 1960s.[14] Cases that are subject to the rule of reason require years to adjudicate; they do not yield clear standards of conduct; the rule of reason renders enforcement of antitrust law expensive and inefficient, and the rule of reason requires generalist judges to perform a function that they are not well-equipped to perform. By contrast, per se rules announce clear standards of conduct; they make enforcement of antitrust law far more efficient and effective; and they call on generalist judges to perform functions that they know how to perform.

I agree with all of Chair Khan's criticisms of the adjudication process and her praise for the rulemaking process. I have made similar arguments in many contexts for decades.[15] I have even supported greater use of rulemaking by the FTC to announce standards that the agency finds to be sound interpretations of antitrust law.[16] I also share her criticisms of the rule of reason and her praise for per se rules. Those generalizations must be qualified, however, based on the well-documented limitations of both rulemaking and per se rules.

The most important limitation of both rulemaking and per se rules is their inability to capture and reflect variations in the effects of many forms of conduct on the performance of markets. A per se rule performs well in a context in which we have reason to believe that a particular type of conduct produces bad effects on the performance of markets in all or most circumstances. A per se rule produces bad results, however, if it prohibits conduct that yields net social benefits in many circumstances. Many scholars believe that most of the forms of conduct that Chair Khan wants to prohibit in all circumstances create net benefits to society in many circumstances.[17] The Supreme Court relied heavily on per se rules from 1940 until 1974, with demonstrably bad results.[18] The rules often prohibited conduct that benefited society and encouraged conduct that harmed society.

Rulemaking also has other well-known disadvantages. The kinds of rules that Chair Khan wants to issue—legislative rules that have the force of law--require use of notice and comment.[19]

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[12] Id. at 363-74.
[13] Id. at 359-63.
[14] Khan, supra. note 2, at 717-22.
[15] E.g., Kristin E. Hickman & Richard J. Pierce, Jr., Administrative Law Treatise §4.8 (6th ed. 2019).
[16] Richard J. Pierce, Jr., The Rocky Relationship Between the Federal Trade Commission and Administrative Law, 83 G. W. L. Rev. 2026, 2040-41 (2015).
[17] See, e.g., Herbert Hovenkamp, Antitrust and Platform Monopoly, 130 Yale. L. J. 1952 (2021) (describing the many variables that must be considered in the process of evaluating the effects of various forms of conduct).
[18] See, e.g., ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978) (explaining and documenting the adverse effects of the antitrust decisions of the 1940s, 1950s and 1960s).
[19] Hickman & Pierce, supra. note 15, at §§4.3, 5.1-5.4.

The notice and comment rulemaking process is long and resource-intensive.[20] A typical notice and comment rulemaking takes many years to complete and requires the agency to devote significant resources to a single proceeding.[21] Two other types of rules—interpretive rules and policy statements—lack the force of law but can be issued quickly and with only a modest commitment of agency resources.[22]

Rules issued through use of the notice and comment process also have another important characteristic that is relevant to Chair Khan's plan. They are subject to judicial review. I consider that to be a virtue of the rulemaking process, but Chair Khan is likely to experience it primarily as a major impediment to issuance of the kinds of rules that she proposes. Courts are unlikely to uphold most of those rules.

A closely related limitation of rulemaking and per se rules is tied to the goals that Chair Khan seeks to further by announcing a new set of per se rules. She wants to replace the effort to maximize consumer welfare that courts and agencies have pursued for the past half a century with a long list of goals that the new per se rules would further.[23] Any attempt to create and announce rules that simultaneously further the goals that Chair Khan wants to pursue is certain to fail.

I use one simple pattern of facts to illustrate the inherent inconsistency of such a multiple goal approach during the first week of my antitrust course. Suppose that a market consists of 3 large firms, each of which accounts for 30% of the market and 100 small firms each of which accounts for 0.1% of the market. Suppose that the process of making the product that is sold in the market has evolved in ways that provide the opportunity to reduce the costs of producing the product substantially by increasing the scale at which the product is produced up to the level of production of each of the 3 large firms.

Now suppose that you discover that the three large firms have entered into an agreement to sell the product at a price far above their cost of production. How should antitrust law address that situation? If the goal is to maximize consumer welfare the answer is easy. The 3 large firms should be punished for engaging in price fixing. If the goal is to protect the 100 small firms from the three large firms, the answer is also easy. The 3 large firms should be encouraged to engage in price fixing. The resulting large price increase would protect the small firms from going out of business.

This is just one of an unlimited number of entirely realistic circumstances in which any agency that attempts to further multiple goals with antitrust law would have to make tradeoffs among goals. Chair Khan does not tell us how she would make those tradeoffs, but her discussion of

[20] Richard Pierce, Rulemaking Ossification Is Real: A Response to Testing the Ossification Hypothesis, 80 G.W. L. Rev.1493 (2021).
[21] Richard Pierce, The Administrative Conference and Empirical Research, 83 G.W.L. Rev. 1564, 1566-69 (2015).
[22] Hickman & Pierce, supra. note 15, at §§4.4, 4.5.
[23] Khan, supra. note 2, at 710, 716-17, 738-44.

economies of scale provides a powerful clue.[24] She criticizes scholars who characterize economies of scale as "objective technical demands of production and distribution." She characterizes them instead as barriers to entry that are inconsistent with her definition of a competitive market. The kinds of per se rules that Chair Khan proposes would produce good results only if you believe that it would be good to increase significantly the prices that consumers pay for many goods and services and to reduce significantly the quantity of goods and services that consumers can buy.

The advantages and disadvantages of the rulemaking process that Chair Khan proposes will become more apparent when I describe the likely results of Chair Khan's attempt to implement her plan in four illustrative contexts in section III of this article.

II. FTC Power to Issue Rules

An agency has the power to issue legislative rules to implement a statute only if Congress has given it that power.[25] The FTC has no power to issue rules to implement the two primary sources of antitrust law--the Sherman Act and the Clayton Act. There is a lively debate about whether the FTC has the power to implement the provision in section five of the FTC Act of 1914 that makes it illegal to engage in "unfair methods of competition." The FTC has never attempted to use rulemaking for that purpose, but that is the power that Chair Khan plans to use to make major changes in antitrust law.[26]

Section five of the FTC Act states that "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."[27] Section five continues by describing in detail the process of adjudication that the FTC is required to use to implement that declaration.

