

ILLUSORY CONFLICTS: POST-EMPLOYMENT CLEARANCE PROCEDURES AND THE FTC'S TECHNOLOGICAL EXPERTISE

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ABSTRACT

The federal government restricts what former employees can work on after they leave the government, and for good reason. These post-employment conflict restrictions attempt to address the “revolving door” problem, where employees take information learned from their position in government to unfairly advantage industry. But an unintended consequence of overbroad conflict rules is that they impede well-meaning, former federal employees from providing their knowledge and general expertise to other enforcement agencies with similar missions, such as those at the state level. This is playing out right now with FTC technologists, at a time when the agency—and, indeed, consumer protection agencies more broadly—desperately needs greater technical expertise. Three problems result: (1) former FTC technologists find themselves unable to contribute to the enforcement efforts of other agencies and plaintiffs’ attorneys aligned with the mission of the FTC, (2) some current FTC technologists are unwilling to work on important issues before the agency out of fear that doing so will limit their ability to work on related matters in the future, and (3) would-be technologists may be unwilling to take a position at the agency due to these concerns.

We explore the impact of federal conflict rules on technologists working with the FTC, consider how this impact has changed alongside changing circumstances and enforcement practices, and discuss policy implications. We conclude that unless the FTC reforms the way it administers its conflict rules, it risks losing the assistance of technological expertise—expertise of which it badly needs more, rather than less.

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TABLE OF CONTENTS

I.	INTRODUCTION	794
II.	FEDERAL POST-EMPLOYMENT RESTRICTIONS.....	796
A.	HISTORY AND GOALS OF FEDERAL POST-EMPLOYMENT RESTRICTIONS	796
B.	POST-EMPLOYMENT CONFLICT OF INTEREST RESTRICTIONS UNDER 18 U.S.C. § 207.....	800
C.	POST-EMPLOYMENT CONFLICT OF INTEREST RESTRICTIONS UNDER FTC RULES.....	802
III.	POST-EMPLOYMENT RESTRICTIONS IN FTC PRACTICE TODAY	804
A.	IMPACT OF POST-EMPLOYMENT RESTRICTIONS ON TECHNOLOGISTS	805
B.	INCREASED MARKET CONSOLIDATION.....	807
C.	TECHNOLOGISTS ACT AS UTILITY PLAYERS.....	810
D.	LENGTHY AND BROAD CONSENT DECREES.....	813
E.	RISK-AVERSE AGENCY CULTURE.....	815
F.	POSSIBLE POLITICAL CONFLICT BETWEEN FTC AND STATE ATTORNEYS GENERAL.....	818
IV.	IMPLICATIONS FOR AGENCY EFFICACY.....	822
V.	POLICY RECOMMENDATIONS.....	826
VI.	CONCLUSION.....	833

I. INTRODUCTION

The Federal Trade Commission's (FTC) laudable decade-long experiment to hire in-house technologists may be in jeopardy from an unexpectedly bureaucratic source: federal conflict of interest law. Post-employment restrictions for federal employees are designed to ensure that government officials avoid corruption and to slow the revolving door into industry. In their current application to former technologists, however, they have the counterproductive effect of preventing people with technical expertise from engaging in work that creates no meaningful conflicts.

Preventing technologists from accepting unproblematic post-government work through the conflicts clearance process harms the consumer protection and pro-competition missions of the agency. Overbroad conflicts clearance policies harm the direct mission of the agency by limiting the ability of experts

to aid fellow enforcers such as state attorneys general, who should be seen as force multipliers or fellow travelers in policing technology companies. These policies also make it more difficult for the FTC to hire and retain technological experts, which hampers the agency's ability to adequately fulfill its competition and consumer protection missions. Prospective technologists think twice about working for the agency when they hear about the way the clearance process has limited the activity of others. FTC employees also limit the cases they can work on in order to avoid potential post-employment conflicts.

This paper builds on the direct experience of two of the authors, one a former Chief Technologist and the other a former Senior Policy Advisor for privacy at the FTC. Since leaving the agency, we have encountered numerous obstacles in our experience with the FTC's clearance process, which we find to be unnecessarily broad in design and perhaps also in execution. We have bolstered this firsthand experience through interviews with numerous former FTC officials who confirm and expand upon our observations.

We begin with an outline of our methodology. We interviewed eight former FTC consumer protection attorneys and technologists and two attorneys in the offices of state attorneys general in order to assess the extent of the problem. The goal of the interviews was to determine whether the experience of two of us being denied the ability to work on certain matters post-FTC employment was representative, whether technologists and other specialists were treated differently for the purpose of conflicts, and whether there was any consensus as to why the FTC was applying the conflicts rules the way it was and still is.

Preserving anonymity to allow our interviewees to discuss sensitive topics was and is a key concern, given how few former technologists there are and how easily certain details would reveal the identity of the interviewees. For the reader's edification, we have tried to provide as much context as possible without compromising the anonymity of the interviewees, such as by highlighting when statements were contradicted by other interviewees, not contradicted by any interviewees, supported by interviewees, supported by only some interviewees, or when they were supported indirectly. Indeed, the difficulty of preserving the anonymity of our interviewees underscores the very problem enumerated in this essay—there are simply too few FTC technologists for the answers we describe here to allow each subject to get lost in a crowd.

We focus on the FTC because that is the agency with which we have direct experience, but the lessons of our analysis may also apply to other government agencies seeking to hire and retain technological experts, which ought to describe nearly every agency in this technological age. The way an agency

interprets the conflict of interest laws and the way it administers its clearance procedures can have an important, underappreciated impact on the way it fulfills its mission—and the ability of other enforcers to fulfill theirs.

Part II of this Article explains why the federal conflict rules were created and how they affected current and former agency employees at that time. Part III discusses how changes in technology, economy, market, and agency practices have altered the impact of these conflict rules on technologists working with the FTC. Part IV explores the implications of this changing impact on agency efficacy and on the FTC's ability to handle technical and other specialized subject matters. Part V offers policy recommendations to address this problem to help pave the way for the FTC and other federal agencies to increase their technical capacity, in part by hiring technical specialists.

II. FEDERAL POST-EMPLOYMENT RESTRICTIONS

Federal law restricts post-government employment opportunities for all federal government employees. The primary source of these restrictions across the federal government comes from one federal ethics statute, 18 U.S.C. § 207. In addition to § 207, former FTC employees must comply with post-employment restrictions set forth in the FTC Rules of Practice (i.e., 16 C.F.R. § 4.1(b)). As a starting point, it is helpful to understand more about the history, origin, and intent of these restrictions, as well as what they do and who interprets and enforces them.

A. HISTORY AND GOALS OF FEDERAL POST-EMPLOYMENT RESTRICTIONS

Both the federal conflict statute and the FTC's conflict rules were established in the 1960s.¹ Legislative and administrative history show that restrictions on where a former federal employee may work and what matters they may work on are intended to combat the “revolving door” problem and to prevent both actual government corruption and the appearance thereof.²

1. 18 U.S.C. § 207 was established in 1962 alongside several other federal anti-corruption provisions. Act to Strengthen the Criminal Laws Relating to Bribery, Graft, and Conflicts of Interest, and for Other Purposes, ch. 11, §§ 201–09, 218, 76 Stat. 1119–25 (1962). 16 C.F.R. § 4.1(b) was established in 1967. Commercial Practices, 32 Fed. Reg. 8444, 8456–59 (June 13, 1967).

2. See S. REP. NO. 95-170, at 32 (1977) (“18 USC 207, like other conflict of interest statutes, seeks to avoid even *the appearance* of public office being used for personal or private gain. In striving for public confidence in the integrity of government, it is imperative to remember that what appears to be true is often as important as what is true. Thus government

The rules are nevertheless intended to be somewhat restrained, balancing the need to combat these problems with the need to preserve the government's ability to attract and retain top-notch expertise.³ Striking the right balance between these competing objectives—preventing corruption and facilitating expertise—is key to optimizing government function.

The federal statute designed to prevent actual and perceived conflict by former federal employees, § 207, was developed on the belief “that a public servant owes undivided loyalty to the Government.”⁴ The statute addresses two primary ways in which potential conflicts might occur. First, former federal employees could “switch sides” upon leaving the government, going on to provide other parties with an agency's proprietary information in an adversarial proceeding, which would limit the agency's ability to protect the public interest.⁵ Second, if federal employees anticipate using their federal experience to help secure lucrative post-agency employment at a regulated entity, they might temper their behavior while employed by the agency.⁶ Lax rules for post-agency employment conflicts would invite federal employees to mold their conduct at the agency to make themselves more appealing candidates for employment at a regulated entity after leaving the agency. The

in its dealings must make every reasonable effort to avoid even the appearance of conflict of interest and favoritism.” (emphasis in original)).

3. *See id.* (“But, as with other desirable policies, it can be pressed too far. Conflict of interest standards must be balanced with the government's objective in attracting experienced and qualified persons to public service. Both are important, and a conflicts policy cannot focus on one to the detriment of the other. There can be no doubt that overly stringent restrictions have a decidedly adverse impact on the government's ability to attract and retain able and experienced persons in federal office.”).

4. H.R. REP. NO. 87–145, at 3 (1961).

5. *Id.* at 4 (“[A]n official should be prohibited from resigning his position and ‘switching sides’ in a matter which was before him in his official capacity.”); *see also* *United States v. Nasser*, 476 F.2d 1111, 1116 (7th Cir. 1973) (describing § 207 restrictions as serving to protect the government from use of agency information against the government); JACK MASKELL, CONG. RESEARCH SERV., POST-EMPLOYMENT, “REVOLVING DOOR,” LAWS FOR FEDERAL PERSONNEL 1–2 (2014), <https://fas.org/sgp/crs/misc/R42728.pdf> (“One of the initial and earliest purposes of enacting the ‘revolving door’ laws was to protect the government against the use of proprietary information by former employees who might use that information on behalf of a private party in an adversarial type of proceeding or matter against the government, to the potential detriment of the public interest.”).

6. MASKELL, *supra* note 5, at 2 (“Another interest of the government in revolving door restrictions was to limit the potential influence and allure that a lucrative private arrangement, or the prospect of such an arrangement, may have on a current federal official when dealing with prospective private clients or future employers while still with the government, that is, ‘that the government employee not be influenced in the performance of public duties by the thought of later reaping a benefit from a private individual.’”) (quoting *Brown v. D.C. Bd. of Zoning Adjustment*, 413 A.2d 1276, 1282 (D.C. App. 1980)).

legislative history and subsequent cases interpreting the statute and rules also reflect a concern about the appearance of conflict, in addition to actual conflicts, because even the perception of corruption can erode public faith in the rule of law.⁷

Federal post-employment restrictions also aim to avoid being overly rigid. Overly rigid conflict rules might make it impossible to draw top talent to agencies where employees with needed expertise could easily find employment with other agencies or the private sector.⁸ Indeed, in enacting and revising § 207, Congress was acutely aware that restrictive rules could hamstring the government's ability to attract and retain technical experts. For example, in a 1960 House hearing on federal conflict of interest legislation, a representative of the Department of Defense expressed concern that the proposed § 207 “would greatly narrow the opportunity for [people who came to government from private industry] to seek employment outside the Government if they were precluded thereafter from rendering any assistance to anyone in connection with any subject matter concerning which they had any responsibility.”⁹ The Defense Department representative also pointed out that “[w]e have had considerable difficulty in recruiting engineers and scientists.”¹⁰

As Congress deliberated over the structure and wording of conflicts restrictions in the year before passage of the bill that established § 207, President Kennedy sent a letter to Congress urging accommodations for temporary, part-time, and technical experts:

The fundamental defect of [conflict] statutes as presently written is that: On the one hand, they permit an astonishing range of private interests and activities by public officials which are wholly incompatible with the duties of public office; on the other hand, they create wholly unnecessary obstacles to recruiting qualified people for government service. This latter deficiency is particularly serious in the case of consultants and other temporary employees, and has

7. *Id.*; see also Adam Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1599 (2011) (discussing ethics rules designed to facilitate public trust by diminishing the possible appearance of corruption).

8. MASKELL, *supra* note 5, at 2 (“These purposes in adopting limitations on former employees’ private employment opportunities must, however, also be balanced against the deterrent effect that overly restrictive provisions on career movement and advancement will have upon recruiting qualified and competent persons to government service.”); S. REP. NO. 95–170, at 32 (1977).

9. *Federal Conflict of Interest Legislation: Hearing on H.R. 1900, H.R. 2156, H.R. 2157, H.R. 6556, and H.R. 10575 Before the H.R. Antitrust Subcomm. of the Comm. on the Judiciary*, 86th Cong. 144 (1960) (statement of Stephen S. Jackson, Deputy Assistant Secretary of Defense for Manpower, Personnel, and Reserve).

10. *Id.*

been repeatedly recognized by Congress in its enactment of special exemption statutes . . .

But if the statutes often leave important areas unregulated, they also often serve as a bar to securing important personal services for the government through excessive regulation when no ethical problem really exists. Fundamentally, this is because the statutes fail to take into account the role in our government of the part-time or intermittent adviser whose counsel has become essential but who cannot afford to be deprived of private benefits, or reasonably requested to deprive themselves, in the way now required by these laws. Wherever the government seeks the assistance of a highly skilled technician, be he scientist, accountant, lawyer, or economist, such problems are encountered.¹¹

The following decade, after the Watergate scandal, Congress passed the Ethics in Government Act, which revised and crafted new post-employment restrictions as part of a wave of reforms.¹² Before the new restrictions went into effect, however, a number of parties raised concerns that the restrictions might interfere with the hiring of high-caliber employees.¹³ In a report on the legislation, the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce explained that ethics restrictions should “accommodate the need to attract and retain a qualified and experienced work force.”¹⁴ The report also stated that “hearings reflected the grave concern of agency heads” that the “balance between maintaining integrity and ensuring an able work force has not been properly struck.”¹⁵ For example, the Secretary of Health, Education, and Welfare characterized the revisions as likely to cause “the greatest brain drain of talent in the history of Federal service.”¹⁶ Recognizing the need to strike a balance between preventing

11. President’s Special Message to the Congress on Conflict-of-Interest Legislation and on Problems of Ethics in Government, 1961 PUB. PAPERS 327–329 (Apr. 27, 1961).

12. SAM BERGER & ALEX TAUSANOVITCH, CTR. FOR AM. PROGRESS, LESSONS FROM WATERGATE: PREPARING FOR POST-TRUMP REFORMS 3–6 (2018), <https://cdn.americanprogress.org/content/uploads/2018/07/27101947/WatergateReformsReport-3.pdf> (discussing the Ethics in Government Act and other “extensive” post-Watergate government reforms). Among other things, the 1978 Ethics in Government Act established “a mechanism for the appointment of an independent special prosecutor”; created the Office of Government Ethics; and “imposed the first mandatory financial disclosures for members of Congress, candidates, and some high-level executive branch officials.” *Id.*

13. STAFF OF THE SUBCOMM. ON OVERSIGHT & INVESTIGATIONS OF THE H. COMM. ON INTERSTATE & FOREIGN COMMERCE, 96TH CONG., CONG. REP. ON IMPACT OF THE ETHICS IN GOV’T ACT 5 (Comm. Print 1979).

14. *Id.*

15. *Id.*

16. *Id.*

conflicts and attracting top talent, Congress ultimately softened the new limitations before they went into effect.¹⁷

B. POST-EMPLOYMENT CONFLICT OF INTEREST RESTRICTIONS UNDER 18 U.S.C. § 207

The federal statute defining post-employment conflicts, § 207, is both a criminal and a civil statute; those who violate it could end up in prison or be subject to a hefty civil penalty.¹⁸ The statute is enforced by the Department of Justice (DOJ),¹⁹ but the Office of Government Ethics (OGE) has regulatory authority to promulgate rules, providing further details on the application of § 207 beyond what is provided in the statute.²⁰ In addition, the FTC provides direct guidance to former employees regarding § 207.²¹ Under § 207, former federal employees are not prohibited from taking a job with any other potential employer but are prohibited from engaging in certain activities.²² For former FTC employees, there are two types of conduct prohibited under the federal statute of which they should be aware.