Section six of the FTC Act is titled "Additional powers of the Commission."[28] It describes a wide variety of powers, most of which are powers to investigate and to gather and report data of various types. Subsection (g) of section six is titled: "Classification of corporations; regulations." It empowers the Commission to "classify corporations and . . . to make rules and regulations for the purpose of carrying out the provisions of this subchapter."

Between 1914 and 1962, the FTC, Congress, courts, and scholars were unanimous in their belief that the FTC did not have the power to issue legislative rules.[29] There was universal agreement that section 6(g) of the FTC Act gave the FTC only the power to issue procedural rules. That view was consistent with the legislative history of the Act and the fact that the statute has

[24] Khan, supra. note 2, at 719-20.
[25] Hickman & Pierce, supra. note 15, at §4.2.
[26] Chopra & Khan, supra. note 10, at 377-79.
[27] 5 U.S.C. §45.
[28] 5 U.S.C. §46.
[29] Thomas W. Merrill & Kathryn Tongue Watts, Agency Rules with the Force of Law: The Original Convention, 116 Harv. L. Rev. 467, 506 (2002).

a provision that instructs courts to enforce orders that the FTC issues in adjudications, but it does not have a provision that authorizes courts to enforce rules that the FTC issues.[30]

In 1962, the FTC announced for the first time that it was going to rely on section 6(g) as the basis to issue what it called Trade Regulation Rules—rules that would have the force of law and that would prohibit specified forms of conduct.[31] The FTC's power to issue those rules was challenged in the D.C. Circuit in the context of a rule that prohibited the retail sale of gasoline without posting the octane content of the gasoline. The court upheld the rule and the power of the FTC to issue legislative rules in its 1973 decision in *National Petroleum Refiners v. FTC.*[32]

The court was not troubled by the inconsistency of the FTC's new position with the universal belief of the FTC, Congress, courts, and scholars for the first 48 years of the existence of the agency that it lacked that power.[33] The court was also not troubled by the detailed description of the process of adjudicating section five disputes that immediately followed the sentence in section five that declared that "unfair or deceptive acts" and "unfair methods of competition" are unlawful. The court acknowledged that the FTC could rely on adjudication to implement section five, as it had for sixty years, but it noted that the statute did not say that the FTC could *only* use adjudication to implement section five.[34]

The court devoted most of its opinion to a detailed description of the advantages of the rulemaking process.[35] The court's reasoning process can be summarized as: An agency can do its job more effectively if it has the power to issue legislative rules, and the statute that created the FTC has a passing reference to the power to issue rules of some kind. It follows that the agency has the power to issue legislative rules even though the agency, Congress, courts, and scholars believed that it lacked that power for almost fifty years.

The method of statutory interpretation that the D.C. Circuit used in *National Petroleum Refiners* was used by several circuits in the 1970s.[36] It was never embraced by the Supreme Court, however, and no court has used it in decades.[37] I will return to discussion of the continued viability of the holding in *National Petroleum Refiners* after I discuss the congressional reaction to that decision.

After its surprising victory in *National Petroleum Refiners*, the FTC began to use its new-found rulemaking power to begin rulemakings that challenged the marketing practices that firms had long used in many markets. Congress reacted negatively to the FTC's aggressive use of its rulemaking power. Congress enacted two statutes that made it extraordinarily difficult—perhaps

[30] Id. at 504-05.
[31] Id. at 549-54.
[32] 482 F. 2d 672 (D.C.Cir. 1973).
[33] Id. at 685-86.
[34] Id. at 677-78.
[35] Id. at 681-83, 690-93.
[36] Merrill & Watts, supra. note 29, at 557-70.
[37] Id. at 528-45, 570-78.

impossible—for the FTC to use its new power to issue legislative rules. Those statutes added fifteen procedures that the FTC was required to use in any rulemaking that it undertook to implement section five of the FTC Act.[38]

The FTC was able to use rulemaking to issue about a dozen legislative rules to implement section five of the FTC Act before Congress amended it by adding many mandatory procedures. The FTC was able to issue those rules in an average of 2.94 years each.[39] After Congress enacted the first statute that imposed some new procedural mandates in 1975, the FTC was able to issue seven more rules, but the new rulemaking procedure increased the average length of a rulemaking from 2.94 years to 5.57 years.[40] The FTC also abandoned several other rulemakings after spending an average of 8.66 years on each.[41] In 1980, Congress enacted another statute that amended the FTC Act. That statute added still more lengthy procedures that the FTC must use to complete a rulemaking to implement the FTC Act.[42] The FTC has not attempted to issue any legislative rule to implement the FTC Act since Congress amended the Act in 1980.[43]

Under Chair Khan's leadership, the FTC recently amended its rules for using the rulemaking process that Congress created in the 1975 and 1980 amendments to the FTC Act.[44] The amendments to the rules of procedure are intended to restore the viability of the process. Those changes might trim a year or two from length of the process. The process would still take over five years to issue a single rule, however. It is unlikely that Chair Khan will try to use a process that takes at least five years to issue a single rule in her effort to implement her ambitious agenda to transform most of antitrust law.

Chair Khan is relying instead on a combination of the D.C. Circuit's opinion in *National Petroleum Refiners* and one provision of the 1975 statute that amended the FTC Act. That provision states:

> The Commission shall have no authority under this Act [the FTC Act] other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1)). The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.[45]

[38] Jeffrey S. Lubbers, It's Time to Remove the "Mossified" Procedures for FTC Rulemaking, 83 G.W.L.Rev. 1979, 1982-84 (2015).
[39] Id. at 1985-87.
[40] Id. at 1988-89.
[41] Id. at 1989.
[42] Id. at 1989.
[43] Id. at 1989-90.
[44] Federal Trade Commission, Statement of Commissioner Rebecca Slaughter Kelly Joined by Chair Lina Khan and Commissioner Rohit Chopra Regarding the Adoption of Revised Section 18 Rulemaking Procedures (July 1, 2021).
[45] Pub. L. 93-637, §202(a)(2).

Since the "section" to which the provision refers describes the new mandatory procedures that the FTC must use in rulemakings to define an "unfair or deceptive act," the FTC is required to use those procedures when it issues a rule that defines an "unfair or deceptive act." This peculiarly worded provision raises many other questions, however. Chair Khan interprets it as an implicit legislative endorsement of the D.C. Circuit's decision in *National Petroleum Refiners* in the context of the FTC's power to issue legislative rules to define "unfair methods of competition."[46] That may be a plausible interpretation, but it is far from a necessary interpretation.