First, the federal statute essentially prohibits a former federal employee from switching sides on a matter on which they previously represented the federal government.²³ If a former FTC employee communicates to, or appears

17. OFFICE OF GOV'T ETHICS, REPORT TO THE PRESIDENT AND TO CONGRESSIONAL COMMITTEES ON THE CONFLICT OF INTEREST LAWS RELATING TO EXECUTIVE BRANCH EMPLOYMENT 14 (2006) (“Before these new restrictions even became effective, Congress amended section 207 to lighten the new restrictions, in response to expressions of concern about the expected impact on recruitment and retention.”).

18. An offense can result in up to a year in prison, and a willful offense can result in up to five years. 18 U.S.C. § 216(a) (2018). In addition, a person who violates § 207 can be subject to a civil penalty up to fifty-thousand dollars for each violation or the amount of compensation which they received for the prohibited conduct, whichever amount is greater. 18 U.S.C. § 216(b).

19. Post-Employment Conflict of Interest Restrictions, 5 C.F.R. § 2641.103(a) (2020).

20. 5 C.F.R. § 2638.108(a)(1).

21. See 5 C.F.R. § 2641.105(a) (stating that “[t]he agency in which an individual formerly served has the primary responsibility to provide oral or written advice concerning a former employee's post-employment activities,” including regarding § 207). This is consistent with our experience. Staff of the FTC’s Office of General Counsel have provided us with guidance and advice regarding the application of § 207 to post-employment activities that we have inquired about.

22. 18 U.S.C. § 207; see OFFICE OF GOV'T ETHICS, *supra* note 17, at 11 (“None of its provisions bars any individual, regardless of rank or position, from accepting employment with any private or public employer after Government service. Section 207 only prohibits former employees from engaging in certain activities on behalf of persons or entities other than the United States, whether or not done for compensation.”).

23. 18 U.S.C. § 207; see MASKELL, *supra* note 5, at 2–3; *United States v. Nasser*, 476 F.2d 1111, 1116 (7th Cir. 1973) (holding in favor of constitutionality of prohibition language).

before, the federal government as a part of their new job with the intent to influence “in connection with a particular matter . . . in which the person participated personally and substantially” as a federal employee, that behavior constitutes a violation.²⁴ This prohibition lasts forever.

Second, even for a matter in which the former federal employee did *not* “participate[] personally and substantially,” § 207 still prohibits the person from working on it if the person “knows or reasonably should know [the matter] was actually pending under his or her official responsibility . . . within a period of 1 year before the termination” of their employment.²⁵ This restriction expires after two years.²⁶

In determining whether a former matter and a post-employment matter are the same, OGE rules state that “all relevant factors should be considered, including the extent to which the matters involve the same basic facts, the same or related parties, related issues, the same confidential information, and the amount of time elapsed.”²⁷

§ 207(j) lays out a number of exceptions to these general restrictions. For example, under this subsection, former employees are exempted from certain post-employment restrictions to carry out official duties as a federal employee, state or local government official, or representative of a higher education institution. One exception that is particularly relevant to agency technologists is an exception under several provisions of § 207 for “communications [made] solely for the purpose of furnishing scientific or technological information, if such communications are made under procedures acceptable to the department or agency concerned.”²⁸

As noted above, § 207 is enforced by the DOJ.²⁹ Accordingly, an agency where a former federal employee served—such as the FTC—does not have the authority to determine definitively how § 207 applies to a former employee, but the agency is responsible for providing former employees with advice regarding the application of § 207 to post-employment activities.³⁰ In

24. 18 U.S.C. § 207(a)(1). This only applies when the matter also is one “in which the United States or the District of Columbia is a party or has a direct and substantial interest,” and “which involved a specific party or specific parties at the time” the former employee worked on it. *Id.* Former federal employees also cannot engage in this variety of prohibited communications and/or appearances before the District of Columbia. *Id.*

25. 18 U.S.C. § 207(a)(1)–(2).

26. *Id.* For a more fulsome explanation of the provisions of § 207, including restrictions not discussed here, see MASKELL, *supra* note 5, at 3–6.

27. 5 C.F.R. § 2641.201(h)(5)(i).

28. 18 U.S.C. § 207(j)(5).

29. 5 C.F.R. § 2641.103(a).

30. 5 C.F.R. § 2641.105(a).

determining whether and how to pursue prosecution under § 207, however, the DOJ may take into account a former federal employee's reliance on advice received from the agency where they formerly served.³¹

C. POST-EMPLOYMENT CONFLICT OF INTEREST RESTRICTIONS UNDER FTC RULES

The FTC's rules also restrict what matters a former employee can work on after their employment with the FTC ends.³² Generally speaking, the FTC's post-employment conflict rules prohibit former employees from communicating to or appearing before the FTC and from assisting or advising behind-the-scenes regarding certain "proceeding[s] or investigation[s]."³³

Most relevant to former technologists is § 4.1(b) of the FTC's rules.³⁴ After leaving the agency, a former employee generally cannot work on a proceeding or investigation that is the same as one in which they "participated" on behalf of the agency.³⁵ A former employee also cannot later work on a proceeding or investigation if they received or saw "nonpublic documents or information" pertaining to it while working for the agency.³⁶ These restrictions are permanent, but the FTC's rules also establish certain time-limited restrictions for former employees.³⁷

There is no bright-line rule that enables a former employee to conclude with certainty that an activity in which they would like to engage constitutes the same "proceeding or investigation" as one in which they participated while employed by the FTC. According to a note in the FTC's rules, "a new 'proceeding or investigation' may be considered the same matter as a seemingly separate 'proceeding or investigation' that was pending during the former employee's tenure."³⁸ In assessing this differentiation, "the Commission . . . consider[s]: the extent to which the matters involve the same or related facts, issues, confidential information and parties; the time elapsed; and the

31. 5 C.F.R. § 2641.105(c).

32. 16 C.F.R. § 4.1(b)(1) (2020).

33. *Id.*; see *Post-Employment Restrictions*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/bureaus-offices/office-general-counsel/post-employment-restrictions> (last visited Aug. 22, 2020).

34. 16 C.F.R. § 4.1(b).

35. *Id.*

36. *Id.*

37. *Id.* A former employee cannot work on a proceeding or investigation that was pending under their official responsibility within a year of when they left the agency. *Id.* This restriction lasts for two years after an employee leaves the agency. *Id.* In addition, for one year after leaving the agency, Commissioners and "senior employees" cannot work on any proceeding or investigation before the FTC. *Id.*

38. 16 C.F.R. § 4.1(b)(1) n.1.

continuing existence of an important Federal interest.”³⁹ These criteria are nearly identical to the criteria considered by the OGE in determining whether a former matter and post-employment matter are the same under § 207.⁴⁰

The FTC’s rules also set forth a formal process to help former employees determine whether or not they are indeed restricted from working on a matter in their non-FTC employment capacity.⁴¹ In certain circumstances, a former employee is required to file a “request for clearance” to participate in a matter that is or was before the FTC.⁴² If the former employee left the agency within the previous three years, these circumstances include when the proceeding or investigation was pending before the FTC while the former employee was there, when the matter is the direct result of another proceeding or investigation that was pending before the FTC while the former employee was there, or when “nonpublic documents or information” pertaining to the matter were seen (or likely would have been seen) by the former employee as part of their work for the FTC.⁴³

After a former employee files a clearance request, the FTC’s Office of the General Counsel (OGC), or designee, has ten business days to respond by (1) granting the request, (2) stating that it recommends the FTC deny the request, or (3) extending its consideration of the request by up to ten additional business days.⁴⁴ If a former employee is not sure whether or not they need to file a clearance request, they can ask the General Counsel for advice.⁴⁵ The General Counsel or their designee will provide advice within three business days.⁴⁶

Significantly, the FTC’s rules grant the agency the discretion to simply decline to apply the rules to any specific set of circumstances. In addition, the rules do not apply to post-employment activities that would be covered if “otherwise specifically authorized by the Commission.”⁴⁷

While § 207 is enforced by the DOJ, the FTC’s post-employment conflict of interest restrictions are applied and enforced only by the FTC itself. To help current and former employees better understand the rules, the FTC provides guidance on its website.⁴⁸ The agency also gives new employees an ethics guide.

39. *Id.*

40. *See* 5 C.F.R. § 2641.201(h)(5)(i).

41. *See* 16 C.F.R. § 4.1(b)(2).

42. *Id.*

43. *Id.*

44. 16 C.F.R. § 4.1(b)(7).

45. 16 C.F.R. § 4.1(b)(6).

46. *Id.*

47. 16 C.F.R. § 4.1(b)(1).

48. *Post-Employment Restrictions*, *supra* note 33.

The guide states: “if an FTC matter was open during your [(i.e., former employee’s)] time here, you likely need to receive clearance before you work on it for a new employer. If you worked on the matter while at the FTC or had access to significant non-public FTC information about the matter, you are unlikely to get clearance.”⁴⁹

III. POST-EMPLOYMENT RESTRICTIONS IN FTC PRACTICE TODAY

As discussed above, post-government employment restrictions seek to balance the need to combat the revolving door and corruption with the need to preserve the government’s ability to attract and retain top-notch expertise. In the modern era, however, there is a greater need than ever in government—and perhaps especially in the FTC—for highly-skilled, technical expertise.⁵⁰ As a result, these restrictions appear to be off-balance with the FTC interpreting and applying post-government restrictions aggressively to combat the revolving door and corruption at the cost of attracting and retaining technical expertise. This is particularly true as applied to conduct that supports the FTC’s objectives and doesn’t implicate the corruption concerns that § 207 was designed to address. A former FTC technologist seeking to consult on a state attorney general investigation regarding consumer protection matters is better described as entering an adjoining wing than availing herself of a revolving door. Section III.A begins by identifying how post-employment restrictions arguably are failing to facilitate hiring and retention of skilled experts, specifically technologists. Why would the FTC administer conflict rules more broadly than necessary to advance the policy goals of preventing corruption and slowing the revolving door? Sections III.B–F identify several possible explanations, including increased market consolidation, the growing role of technologists as utility players, the length and breadth of consent decrees, the agency’s risk-averse culture, and possible political conflicts between the FTC and other enforcement agencies.

49. FED. TRADE COMM’N, LET’S TALK ETHICS: ETHICS ORIENTATION FOR NEW EMPLOYEES 7 (2019), https://www.ftc.gov/system/files/attachments/office-general-counsel/ieo_for_new_ftc_employees.pdf.

50. For a discussion by the former FTC Commissioner on enforcement and oversight challenges created by rapidly changing technology and the possibility that the FTC is failing to keep up, see generally Terrell McSweeney, *Psychographics, Predictive Analytics, Artificial Intelligence, & Bots: Is the FTC Keeping Pace?*, 2 GEO. L. TECH. L. REV. 514 (2018).

A. IMPACT OF POST-EMPLOYMENT RESTRICTIONS ON TECHNOLOGISTS

The FTC's application of post-employment restrictions today goes beyond the policy goal of limiting corruption and the appearance of corruption.⁵¹ The FTC may also apply post-government employment restrictions too broadly in cases involving former employees who want to work for the companies the FTC investigates, but we focus here primarily on circumstances for which there are clear public policy reasons to support a more permissive interpretation of post-employment restrictions: requests to work for state attorneys general seeking to investigate violations of law. In these cases, prohibiting former technologists from contributing does not serve the federal conflicts provisions' goal of preventing employees from leaving the government and "switching sides." On the contrary, these other entities are best characterized as being on the *same side* as the FTC, and their law enforcement work is consonant with the consumer protection and pro-competition missions of the FTC.

As technologists and former FTC officials, two of us have encountered firsthand the FTC's broad interpretation of post-employment restrictions precluding us from contributing to valuable enforcement work by other agencies and plaintiffs. In addition, we conducted informal interviews of several other former FTC employees and technologists in order to ascertain additional information and context about how post-employment restrictions affect technologists.⁵²

From these interviews, we heard consistent variations on a theme: *there was general consensus that the rules were overly broad, their application opaque, and their impact felt acutely and disproportionately by former technologists.* While not everyone we spoke to had sought clearances themselves, many were aware of the process from colleagues. Several, however, had firsthand experience contacting the FTC to seek advice and, ultimately, clearance regarding matters they would like to work on that could be construed as related to matters they had worked on while employed by the FTC.

In particular, former technologists—ourselves included—have often been denied clearance by the FTC, under its own rules, to help others investigate entities subject to FTC enforcement even after a substantial period of time has passed. The crux of the problem is that the FTC often considers a state attorney general's current investigation regarding a major company to be the same "proceeding or investigation" as one conducted by the FTC of the same company for related practices—even if the FTC's investigation culminated in

51. See MASKELL, *supra* note 5, at 2.

52. For a discussion of methodology, see *supra* Part I.

a complaint that has already been settled with the company in question.⁵³ The FTC further appears to consider technologists to have “participated personally and substantially” in its investigations of technology companies.⁵⁴

In other words, the FTC interprets its conflict rules as prohibiting us from working on the “same side” as the FTC in investigations that run parallel to the agency’s mission. On at least three occasions, we have sought clearance to provide technical guidance to state attorneys general investigating the practices of major technology companies. Two of these requests for clearance were denied and the third took weeks to process. In fact, on one occasion, FTC staff told one of us directly that, even though providing assistance to a state attorney general would be working on the “same side” as the FTC, this was “irrelevant to the analysis” under FTC rules.⁵⁵

The conflicts rules are intended to prevent the appearance or actual existence of conflicts between current employees and companies the FTC oversees, not other enforcement entities.⁵⁶ By making it unduly difficult for former technologists to receive clearances, the agency makes it less attractive for technologists to work there and discourages those who do from working on certain cases, thus limiting the agency’s own efficacy. This problem is intensifying as technological advancements increase the FTC’s need for technical expertise.⁵⁷ In turn, this problem also makes other avenues in the

53. 16 C.F.R. § 4.1(b)(1)(i) (restricting post-employment activities if “[t]he former employee participated personally and substantially on behalf of the Commission in the same proceeding or investigation in which the employee now intends to participate”). As discussed below, this problem likely is compounded by the fact that FTC consent decrees typically last for twenty years. *Infra* Section III.D.

54. 16 C.F.R. § 4.1(b)(1)(i). As discussed below, this problem likely is compounded by the fact that FTC technologists are relied upon as utility players. *Infra* Section III.C.

55. Email from Alternate Designated Agency Ethics Official, Office of the General Counsel, Federal Trade Commission, to one of the authors (Mar. 01, 2019, 08:00 EST) (on file with authors).

56. See MASKELL, *supra* note 5, at 2 (identifying the animating goals of “revolving door” laws as “protect[ing] the government against the use of proprietary information by former employees who might use that information *on behalf of a private party* in an adversarial type of proceeding or matter against the government, to the potential detriment of the public interest,” “limit[ing] the potential influence and allure that a lucrative *private* arrangement, or the prospect of such an arrangement, may have on a current federal official when dealing with prospective *private* clients or future employers while still with the government,” and “prevent[ing] the corrupting influence on the governmental processes of both legislating and administering the law that may occur, and the appearances of such influences, when a federal official leaves his government post to ‘cash in’ on his ‘inside’ knowledge and personal influence with those persons remaining in the government.”) (emphasis added).

57. See generally McSweeney, *supra* note 50.

U.S. enforcement ecosystem less effective because it limits the access of state attorneys general to qualified technology experts.