There are many reasons to question whether Congress simultaneously conditioned the FTC's power to issue rules that define "unfair or deceptive acts" in ways that had the effect of making that power nearly impossible to exercise and endorsed the FTC's power to issue rules that define "unfair method of competition." First, it is difficult, if not impossible, to distinguish between an "unfair act" and an "unfair method of competition." Most of the acts that the FTC had previously defined as "unfair acts" also qualify as "unfair methods of competition." They prohibited firms from using particular methods to advertise or market their goods or services. Did Congress intend to authorize the FTC to use notice and comment rulemaking to prohibit "unfair methods of competition" that do not also qualify as "unfair acts?" If so, what conduct that is not an "unfair act" qualifies as an "unfair method of competition?" It is not clear that there is any conduct that qualifies as an "unfair method of competition" that does not also qualify as an "unfair act."

Second, the reference to interpretive rules and general statements of policy in the second sentence of the provision suggests another possible interpretation of the sentence. Perhaps Congress was just trying to make it clear that it was not qualifying the FTC's power to issue interpretive rules or general statements of policy to implement section five by requiring the FTC to use the extraordinarily burdensome procedures that it was requiring the FTC to use when it issued legislative rules.

That interpretation would be consistent with the general principles of administrative law and statutory interpretation that apply to other agencies. While an agency does not have the power to issue legislative rules to implement a statute unless Congress has explicitly given the agency that power, agencies need no explicit statutory authority to issue interpretive rules or general statements of policy.[47] It is hard to imagine why Congress would want to limit any agency's power to announce to the public its non-binding interpretations of the statutes that it implements or the policies that it intends to further when it implements the statute.

An agency can issue an interpretive rule or a policy statement without following any statutorily prescribed procedure, since rules of that type have no legally binding effect.[48] By

[46] Chopra & Khan, supra. note 10, at 377-79.
[47] Hickman & Pierce, supra. note 15, at §4.2.1.
[48] Id. at §§4.4, 4.5.

contrast, agencies are required to use the notice and comment process to issue legislative rules because they have the force of law. Like all agencies, the FTC has long used the process of issuing interpretive rules and policy statements to provide the public with valuable information about the agency's non-binding statutory interpretations and the policies that it is trying to further. It would make sense for Congress to make it clear that the additional procedures that it required the FTC to use when it engaged in the process of creating a legislative rule do not apply to the process of announcing its statutory interpretations or its general policies.

Chair Khan's belief that the FTC can use the notice and comment process to issue rules that transform antitrust law is necessarily based on her belief that the D.C. Circuit's 1973 decision in *National Petroleum Refiners* remains good law today. It also depends on the validity of her belief that Congress implicitly ratified that decision in the context of rules that define "unfair methods of competition" in the 1975 statute in which it amended the FTC Act to make it nearly impossible for the FTC to issue rules that define "unfair acts." I am skeptical that the Supreme Court will find Chair Khan's arguments persuasive.

As Tom Merrill and Kathryn Watts have explained in detail, the method of statutory interpretation that the D.C. Circuit used in *National Petroleum Refiners* has never been embraced by the Supreme Court; it has not been used by any court in decades; and, it is inconsistent with the principles of separation of powers that the Supreme Court has emphasized for decades.[49] One of the most important of those principles is that no agency has the power to take an action that has the force of law unless Congress has clearly conferred that power on the agency.

If the FTC attempts to rely on the D.C. Circuit's decision to support its effort to use rulemaking to transform antitrust law, the Supreme Court is likely to reject that attempt. The Supreme Court has shown no reluctance to overrule longstanding circuit precedents that are based on long-abandoned methods of statutory interpretation. Thus, for instance, in 2019 the Supreme Court unanimously overruled a 1974 D.C. Circuit precedent with the following statement: "*National Parks'* contrary holding is a relic from a bygone era of statutory interpretation."[50] The Supreme Court is likely to use similar language in the process of overruling *National Petroleum Refiners*.

The Supreme Court is also likely to reject the argument that Congress implicitly ratified the D.C. Circuit's decision by including a strangely worded provision in a 1975 statute that amended the FTC Act. It seems unlikely that Congress intended to make it clear that the FTC has the power to issue legislative rules that define "unfair methods of competition" in the same statute in which it made it nearly impossible for the FTC to issue legislative rules that define "unfair acts." Moreover, the vast bulk of the circumstantial evidence of the intent of Congress

[49] Merrill & Watts, supra. note 29, at 590-92.
[50] Food Marketing Institute v. Argus Leader Media, 139 S.Ct. 2356, 2364 (2019).

supports the contrary view. For nearly half a century, Congress repeatedly acted on the basis of its belief that the FTC lacks the power to issue legislative rules to implement the FTC Act.

In the following section I will assume that the FTC has the power to issue legislative rules to define "unfair methods of competition" and explain why that power is not sufficient to enable Chair Khan to implement her ambitious agenda.

IV. Four Illustrations of Potential FTC Uses of Rulemaking to Transform Antitrust Law

In this section, I will predict the likely results of potential FTC efforts to use rulemaking to transform antitrust law in four contexts. I will begin by discussing the FTC's suggestion that it might issue a rule that creates a right to repair products. Many companies that make and sell products, particularly high-tech products, preclude the owners of those products from repairing the products themselves or from using an independent company to repair the products. Chair Khan has identified creation of a right to repair as a high priority in her efforts to use rulemaking to change antitrust law, and President Biden expressed his support for such an effort both in his Executive order and in the press conference at which he announced that Order.

I will follow that discussion with a discussion of the context in which I am most optimistic that the FTC can use rulemaking to make major changes in antitrust law. I believe that the FTC can use rulemaking to make major changes in antitrust law as it applies to non-compete clauses in employment contracts. This is one of the changes in law that President Biden urged in his Executive Order on antitrust law. He signaled his strong interest in making such a change in the press conference in which he signed the Executive Order by describing the adverse effects of non-compete clauses on wages.

I have chosen predatory pricing as the third context in which I will discuss the FTC's efforts to use rulemaking to change antitrust law. Chair Khan has repeatedly emphasized her belief that predatory pricing is widespread and extremely damaging. She devotes scores of pages of her scholarly writing to harsh criticism of the Supreme Court's approach to predatory pricing. She is likely to place a high priority on issuance of a rule that reflects her strong belief that antitrust law must be changed in ways that make it impossible for large firms to engage in predatory pricing.

The final context I will discuss is "reverse payments" in royalty disputes between manufacturers of prescription drugs and companies that want to make and sell generic equivalents of those drugs. Generic equivalents of brand name drugs usually sell at prices far below the price of the brand name drug once the initial patent on the brand name drug expires. Manufacturers of brand name drugs try to avoid having to compete with low-priced generic equivalents by obtaining a second patent on the drug, suing the manufacturer of the generic equivalent for allegedly infringing on that patent, and settling the infringement case by agreeing to make a large payment to the manufacturer of the generic equivalent in return for a commitment not to market the generic equivalent. Critics of reverse payment agreements argue that they are just agreements to continue to charge monopoly prices for the drugs by paying potential manufacturers of generic equivalents not to make a competing product. President Biden included reverse payments agreements on his list of practices that he wants to eliminate, and Chair Khan has referred to reverse payments agreements as one of the leading candidates for an FTC rulemaking.

A. Creating a Right to Repair

Many manufacturers of products take a variety of steps to make it difficult or impossible for consumers to repair the products that they own or to have those products repaired by an independent service organization (ISO).[51] President Biden included creation of a right to repair in his Executive Order on antitrust law.[52] In one of its first actions after Lina Khan became Chair of the FTC, the agency issued a policy statement that suggested that it is seriously considering use of rulemaking to create a right to repair.[53]

The FTC has long had clear statutory authority to prohibit manufacturers from using one method of denying consumers the right to repair products that they own. The Magnuson-Moss Warranty Act prohibits manufacturers from conditioning a warranty on a consumer's use of service provided or approved by the manufacturer except in specified narrow circumstances.[54] The agency cannot use that statutory authority to create a right to repair, however, because conditioning a warranty on use of a service provider approved by the manufacturer of a product is only one of at least nine ways in which manufacturers restrict consumers from engaging in self-repair or using repair services provided by an ISO.[55]

In its policy statement on the right to repair, the Commission urged the public to "submit complaints and other information to aid in greater enforcement of the Magnuson-Moss Warranty Act and its regulations." It then stated that it will "scrutinize repair restrictions for violations of antitrust laws." Finally, it stated:

> Third, the Commission will assess whether repair restrictions constitute unfair acts or practices, which are also prohibited by Section 5 of the Federal Trade Commission Act. In addition, the Commission will analyze any material claims made to purchasers and users to ascertain whether there are any prohibited deceptive acts or practices, in violation of Section 5 of the Federal Trade Commission Act.

In a footnote, the Commission noted that section 5 prohibits both "unfair or deceptive acts" and "unfair methods of competition."

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[51] Federal Trade Commission, Nixing the Fix: An FTC Report to Congress on Repair Restrictions pp. 1-6 (May 2021) [hereinafter Report].
[52] 86 Fed. Reg. at 36992.
[53] Federal Trade Commission, Policy Statement of the Federal Trade Commission on Repair Restrictions Imposed by Manufacturers and Sellers (July 21, 2021). See also Remarks of Chair Lina Khan Regarding the Proposed Policy Statement on Right to Repair (July 21, 2021).
[54] 15 U.S.C. §2302.
[55] Report p.6.

The policy statement reflects Chair Kahn's view that the FTC can use its section five authority to declare that acts that do not violate the Sherman or Clayton Act are prohibited as "unfair acts" or as "unfair methods of competition." The reference to the prohibition of "unfair acts" in section five suggests that the Commission is considering use of its power to issue legislative rules that prohibit manufacturers from engaging in "unfair acts" to create a right to repair. It is hard to take that suggestion seriously, however. The FTC has the power to issue rules to prohibit "unfair acts," but Congress added mandatory procedures to the exercise of that power that are so burdensome and time-consuming that the FTC abandoned its efforts to use that authority over forty years ago.

The Commission's reference to the prohibition on "unfair methods of competition" in section five suggests that the Commission is considering use of notice and comment rulemaking to create a right to repair. Chair Khan believes that the combination of the D.C. Circuit's decision in *National Petroleum Refiners* and a provision in a 1975 statute that amended the FTC Act gives the FTC the power to use notice and comment rulemaking to prohibit "unfair methods of competition" without having to use the additional procedures that Congress mandated for rulemakings to issue rules that prohibit "unfair acts." If her view prevails in court, the FTC might be able to complete a rulemaking to create a right to repair by declaring that all manufacturers' restrictions on repair are illegal "unfair methods of competition" in only two or three years. Any such rule would have to survive judicial review, however.

The Supreme Court has never had occasion to evaluate an agency attempt to create a right to repair because no agency has ever attempted to create such a right. The Court has addressed a related question, however. Can a manufacturer that has previously allowed ISOs to repair its products change its policy and practices in ways that preclude ISOs from continuing to repair the products? Kodak initially permitted ISOs to repair its photocopying machines. It then changed its policy and decided that all repairs had to be made by Kodak. It implemented the new policy by refusing to sell replacement parts to ISOs.

The ISOs filed a complaint in 1987 in which they alleged that Kodak's change in policy violated the Sherman and Clayton Antitrust Acts. Kodak filed a motion for summary judgment. The district court granted the motion, but a divided panel of a circuit court reversed. In 1992, the Supreme Court also divided in *Eastman Kodak v. Image Technical Services Inc.*[56] Three Justices would have upheld the grant of summary judgment.[57] Those Justices expressed the view that a manufacturer can never violate antitrust law by precluding ISOs from repairing its products. The six-Justice majority reversed the grant of summary judgment. They held that the plaintiffs could prevail if they could prove that the manufacturer has market power in the market for repair of its products and if the manufacturer could not prove that its new policy has good effects.[58]

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[56] 504 U.S. 451 (1992).
[57] Id. at 486.
[58] Id. at 481-85.

It was difficult for the ISOs to prove that the manufacturer had market power in the market for repair of its products because that depends on the cross-elasticity of demand for the products and for repair of the products. That, in turn, depends on the magnitude of the information asymmetries in the market for the products. In the absence of significant information asymmetries, a manufacturer cannot exercise market power in the market for repair of its products because any increase in the price it charges for repairs would reduce the demand for its products.