In addition to interpreting its own rules in this manner, the FTC also appears to interpret § 207 quite broadly. FTC staff have advised us that activities we sought to assist alongside state attorneys general could implicate § 207 as constituting the same matter as one in which we had participated at the FTC.⁵⁸

The FTC's procedural approach to former employees' conflict clearance inquiries raises additional problems. Based on our experience and that of the people we interviewed, it seems the FTC's OGC routinely denies clearance requests through an informal process completed over email. The OGC sometimes advises former employees to submit a formal clearance request using a form designed for that purpose, but often does not. This approach limits the transparency of the decision, avenues for appeal, and rigor of the analysis.

B. INCREASED MARKET CONSOLIDATION

Increased market concentration and horizontal expansion in the technology sector also contribute to the agency's broad application of conflicts rules to technologists. In a diversified market, it can be easy to tell that a former FTC employee's work investigating Company A is not the same "matter" as, or is an unrelated "proceeding or investigation" to, work involving Company B. But when Company A is at the heart of both the prior investigation and the prospective work—perhaps because Company A acquired "nascent or potential competitor" Company B to eliminate a threat to Company A's market—the potential for conflict of interest may be higher.⁵⁹

There is no question that recent years have seen massive corporate consolidation, both vertical and horizontal.⁶⁰ The technology sector, in

58. 18 U.S.C. § 207(a)(1)(A) (restricting post-employment activities related to a particular matter "in which the United States or the District of Columbia is a party or has a direct and substantial interest").

59. Press Release, Fed. Trade Comm'n, FTC to Examine Past Acquisitions by Large Technology Companies (Feb. 11, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies> (describing current FTC investigation of anti-competitive acquisitions by technology companies).

60. *America's Concentration Crisis: An Open Markets Institute Report*, OPEN MKTS. INST., <https://concentrationcrisis.openmarketsinstitute.org/> (last visited Aug. 22, 2020) (illustrating the wave of consolidation across a wide range of industries over the past fifty years); Lina M. Kahn, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J.F. 960, 964 (2018), <http://www.yalelawjournal.org/forum/the-ideological-roots-of-americas-market-power-problem> (tracing the rise of concentration and the "cripple[ing]" of antitrust enforcement);

particular, exhibits a steady trend toward greater consolidation.⁶¹ For example, according to a recent report from the Open Markets Institute, the three largest social networking sites controlled eighty-five percent of the market in 2018, up from seventy-five percent in 2012; the two largest search engines controlled ninety-seven percent of the market in 2017, up from eighty-two percent in 2011; and the two largest e-commerce firms controlled fifty-six percent of the market in 2018, up from forty-six percent in 2016.⁶²

In addition to greater consolidation in the technology sector, the resultant diminished number of targets for enforcers to go after overall has provided all enforcement agencies—including the FTC—clear reasons to investigate the largest companies for violations of trade practice law. Precisely because of their outsized market shares, large companies that violate the law have the potential to cause substantial injury to large numbers of consumers.⁶³ And an enforcement agency with limited resources will get the greatest “bang for its buck” going after companies with large numbers of users, substantial economic clout, and a high public profile, rather than going after smaller companies. Thus when the FTC announced its record five-billion-dollar settlement with Facebook in 2019, the size of the company was relevant: as the agency stated in its press release, “[m]ore than 185 million people in the United States and Canada use Facebook on a daily basis.”⁶⁴

A review of recent enforcement actions reveals that the enforcement efforts of the FTC and state attorneys general are indeed converging on a handful of companies. For example, in the last two years alone, Facebook has been both a target of the FTC and the subject of public investigations by

David Leonhardt, *The Monopolization of America*, N.Y. TIMES (Nov. 25, 2018), <https://www.nytimes.com/2018/11/25/opinion/monopolies-in-the-us.html> (describing and opining on the Open Markets dataset).

61. Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 710 (2017) (criticizing consumer welfare as ill-adapted to measure anti-competitive harms in the twenty-first century economy, particularly online platforms); Frank Pasquale, *When Antitrust Becomes Pro-Trust: The Digital Deformation of U.S. Competition Policy*, 2017 CPI ANTITRUST CHRON., May 2017, at 1, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3020163 (analyzing the consolidation of the technology sector and describing the failures of antitrust doctrine, and the interpretation and application thereof by U.S. regulators, to new trends).

62. *America's Concentration Crisis*, *supra* note 60. Although the specific search engines controlling the largest market share have changed between 2011 and 2017, the increase in the market share owned by the two largest companies at that time nevertheless reflects market consolidation.

63. When it violates the law, a company that has a billion users has the potential to do greater harm than a company that has only a few thousand users.

64. Press Release, Fed. Trade Comm'n, FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook (July 24, 2019), <https://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restrictions>.

attorneys general in California,⁶⁵ the District of Columbia,⁶⁶ Massachusetts,⁶⁷ New York,⁶⁸ and Washington,⁶⁹ as well as by a group of at least forty-seven state attorneys general investigating Facebook for potential antitrust violations.⁷⁰ Similarly, Google settled a complaint with the FTC in August 2019 but has been publicly investigated in the past two years by Arizona,⁷¹ Connecticut and New York (in tandem),⁷² and fifty attorneys general probing the company's competition practices.⁷³

Because of the increase in the number of investigations targeting the same handful of companies, a former employee who wishes to assist another enforcer with a new case is increasingly likely to find that the new case concerns an old target.

65. Cecilia Kang & David McCabe, *California Sues Facebook for Documents in Privacy Investigation*, N.Y. TIMES (Nov. 6, 2019), <https://www.nytimes.com/2019/11/06/technology/facebook-california-investigation.html>.

66. Matthew P. Denn & Amanda Fitzsimmons, *District of Columbia v. Facebook: General Consumer Protection Statute Can Serve as Vehicle for State Attorney General Seeking Redress for Data Privacy Violations*, DLA PIPER (June 12, 2019), <https://www.dlapiper.com/en/us/insights/publications/2019/06/district-of-columbia-v-facebook/>.

67. Associated Press, *Facebook Must Provide Info Sought by Massachusetts Attorney General*, BOSTON.COM (Jan. 19, 2020), <https://www.boston.com/news/local-news/2020/01/19/facebook-must-provide-info-sought-by-massachusetts-attorney-general>.

68. Makena Kelly, *New York's Attorney General Is Investigating Facebook After Contact-Scraping Scandal*, THE VERGE (Apr. 25, 2019, 5:15 PM), <https://www.theverge.com/2019/4/25/18516716/new-york-attorney-general-facebook-contact-scraping-letitia-james>.

69. Associated Press, *Washington Attorney General Sues Facebook over Campaign Ads*, U.S. NEWS & WORLD REP. (Apr. 14, 2020, 5:47 PM), <https://www.usnews.com/news/best-states/washington/articles/2020-04-14/washington-attorney-general-sues-facebook-over-campaign-ads>.

70. Tony Romm, *Forty-Six Attorneys General Have Joined a New York-Led Antitrust Investigation of Facebook*, WASH. POST (Oct. 22, 2019, 1:32 PM), <https://www.washingtonpost.com/technology/2019/10/22/forty-six-attorneys-general-have-joined-new-york-led-antitrust-investigation-into-facebook/>.

71. Ali Breland, *Arizona Investigating Google's Location Tracking: Report*, THE HILL (Sept. 11, 2018, 3:33 PM), <https://thehill.com/policy/technology/406106-arizona-investigating-googles-location-tracking-report>.

72. Reuters, *At Least Two US Attorneys General Are Investigating the Google+ Glitch that Exposed Hundreds of Thousands of Users' Personal Data*, BUS. INSIDER (Oct. 9, 2018, 4:37 PM), <https://www.businessinsider.com/some-us-attorneys-general-are-investigating-google-data-breach-2018-10>.

73. Makena Kelly, *Google Under Antitrust Investigation by 50 Attorneys General*, THE VERGE (Sept. 9, 2019, 2:59 PM), <https://www.theverge.com/2019/9/9/20857440/google-antitrust-investigation-attorneys-general-advertising-search>.

C. TECHNOLOGISTS ACT AS UTILITY PLAYERS

Unlike most other roles at the FTC, every FTC technologist is forced to be a utility player. Although the FTC employs hundreds of attorneys and dozens of economists,⁷⁴ it employs fewer than ten technologists.⁷⁵ The number of technologists has ebbed and flowed and has been as low as only one. Over the past couple decades, however, the technical complexity of U.S. commerce has grown, thereby increasing agency demand for technical expertise. This has an important impact on conflicts. Attorneys and economists can specialize in narrow slices of the agency's work and focus on a small docket of investigations, but technologists tend to work on a broad set of matters. As a result, for purposes of applying the FTC's post-employment restrictions, technologists may be more likely than other FTC employees to be considered to have "participated personally and substantially" in any FTC investigation of a major company.⁷⁶

Technology now pervades nearly every industry the FTC oversees, leading some to refer to it as the "Federal Technology Commission."⁷⁷ The biggest driver of increasing technical complexity is, of course, the growth of computers and the internet to their modern-day prevalence.⁷⁸ Personal computers and the internet are still relatively recent phenomena. In the nineteen years from 1997 to 2016, the percentage of U.S. households with desktop or laptop computers more than doubled.⁷⁹ From 2000 to 2019, the

74. See *Bureau of Economics Biographies*, Fed. Trade Comm'n, <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics/biographies> (last visited May 19, 2021).

75. As of May 2019, there were only five technologists at the FTC. See Memorandum from the Comm. on Energy & Commerce Staff to the Subcomm. on Consumer Prot. & Commerce Members and Staff 4 (May 8, 2019), <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/FTC%20Oversight%20Memo%20050319.pdf>. In May 2021, an FTC official confirmed that the number of technologists on staff is fewer than ten. Notes of conversation on file with authors.

76. 16 C.F.R. § 4.1(b)(1)(i).

77. Brian Fung, *The FTC Was Built 100 Years Ago to Fight Monopolists. Now, It's Washington's Most Powerful Technology Cop*, WASH. POST (Sept. 25, 2014, 11:30 AM), <https://www.washingtonpost.com/news/the-switch/wp/2014/09/25/the-ftc-was-built-100-years-ago-to-fight-monopolists-now-its-washingtons-most-powerful-technology-cop/> (quoting Geoffrey Manne, executive director of the International Center for Law and Economics).

78. See generally McSweeney, *supra* note 50 (detailing FTC enforcement actions in consumer protection against the backdrop of increasing technological complexity).

79. Laptop and desktop computer ownership increased from 36.6% in 1997 to 77% in 2016. ERIC C. NEWBURGER, U.S. CENSUS BUREAU, COMPUTER USE IN THE UNITED STATES: OCTOBER 1997, at 1 (1999), <https://www.census.gov/content/dam/Census/library/publications/1999/demo/p20-522.pdf>; CAMILLE RYAN, U.S. CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES: 2016, at 2 (2018), <https://www.census.gov>

percentage of U.S. adults who used the internet went from fifty-two percent to ninety percent.⁸⁰ The iPhone was not even introduced until 2007,⁸¹ with the App Store following close behind it, and yet today there are almost two million apps available for download.⁸² E-commerce has simultaneously ballooned over the past two decades.⁸³

Today, technically complex subject matter is often at the center of the agency's investigations and proceedings. For example, the 2019 Facebook complaint discussed Facebook's implementation of facial recognition technology;⁸⁴ the 2019 Google/YouTube complaint discussed behavioral advertising;⁸⁵ the 2019 Equifax complaint discussed critical security vulnerabilities and reasonable patch management policies and procedures;⁸⁶ and the 2018 Uber complaint discussed the company's use of real-time precise geolocation data.⁸⁷

As the role of technology in FTC investigations and enforcement has expanded, the agency has struggled to adjust accordingly, forcing the few

/content/dam/Census/library/publications/2018/acs/ACS-39.pdf. In 2016, eighty-nine percent of households had a smartphone or computer. RYAN, *supra* note 79, at 1.

80. *Internet/Broadband Fact Sheet*, PEW RESEARCH CTR. (June 12, 2019), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/>.

81. Lisa Eadicicco, *This Is Why the iPhone Upended the Tech Industry*, TIME (June 29, 2017, 7:00 AM), <https://time.com/4837176/iphone-10th-anniversary/>.

82. Sam Costello, *How Many Apps Are in the App Store?*, LIFEWIRE, <https://www.lifewire.com/how-many-apps-in-app-store-2000252> (last updated Feb. 24, 2020).

83. U.S. retail e-commerce sales were estimated at \$5.3 billion in the fourth quarter of 1999, when the U.S. Census Bureau first began reporting e-commerce statistics, representing 0.64% of total retail sales. Press Release, U.S. Census Bureau, Retail E-Commerce Sales for the Fourth Quarter 1999 Reach \$5.3 Billion, Census Bureau Reports (Mar. 2, 2000), <https://www2.census.gov/retail/releases/historical/ecom/99q4.pdf>. By the first quarter of 2020, retail e-commerce sales had ballooned to \$160.3 billion, representing 11.8% of total retail sales. Press Release, U.S. Census Bureau, Quarterly Retail E-Commerce Sales: 1st Quarter 2020 (May 19, 2020), <https://www2.census.gov/retail/releases/historical/ecom/20q1.pdf>.

84. Complaint for Civil Penalties, Injunction, and Other Relief at 6, 39–42, *United States v. Facebook, Inc.*, No. 19-cv-2184 (D.D.C. July 14, 2019), https://www.ftc.gov/system/files/documents/cases/182_3109_facebook_complaint_filed_7-24-19.pdf.

85. Complaint for Permanent Injunction, Civil Penalties, and Other Equitable Relief at 4, 7–9, *Fed. Trade Comm'n v. Google LLC*, No. 1:19-cv-2642 (D.D.C. Sept. 6, 2019), https://www.ftc.gov/system/files/documents/cases/172_3083_youtube_revised_complaint.pdf.

86. Complaint for Permanent Injunction and Other Relief at 6, 8–14, *Fed. Trade Comm'n v. Equifax Inc.*, No. 1:19-mi-99999-UNA (N.D. Ga. July 22, 2019), https://www.ftc.gov/system/files/documents/cases/172_3203_equifax_complaint_7-22-19.pdf.

87. Complaint at 2, *Uber Technologies, Inc.*, No. C-4662 (Fed. Trade Comm'n Oct. 26, 2018), https://www.ftc.gov/system/files/documents/cases/152_3054_c-4662_uber_technologies_revised_complaint.pdf.

available technologists to consult on an outsized portion of agency matters.⁸⁸ Our personal experience bears this out. As technologists for the FTC, we were asked to consult with attorneys working on virtually every case that came before the Division of Privacy and Identity Protection, as well as a number of cases originating in other divisions. In interviews with other former FTC technologists, we heard similar accounts. This means that our potential list of conflicts is much longer than non-technologists who work for the FTC for the same length of time. Nearly every matter involving technology during our tenure crossed our desks, even if many of those interactions were fleeting and insubstantial. Still, our list of potential conflicts encompasses nearly everything involving complex information technology during our employment.

The general dearth of technical experts at the FTC reflects the agency's dearth of staff more broadly. Much of the scrutiny the agency exacts on technology companies is facilitated by staff working on privacy and data security, of which the FTC has only about forty.⁸⁹ In contrast, the United Kingdom has more than five hundred people working in its Information Commissioner's office,⁹⁰ and Ireland's Data Protection Commissioner has over 130 employees.⁹¹ As far as technologists are concerned, while the FTC has between five and nine technologists,⁹² Germany—a country with one-fourth the population of the United States—has 101 technology specialists working with its data protection authorities.⁹³ While such a high number is unusual, other European countries nevertheless have drastically more technologists than the United States; Spain has thirty-six, France has twenty-eight, and the United Kingdom has twenty-two.⁹⁴

The dearth of FTC technologists is also evident in comparison to the large population of economists employed by the FTC. The FTC's website currently lists approximately 80 staff in the Bureau of Economics.⁹⁵ This list does not

88. This has been our experience, as well as the experience of several people we interviewed. Contact authors for information on interviews.