Kodak argued that its new policy allowed it to improve the quality of its products by providing it with complete and prompt feedback from repair personnel. That feedback enabled it to identify flaws that it could then correct in the process of designing and manufacturing the products. Kodak also argued that its new policy helped consumers by eliminating confusion about whether performance deficiencies were caused by flaws in the product or errors in the process of repairing the products. With its new policy in effect, consumers could hold Kodak responsible for all performance deficiencies, whether they were caused by defects in the product or errors in the process of repairing the products. The Supreme Court instructed the lower court to allow Kodak to have an opportunity to prove that its new policy yielded benefits that offset any adverse effects of its potential exercise of market power in the repair market.

After a lengthy jury trial, the ISOs prevailed. The jury found that Kodak had market power in the repair market and that Kodak had not proven that its restrictions on repair had offsetting good effects. The Ninth Circuit upheld the jury verdict.[59] The process of adjudicating the case required ten years, however. No plaintiff has been able to reach a jury in any case in which a manufacturer's restrictions on repair have been challenged as a violation of antitrust law since the Supreme Court decided *Kodak*. Moreover, the FTC has expressed its belief that no plaintiff would have any claim under *Kodak* unless the manufacturer initially allowed ISOs to repair its products and then changed its policy.[60]

The time required to litigate *Kodak* and the aftermath of the case illustrate the accuracy of Khan's complaints that the adjudication process, combined with the rule of reason, reduce the effectiveness of antitrust law by making the outcome of antitrust cases depend on the results of a long and complicated decision-making process. The Supreme Court's reasoning in *Kodak* also illustrates the major disadvantage of rules and rulemaking as a means of implementing a statute, however. Rules are only effective if they prohibit a practice completely or in circumstances that are easy for an agency or a court to identify without the need for a long hearing. Rules are not capable of improving a decision-making process when the effects of a practice depend on many variations in the circumstances in which the conduct takes place.

The Supreme Court believes that restrictions on repair imposed by manufacturers of products can have both good and bad effects, depending on the circumstances in which the

[59] Image Technical Services v. Eastman Kodak, 125 F.3d 1195 (9th Cir. 1997).
[60] Report p.14.

conduct occurs. The Court also believes that it is impossible to determine whether restrictions on repair have good or bad effects without conducting a lengthy hearing. If the Court is right, it is impossible to write a rule that will produce acceptable results.

The FTC recently submitted a report to Congress that suggests that it agrees with the Supreme Court's belief that the effects of the restrictions on the right to repair that manufacturers impose vary greatly depending on many characteristics of the circumstances in which the restrictions are imposed. The FTC identified and discussed nine ways in which manufacturers restrict their customers' ability to engage in self-repair.[61] The FTC identified and discussed four potential adverse effects of restrictions on repairs,[62] but it also identified and discussed six potential beneficial effects of restrictions on repairs.[63] The FTC seemed to agree with the Supreme Court that the adverse effects of restrictions on repair depend on whether the manufacturer has market power in the repair market,[64] and the FTC explicitly recognized that manufacturers' justifications for their restrictions "need to be scrutinized on a case-by-case basis."[65]

It is hard to imagine any version of a rule that purports to create a right to repair that a court would uphold. Even if the Supreme Court agrees with Chair Khan that the FTC has the power to create legally binding rules of conduct by declaring that a practice is illegal because it is an "unfair method for competition," the FTC would have no chance of persuading a court to uphold a rule that prohibits manufacturers from using the many methods that they now use to restrict the ability to repair. The FTC might be able to persuade a court to uphold a rule that says that a manufacturer is prohibited from restricting consumers' ability to engage in self-repair or to use the services of an ISO if the manufacturer has market power in the repair market and it is unable to provide evidentiary support for any of the potential six justifications for its restrictions. A rule of that type would have none of the beneficial effects of a rule, however. It would not change the status quo in this area of antitrust law.

B. Banning Non-Compete Clauses

Many firms include non-compete clauses in their employment contracts. The clauses prohibit an employee from leaving their job to take a job with a competing firm. In his Executive Order on competition, President Biden stated his desire to ban non-compete clauses.[66] He emphasized the importance of such a ban during the press conference in which he signed the order. Chair Khan has also identified a ban on noncompete clauses as one of the goals of her plan to use rulemaking to change antitrust law.

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[61] Id. at 17-18.
[62] Id. at 38-44.
[63] Id. at 24-38.
[64] Id. at 9.
[65] Id. at 10.
[66] 86 Fed. Reg. 36992.

It is easy to document the adverse effects of non-compete clauses.[67] They inflict significant harm on employees by prohibiting them from taking jobs that would improve their pay or working conditions. They significantly impair the performance of labor markets by limiting the role of competition.[68] They are responsible for a significant part of the large gap between constantly increasing labor productivity and stagnant wage levels.[69] They also have contributed to the vast gaps in income and wealth that have increased dramatically in recent years.[70]

Non-compete clauses also impair the performance of markets for goods and services.[71] Small firms and startups cannot compete effectively with the large firms that now dominate many markets unless they can hire some of the experienced workers that work for the large established firms. Noncompete clauses preclude them from being able to lure those workers away from the market incumbents, thereby crippling their efforts to succeed in entering a market. Because of non-compete clauses, a new market entrant often cannot succeed even if it would be able to offer a superior product or service because it cannot hire experienced workers to make the product.

Non-compete clauses have long been prohibited by antitrust law unless they are reasonable in scope and justified on the basis that they serve some beneficial purpose.[72] Courts have accepted three justifications for noncompete clauses: to protect the intellectual property rights of the employer, to protect the employer's investment in training employees, and to protect the employer from potential loss of customers as a result of solicitation of the firm's customers by the former employee.

In recent years, firms have increased their use of non-compete clauses significantly. Employers now include non-compete clauses in thirty to fifty per cent of all employment contracts, including contracts to employ people as cooks in fast food restaurants and to serve as janitors. In a high proportion of cases, there is no possibility that the employer could justify the clauses based on some beneficial effect.