89. Harper Neidig, *FTC Says It Only Has 40 Employees Overseeing Privacy and Data Security*, THE HILL (Apr. 3, 2019, 11:01 AM), <https://thehill.com/policy/technology/437133-ftc-says-it-only-has-40-employees-overseeing-privacy-and-data-security>.

90. *History of the ICO*, INFO. COMM'R'S OFFICE, <https://ico.org.uk/about-the-ico/our-information/history-of-the-ico/> (last visited Aug. 23, 2020).

91. Peter Hamilton, *Data Commissioner to Look for More Staff and Funding*, IRISH TIMES (Mar. 7, 2019, 1:50 PM), <https://www.irishtimes.com/business/technology/data-commissioner-to-look-for-more-staff-and-funding-1.3817791>.

92. See Breland, *supra* note 71.

93. JOHNNY RYAN, BRAVE, EUROPE'S GOVERNMENTS ARE FAILING THE GDPR 4 (2020), <https://brave.com/wp-content/uploads/2020/04/Brave-2020-DPA-Report.pdf>.

94. *Id.*

95. See *Bureau of Economics Biographies*, *supra* note 74.

include economists who serve in other roles, such as staff advisors for Commissioners.⁹⁶ With dozens of economists and supporting analysts on staff, it is neither necessary nor feasible to ask any individual economist to take on such a broad portfolio of matters that might serve as a future potential conflict of interest.

D. LENGTHY AND BROAD CONSENT DECREES

Another possible contributor to the FTC's broad application of conflicts rules for technologists is the agency's practice of establishing broad, twenty-year settlements with parties presumed to be in violation of § 5 of the FTC Act.⁹⁷ This would not necessarily pose a problem if the FTC understood that the "proceeding or investigation" in a conflict of interest analysis under § 4.1(b) of the agency's rules should be the specific facts that gave rise to the twenty-year settlement. But if the rules are instead read broadly—too broadly in our view—to encompass "this company and privacy" or "this company and security," the twenty-year term serves as a two-decades-long restraint on future work for former employees. In combination with the fact that companies—especially technology companies—are bigger and more horizontally diversified than they were in the past,⁹⁸ broad and lengthy consent decrees dramatically limit the ability of former FTC staff to work on issues related to technology companies for a period that may cover half a person's professional career.

The FTC has existing consent decrees that will endure many years into the future with a large number of major companies. For example, from past cases, the agency has settlement provisions that will persist with Facebook until

96. See FED. TRADE COMM'N, FEDERAL TRADE COMMISSION ORGANIZATION DIRECTORY 2, https://www.ftc.gov/system/files/attachments/contact-federal-trade-commission/ftc_org_directory_8-8-2019.pdf (last updated Aug. 8, 2019) (listing an "Economic Advisor" for Chairman Joseph J. Simons).

97. See *Legislative Hearing on 17 FTC Bills: Hearing Before the Subcomm. on Commerce, Mfg. & Trade of the H. Comm. on Energy & Commerce*, 114th Cong. 5 (2016) (statement of David C. Vladeck, Professor, Georgetown University Law Center), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/05.24.16_Testimony_Vladeck-CMT-LegHrg-17-FTC-Bills-20160524.pdf ("[T]he Commission has for decades generally insisted on twenty year [*sic*] orders."); *id.* at 6 ("[M]ost [data security cases] were resolved with twenty-year consent decrees."); Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 613–14 (2014) (citing twenty years as a common duration for FTC's privacy and security audits, while also noting variation among the orders); Woodrow Hartzog & Daniel J. Solove, *The Scope and Potential of FTC Data Protection*, 83 GEO. WASH. L. REV. 2230, 2297 (2015) ("While the FTC does not enter into a twenty-year consent order with every company it files a privacy-related complaint against, this burdensome timescale is the most common duration for such agreements.").

98. See discussion in *supra* Section III.C.

2039,⁹⁹ with Apple until 2034,¹⁰⁰ with Google until 2031,¹⁰¹ with Google/YouTube until 2029,¹⁰² with Twitter until 2030,¹⁰³ and with PayPal until 2038.¹⁰⁴

The consent decrees often include provisions that require special behavior, oversight, or reporting with respect to a broad range of activities. For example, consent decrees negotiated as part of privacy and data security cases commonly require parties to commit to not misrepresent their privacy or security practices,¹⁰⁵ obtain express consent from consumers with respect to certain data practices,¹⁰⁶ adopt privacy or security programs incorporating certain specific practices,¹⁰⁷ produce regular privacy or security reports that meet

99. Stipulated Order for Civil Penalty, Monetary Judgement, and Injunctive Relief at Attachment A at 20, *United States v. Facebook, Inc.*, No. 19-cv-2184 (D.D.C. July 24, 2019), https://www.ftc.gov/system/files/documents/cases/182_3109_facebook_order_filed_7-24-19.pdf [hereinafter “FTC Facebook Order 2019”] (“This Order will terminate 20 years from the date of its issuance, or 20 years from the most recent date that the United States of the Commission files a complaint . . .”).

100. Decision and Order at 6, *Apple Inc.*, No. C-4444 (Fed. Trade Comm’n Mar. 25, 2014), <https://www.ftc.gov/system/files/documents/cases/140327appledo.pdf> [hereinafter “FTC Apple Order 2014”] (“This order will terminate on March 25, 2034, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint . . .”).

101. Agreement Containing Consent Order at 7, *Google Inc.*, No. 102316 (Fed. Trade Comm’n 2011), https://www.ftc.gov/sites/default/files/documents/cases/2011/03/1103_30googlebuzzagreeorder.pdf [hereinafter “FTC Google Order 2011”] (“This order will terminate twenty (20) years from the date of its issuance, or twenty (20) years from the most recent date that the United States or the Commission files a complaint . . .”).

102. Stipulated Order for Permanent Injunction and Civil Penalty Judgement at 16, *Fed. Trade Comm’n v. Google LLC*, No. 1:19-cv-02642 (D.D.C. Sept. 4, 2019), https://www.ftc.gov/system/files/documents/cases/172_3083_youtube_coppa_consent_order.pdf [hereinafter “FTC Google/YouTube Order 2019”] (“For ten (10) years after entry of this Order, each Defendant must submit a compliance notice, sworn under penalty of perjury, within fourteen (14) days of any change in . . .”).

103. Agreement Containing Consent Order at 6, *Twitter, Inc.*, No. 0923093 (Fed. Trade Comm’n 2010), https://www.ftc.gov/sites/default/files/documents/cases/2010/06/1006_24twitteragree.pdf [hereinafter “FTC Twitter Order 2010”] (“This order will terminate twenty (20) years from the date of its issuance, or twenty (20) years from the most recent date that the United States or the Commission files a complaint . . .”).

104. Decision and Order at 7, *Paypal, Inc.*, No. C-4651 (Fed. Trade Comm’n May 23, 2018), https://www.ftc.gov/system/files/documents/cases/1623102-c4651_paypal_venmo_decision_and_order_final_5-24-18.pdf [hereinafter “FTC PayPal Order 2018”] (“Respondent must create certain records for 20 years after the issuance date of the Order.”).

105. *See, e.g.*, FTC Facebook Order 2019, *supra* note 99, at 5; FTC PayPal Order 2018, *supra* note 104, at 3; FTC Google Order 2011, *supra* note 101, at 3–4; FTC Twitter Order 2010, *supra* note 103, at 3.

106. *See, e.g.*, FTC Facebook Order 2019, *supra* note 99, at 5–6; FTC Google Order 2011, *supra* note 101, at 4.