Antitrust enforcement agencies have long ignored non-compete clauses because of their belief that state employment law was adequate to ensure that employers do not

[67] Richard J. Pierce, Jr., The U.S Federal Trade Commission Workshop on Noncompete Clauses, 23 Utilities Law Review, Issue 1 (2020).
[68] O.Amir & O. Lobel, Driving Performance: a Growth Theory of Noncompete Law, 16 Stanford Tech. L. Rev, 833, 844-68 (2013).
[69] Economic Policy Institute, The Productivity-Pay Gap (2018).
[70] J. Aboud et al, Earnings Inequality and Labor Mobility Trends in the United States, National Bureau of Economic Research Working Paper No. 23224 (2017).
[71] M. Steinbaum, Antitrust, the Gig Economy and Labor Market Power, 82 L. & Cont. Prob. 45 (2019).
[72] Mitchell v. Reynolds, 24 Eng. Rep. 347 (QB 1711).

include them in contracts in circumstances in which they cannot be justified. Recent studies have found that state law is not effective for that purpose, however. Non-compete clauses are as common and as effective in states that prohibit them as they are in states that permit them.[73] Most employees lack access to the services of a lawyer who can tell the employee that the non-compete clause in their contract is illegal. As a result, the existence of an illegal non-compete clause is almost always effective in deterring an employee from leaving their job to work for a competitor.

The Supreme Court's June 21 opinion in *NCAA v. Alston*[74] provides powerful evidence that the Court would be receptive to an FTC campaign to outlaw most non-compete clauses. The Justices made it clear that they unanimously support efforts to use antitrust law to improve the performance of labor markets. The Court is prepared to hold unlawful any anticompetitive practice that employers adopt as a means of artificially depressing wages. Non-compete clauses fit that characterization perfectly.

The FTC could use the notice and comment process to issue a legislative rule that bans non-compete clauses in a high proportion of employment contracts. As long as the rule did not apply to the few contexts in which the clauses can be justified as furthering some socially beneficial purpose, the FTC would have a good chance of being able to defend such a rule in court. The easiest way to describe the scope of a rule that bans most non-compete clauses would be to make it contingent on an employee's salary, e.g., non-compete clauses are an unfair method of competition in any employment contract applicable to any employee who earns less than X dollars per year. The FTC would have no problem defending such a rule by referring to solid empirical evidence that non-compete clauses cause a lot of harm to labor markets and to product markets and that they cannot have any beneficial effect when they are contained in employment contracts applicable to low paid employees.

The FTC does not need to use the notice and comment process to accomplish that worthy goal, however. It can issue an interpretive rule in which it announces and explains why it interprets section five of the FTC Act to ban the inclusion of non-compete clauses in contracts to employ low paid employees. It can couple that interpretive rule with a general statement of policy in which it announces its intention to take aggressive action against any employer who acts in a manner that is inconsistent with its interpretation of the Act. It can follow those two actions with a couple of well-chosen,

[73] P. Thomas, Would California Survive the Move Act? A Preemption Analysis of Employee Non-Competition Law, 2017 U. Chi. Legal Forum 823, 826-33 (2017).
[74] 141 S.Ct. 2141 (2021).

high visibility enforcement actions against firms that act in ways that are inconsistent with its interpretation of the Act.

That approach to the problem would be as effective as issuance of a legislative rule, and it would have major advantages over issuance of a legislative rule. There is no doubt that the FTC has the power to issue interpretive rules and policy statements to implement section five of the FTC Act. It has issued scores of interpretive rules and policy statements for many decades. The FTC can issue interpretive rules and policy statements in days, in contrast to the years required to complete a notice and comment rulemaking.

There is also no doubt about the FTC's authority to use adjudication to implement section five. It has exercised that power for over a century. The enforcement actions would be easy to win, given the powerful empirical evidence that non-compete clauses cause significant harm to the performance of both labor markets and product markets and that non-compete clauses in the contracts of low paid employees have no plausible offsetting benefits. In a matter of months, the FTC could use the combination of an interpretive rule, a policy statement, and a couple of high visibility enforcement actions to ban non-compete clauses in the contracts of low paid workers.

By contrast, the notice and comment proceeding required to issue a legislative rule would take years to complete. Once the FTC issued such a rule, it would be subjected to judicial review to determine whether the FTC has the power to issue legislative rules to implement section five of the FTC Act. Since the FTC has never previously attempted to exercise that power, there is a good chance that the issue would go all of the way to the Supreme Court. That could delay the effect of the rule for many years. If the FTC lost in that test of its authority, it would have wasted many years of hard work and a great deal of its scarce enforcement resources engaging in an exercise in futility.

Chair Khan has identified the potential availability of *Chevron* deference for a statutory interpretation adopted through the process of issuing a legislative rule as a potential advantage of use of the notice and comment process to issue a legislative rule.[75] In the past, that might have been a good reason for an agency to prefer issuance of a legislative rule to issuance of an interpretive rule. During the last few years, however, the Supreme Court has severely qualified the strength of *Chevron* deference, thereby greatly reducing the potential advantage that an agency can get as a result of issuing a legislative rule rather than an interpretive rule.[76]

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[75] Chopra & Khan, supra. note 10, at 379.
[76] See Kristin Hickman & Mark Thomson, The Chevronization of Auer, 103 Minnesota L. Rev. Headnotes 103 (2019) (describing the many ways in which Chevron deference has been limited).

C. Aggressive Enforcement of a Ban on Predatory Pricing

Predatory pricing is the use of below cost prices to drive competitors out of business. President Biden did not mention predatory pricing in his Executive Order on competition, but Chair Khan has emphasized the need to engage in aggressive enforcement of a ban on predatory pricing in her scholarly writing.[77] Her strong desire to engage in aggressive enforcement of a prohibition against predatory pricing, combined with her strong desire to issue legislative rules to enforce section five of the FTC Act, suggest that she would like to issue a rule that would be a major part of an FTC effort to engage in aggressive enforcement of a ban on predatory pricing.

It would be easy for the FTC to persuade a court to uphold a rule that bans predatory pricing. Predatory pricing has long been a violation of antitrust law. The problem is the unanimous position of the Justices that courts and enforcement agencies should not engage in aggressive efforts to ban predatory pricing. The Justices take that position because of their belief that predatory pricing is rarely attempted and even more rarely successful, coupled with their belief that aggressive efforts to prohibit predatory pricing have the unintended adverse effects of discouraging firms from reducing the price that they charge for a good or service and encouraging firms to engage in price fixing.

The Supreme Court encouraged aggressive efforts to eliminate predatory pricing during the 1960s.[78] The results were awful.[79] When a firm angered a competitor by reducing the price it charged, the competitor often filed a complaint or threatened to file a complaint alleging that the firm was engaged in predatory pricing. The risk of being a defendant in an antitrust case that was based on a claim of predatory pricing discouraged firms from reducing the prices that they charged for goods and services. The threat to file such a complaint also led to discussions between the two firms about ways of settling their dispute. The easiest way to settle such a dispute is to agree to raise the price that the firm charges and to agree never to charge a price below the price that the competing firm charges. Those two incentives—the incentive not to reduce prices and the incentive to raise prices at the request of a competitor--are the opposite of the incentives that antitrust law usually tries to create.

In the meantime, scholars published articles that questioned whether predatory pricing could ever be used successfully to earn monopoly profits by driving competitors

[77] Khan, supra. note 2, at 722-30, 756-75, 803.

[78] E.g., Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967) (holding that 3 firms violated antitrust law by charging prices below their average cost, thereby reducing the plaintiff's share of the market from 66.5% to 45.3%).

[79] Ward S. Bowman, Restraint of Trade by the Supreme Court: The Utah Pie Case, 77 Yale. L.J. 70 (1968).

out of business.[80] To be successful, a predatory pricing complaint must be based on the belief that a firm that is well-capitalized can increase its profits by driving its less well-capitalized competitors out of business by charging below-cost prices and then recouping its losses and increasing its profits by charging monopoly prices. That strategy is rarely, if ever, successful, however.

The problem with any effort to engage in successful predatory pricing lies in the attempt to recoup the firm's losses once it has driven its competitors out of business. During the period in which the firm charges below-cost prices it is certain to lose money. It can recoup its losses and come out ahead only if its attempt to charge monopoly prices does not encourage other firms to enter the market before it has completed the recoupment process. That is impossible in most circumstances.

If the firms that participate in the market in which a firm attempts to implement a predatory pricing strategy have high fixed costs, the firm that engages in predatory pricing will have to charge below-cost prices for many years before it can drive its competitors out of business. During that period, the firm will lose so much money that it would have to charge monopoly prices for many years just to recoup its losses. It would be highly unlikely to succeed in any such effort, however. The monopoly prices that the firm charged would encourage other firms to enter the market. It would be easy for firms to do so by acquiring the assets of the former competitors for a low price and using those assets to compete with the firm that engaged in the predatory pricing. That would deprive the firm of the opportunity to earn monopoly profits.

If the firms that participate in the relevant market have low fixed costs, the firm that engages in predatory pricing might be able to drive its competitors out of business quickly. A market in which firms have that kind of cost structure is also a market in which the barriers to entry are low, however. As a result, the firm that engaged in predatory pricing would attract new entrants quickly as soon as it began to charge monopoly prices, thereby making it impossible for the firm to recoup its losses.

By 1986, a majority of Justices believed that the Court's prior efforts to encourage aggressive enforcement of the ban on predatory pricing were increasing prices and encouraging price fixing. They were also influenced by the scholarship that concluded that predatory pricing rarely, if ever, can succeed. Based on those beliefs, the Court issued an opinion in which it rejected a claim of predatory pricing and announced a new test that made it difficult for any plaintiff to prevail by filing a complaint based on a claim that a competitor is engaged in predatory pricing.[81] The majority stated that its decision was

[80] E.g., John McGee, Predatory Price Cutting: The Standard Oil (N.J.) Case, 1 J.L. & Econ. 137 (1978).
[81] Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

based on its belief that "predatory pricing schemes are rarely tried and even more rarely successful."[82] In 1993, the Court rejected another claim based on an allegation of predatory pricing.[83] It repeated its belief that "predatory pricing schemes are rarely tried and even more rarely successful,"[84] and added that "unsuccessful predation is in general a boon to consumers."[85]

In its 1993 opinion, the Court announced a new standard that made it unlikely that any plaintiff can succeed by filing a complaint that is based on predatory pricing. The Court identified two predicates for recovery in a predatory pricing case: First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that "the prices complained of are below an appropriate measure of its rival's costs."[86] Second, the plaintiff must prove that defendant had a "reasonable prospect . . . of recouping its investment in below cost prices."[87]

Some Justices dissented in 1986 and 1993, but the Court issued an opinion in 2007 that made it clear that all nine Justices now embrace both the test that the Court announced in 1993 and the belief that predatory pricing is rarely attempted and even more rarely successful.[88] Over that same period, both the Department of Justice and the FTC came to the same conclusion. Neither agency has brought a case based on a predatory pricing theory in decades.

Chair Khan is highly critical of the Supreme Court's approach to predatory pricing.[89] She is particularly critical of the requirement that the plaintiff must prove that the defendant had a reasonable prospect of recoupment.[90] If Chair Khan wants to use rulemaking to further her goal of aggressive enforcement of a ban on predatory pricing, she will have to persuade her colleagues to issue a rule that declares that predatory pricing is an "unfair method of competition" even if a firm has no expectation that it can recoup its losses. There is no chance that the Supreme Court would uphold such a rule given the clearly articulated and strongly held unanimous views of the Justices.

There is another context in which Chair Khan may be able to act in accordance with her views on predatory pricing without attempting to contradict the Supreme Court,

82 Id. at 589.
83 Brooke Group Ltd. V. Brown & Williamson Tobacco Co., 509 U.S. 209 (1993).
84 Id. at 226.
85 Id. at 224.
86 Id. at 222-23.
87 Id. at 224-25.
88 Weyerhauser v. Ross-Simmons Hardware, 549 U.S. 312 (2007) (the plaintiff's theory was that the defendant had engaged in predatory bidding rather than predatory pricing, but the reasoning is the same in both contexts).
89 Khan, supra. note 2, at 722-30, 756-75, 803.
90 Id. at 730, 762-68.

however. There is ample support for the Supreme Court's belief that predatory pricing is rarely attempted and even more rarely successful when it is used to obtain market power by driving competitors out of business. However, there is support for the belief that a firm can obtain market power by using predatory pricing to drive down the market value of its competitors' assets and then acquiring those assets at a bargain price. That is the pattern of behavior that The American Tobacco Company used between 1890 and 1906 to obtain a monopoly on the production and sale of tobacco.[91]

The FTC does not need to issue a rule to deter companies from using predatory pricing to reduce the cost of acquiring their competitors, however. It can accomplish that goal much more effectively by refusing to allow firms with market power to acquire their competitors. The FTC has much greater power to preclude firms with market power from acquiring their competitors than it does to issue rules to define unfair methods of competition. The FTC has already announced its intention to be more aggressive in that arena than it has been in the past, and its efforts to do so are well-supported by a wide range of respected scholars.[92] Once firms with market power realize that they will not be allowed to acquire their competitors they will have no incentive to engage in predatory pricing.

D. Banning Pay for Delay Agreements in Prescription Drug Patent Disputes

Manufacturers of prescription drugs invariably obtain a patent on the drug that allows them to charge a monopoly price for the drug for the life of the patent. Once the patent expires, a competitor can make and market a generic equivalent of the drug. A statute authorizes a single firm to market the generic equivalent for a period of six months to encourage the firm to enter the market with a generic equivalent to the brand name drug.[93] Once a generic equivalent becomes available, the manufacturer of the brand name drug no longer has monopoly power. It must reduce significantly the price that it charges for the brand name drug.

Manufacturers of brand name drugs are understandably reluctant to lose their monopoly power. They use a variety of techniques to retain their monopoly power. One technique is to file an application for a second patent that covers some aspect of the drug. When a rival firm files an application to sell the generic equivalent of the drug after the first patent expires, the manufacturer of the brand name drug files an action in which it claims that the rival firm would be violating its second patent if it begins to make and sell

[91] Malcolm Burns, Predatory Pricing and the Acquisition Costs of Competitors, 94 J. Pol. Econ. 266 (1986).
[92] E.g., Hovenkamp, supra. note 17, at 2039-48; Steve Salop, Invigorating Vertical Merger Enforcement, 127 Yale L. J. 1962 (2018); JOHN KWOKA, MERGERS, MERGER CONTROL AND REMEDIES IN THE UNITED STATES: A RETROSPECTIVE ANALYSIS (2015).
[93] 21 U.S.C. §355(j)(5).

the generic equivalent. The two firms then resolve the patent infringement suit by entering into an agreement in which the firm that planned to make and sell the generic equivalent agrees to refrain from doing so in return for a payment from the manufacturer of the brand name drug. The manufacturer of the brand name drug is then able to continue to sell the drug at a monopoly price for the duration of the second patent even though no court has decided whether that patent precludes the rival firm from making and selling the generic equivalent. The contract between the two firms looks suspiciously like an agreement in which one firm agrees to refrain from competing with another firm in return for a share of the resulting monopoly profits that the other firm earns.

President Biden included in his Executive Order on competition a request that the FTC use its rulemaking authority to stop "unfair anticompetitive conduct or agreements in the prescription drug industries, such as agreements to delay the market entry of generic drugs or biosimilars."[94] Chair Khan has argued that the FTC should use its rulemaking power to create "clear rules by which [courts] can evaluate these agreements."[95]

The main obstacle to this effort is the reception that the FTC got from the Supreme Court when it attempted to further that goal eight years ago. In *Federal Trade Commission v. Actavis*,[96] the FTC urged the Court to adopt a set of rules applicable to pay for delay contracts. Notably, the FTC specifically relied on the prohibition of "unfair methods of competition" in section five of the FTC Act[97]—the same statutory provision that the FTC would have to rely on to persuade a court to uphold a rule that would make it easy for the FTC to prevail in challenges to reverse payment agreements. The rule that the FTC asked the Court to approve would have made it relatively easy for the FTC to prevail in its attempt to preclude firms from entering into agreements of this type by establishing a rebuttable presumption that reverse payment agreements are unfair methods of competition.[98] The Justices divided with respect to their preferred approach to this class of agreements, but they unanimously rejected the rule the FTC urged them to adopt.[99] The majority adopted an approach that the FTC has not been able to use to block any pay for delay agreement.[100]

[94] 86 Fed. Reg. at 36992.
[95] Chopra & Khan supra. note 10, at 372.
[96] 570 U.S. 136 (2013).
[97] Brief for the Petitioner, Federal Trade Commission, in FTC v. Watson Pharmaceuticals, Supreme Court Docket No. 12-416 p. 12 (Jan. 22, 2013).
[98] Id. at pp. 15-40.
[99] 570 U.S. at 158-59.
[100] The majority describes its complicated approach in five pages. Id. at 154-58. The circuit court had rejected the majority's approach on the basis that it was not administratively feasible. It concluded that it would be time

President Biden and Chair Khan seem to believe that the FTC can succeed in persuading the Supreme Court to adopt rules that the Justices have unanimously rejected by using rulemaking rather than adjudication as their point of entry. That belief is unrealistic. The FTC had the opportunity to persuade the Justices to accept the agency's preferred rules when it presented them, along with the studies that the FTC had completed in support of its proposed rules, in the context of the adjudication that gave rise to the Court's decision in *Actavis*. It failed to persuade a single Justice to adopt its proposed rules. If the FTC uses the power that it claims to have to issue a similar rule to implement section five of the FTC Act, that rule will elicit the same reaction from the Justices.

Conclusion

Lina Khan, the new Chair of the FTC, proposes to use notice and comment rulemaking to make major changes in antitrust law by declaring many practices to be "unfair methods of competition" within the meaning of that term in section five of the FTC Act. She has the strong backing of President Biden and her Democrat colleagues. That raises two questions. Does the FTC have the power to use the notice and comment process to implement Section five? If it has that power, can it use the rulemaking process to make the major changes in antitrust law that Chair Khan proposes? I answer those questions in this article.

I conclude that the FTC probably lacks the power to use notice and comment rulemaking to implement section five of the FTC Act. I also conclude that, even if the FTC has that power, it cannot use that power to make most of the major changes in antitrust law that Chair Khan envisions. The FTC can use rulemaking to improve antitrust law by limiting the use of non-compete clauses in employment contracts, but the FTC can accomplish that goal more rapidly and with less legal risk by using a combination of the tools that it has long used—interpretive rules, policy statements, and adjudication.

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consuming, complex, and uncertain. Id. at 153, 57. The dissenting Justices would have held that any reverse payment settlement that is within the scope of a patent is immune from attack under antitrust law. Id. at 160-77.