107. *See, e.g.*, FTC Facebook Order 2019, *supra* note 99, at 6–12; FTC Google Order 2011, *supra* note 101, at 4–5; FTC Twitter Order 2010, *supra* note 103, at 3–4.

outlined standards,¹⁰⁸ and make certain documents available to the FTC upon request.¹⁰⁹

Because the term of the agreements is long and the scope broad, former employees may find that if they worked on or saw documents related to an investigation of a company that later settled with the FTC, future work relating generally to the data practices of that same company is then essentially off-limits for the lengthy term of the agreement. Even investigations into products or services that *did not yet exist* at the time can then be construed as the “same proceeding or investigation” under the agency’s rules restricting post-employment activities.¹¹⁰

E. RISK-AVERSE AGENCY CULTURE

When we interviewed former FTC employees, they generally agreed that another cause of the agency’s broad application of post-employment conflicts rules is a cultural inclination toward risk-aversion at the agency.¹¹¹ In particular, interviewees stated that there is a widespread concern about heavy congressional criticism within the agency.¹¹² This is viewed as a motivating factor for a number of agency considerations. Many interviewees stated a belief that the agency’s extreme caution harkens back to the 1970s when, in what is known as “KidVid,” the agency attempted to ban television ads for junk food directed at children—a move perceived by a congressional majority as regulatory overreach.¹¹³ In response, Congress limited the agency’s authority

108. See, e.g., FTC Facebook Order 2019, *supra* note 99, at 12–14; FTC PayPal Order 2018, *supra* note 104, at 5–6; FTC Google Order 2011, *supra* note 101, at 5–6; FTC Twitter Order 2010, *supra* note 103, at 4–5.

109. See, e.g., FTC Facebook Order 2019, *supra* note 99, at 20; FTC PayPal Order 2018, *supra* note 104, at 8; FTC Google Order 2011, *supra* note 101, at 6; FTC Twitter Order 2010, *supra* note 103, at 5–6.

110. 16 C.F.R. § 4.1(b)(1)(i).

111. Interviews, *supra* note 88; see also Nicholas Confessore & Cecilia Kang, *Facebook Data Scandals Stoke Criticism That a Privacy Watchdog Too Rarely Bites*, N.Y. TIMES (Dec. 30, 2018), <https://www.nytimes.com/2018/12/30/technology/facebook-data-privacy-ftc.html> (“In more than 40 interviews, former and current F.T.C. officials, lawmakers, Capitol Hill staff members, and consumer advocates said that as evidence of abuses has piled up against tech companies, the F.T.C. has been too cautious.”).

112. Interviews, *supra* note 88.

113. See CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY 60–66 (2016) (describing the KidVid controversy, the ensuing fallout, and the impact on the FTC’s enforcement approach); Confessore & Kang, *supra* note 111 (“The F.T.C. is haunted, for example, by a clash with Congress in the 1980s over an attempt by the agency to ban television ads for junk food directed at children, known as ‘KidVid.’ . . . Fears that Congress could again cripple the F.T.C. have made some career lawyers reluctant to take on politically sensitive cases, according to current and former employees, speaking about their

and withdrew its funding.¹¹⁴ Many believe that the agency continues to tread lightly today out of a lingering fear of congressional backlash, an assessment echoed by our interviewees. Applying this approach to conflicts questions, the agency may reasonably calculate that there are few or no downsides to OGC rejecting a former employee's clearance request.

In contrast, granting a former employee's clearance request—especially when it concerns a major company or highly visible matter—could provide fodder for a company under the scrutiny of the FTC to attempt to drum up criticism of the agency. This is not an unfounded concern; in response to unwanted FTC investigation, companies have attempted all manner of interference strategies throughout the agency's history. For example, in 1918 when the FTC issued a report documenting the predatory and collusive practices of meatpackers and calling for the nationalization of certain components of the industry, the agency was roundly attacked.¹¹⁵ The U.S. Chamber of Commerce and the New York Times Editorial Board called for the agency to be “cured of its present bolshevist and propagandist tendencies,”¹¹⁶ and were echoed by Senator James Watson when he specifically targeted the FTC's Chicago field office as a “spawning ground of sovietism.”¹¹⁷ In response, the agency investigated, cleared of wrongdoing, but ultimately still fired eleven of the employees who worked on the report, and Congress removed the agency's oversight of meatpackers, awarding this jurisdiction

experiences during the Trump and Obama administrations.”). In one memorable example of a culture of severe sensitivity to congressional censure at the agency, an interviewee described briefing their superiors on research that websites were using JavaScript code that could surreptitiously dig through a user's browser and access the sites they had visited. (Please contact authors for information on interviews.) The most heavily trafficked site that was engaging in that practice belonged to a pornography website. *Id.* The interviewee was informed that the agency would not investigate the pornography company because the FTC did not want to run the risk of being perceived as “protecting the privacy of people who watch pornography.” *Id.* While no other interviewees provided similarly colorful examples to illustrate the point, this example is representative of the risk-adverse culture described by the other former FTC employees.

114. Hoofnagle, *supra* note 113, at 65 (describing the FTC Improvement Act of 1980, which passed in response to the KidVid controversy, implemented a Congressional veto of Agency action, limited the Agency's rule-making authority, and temporarily expunged funding).

115. Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U.L. REV. 431, 467 (2021). The practices described in the report also provided the basis for a subsequent criminal suit by the Attorney General.

116. Editorial, *The Trade Commission*, N.Y. TIMES, Sept. 3, 1918, at 10, available at https://timesmachine.nytimes.com/timesmachine/1918/09/03/97024087.pdf?pdf_redirect=true&ip=0.

117. Paul A. Pautler, *A Brief History of the FTC's Bureau of Economics: Reports, Mergers, and Information Regulation*, 46 REV. INDUS. ORG. 59, 64 n.13 (2015).

instead to the more industry-friendly Department of Agriculture.¹¹⁸ Sixty years later in KidVid, when the agency considered children's advertising rules, advertisers devoted the equivalent of one-fourth of the agency's budget at the time to lobbying and public relations efforts against the rules, while advertising trade associations petitioned the FTC to compel Chair Michael Perschuk to recuse himself based on his prior statements about the regulation of children's advertising.¹¹⁹ When Perschuk initially refused, the advertisers sued, won, and lost on appeal; nevertheless, Perschuk eventually recused himself voluntarily to shield the rulemaking from further corruption accusations.¹²⁰ These episodes provide support for fears of corporate retaliation: when it comes to companies attempting to avoid profit-narrowing regulation, some will not hesitate to work the referees, and many of those will be rewarded with the calls they sought.

Indeed, we know of at least two instances when the agency acted on outside claims of conflict or bias that seemed exceptionally weak on their face, and for which it is difficult to explain the agency's responses as anything other than extreme risk aversion. One former technologist we interviewed publicly criticized a large technology company prior to his employment by the agency.¹²¹ When the company filed a complaint with the FTC regarding the employee's participation in investigations of the company, the FTC removed the employee from the investigation and precluded him from working on any investigation of that company for the rest of his employment at the FTC. In another case, a large technology company complained to the FTC when a member of an FTC technologist's Ph.D. dissertation committee filed a public request for the agency to investigate that company. The request was based entirely on publicly available information but, because the company complained that the employee was somehow conflicted, the FTC prohibited

118. *Id.* (noting that the employees were "cleared of wrongdoing" and that their firing was "presumably to placate Senator Watson"); Hoofnagle, *supra* note 113, at 24–25 (recounting the episode and characterizing the Department of Agriculture as "friendlier" to the meatpackers than the FTC).

119. Herrine, *supra* note 115, at 503 ("With General Mills and Bristol-Myers in the lead and "Washington super-lobbyist Tommy Boggs" coordinating (and rumors of the tobacco lobby contributing substantially), a "war chest" of \$30 million was raised to "Stop the FTC" and KidVid in particular."); *id.* at 506–07 (detailing The Association of National Advertisers, Inc., the American Association of Advertising Agencies, the American Advertising Federation, and the Toy Manufacturers of America, Inc.'s demands that Perschuk recuse himself for conflict of interest due to his "public statements concerning regulation of children's advertising that demonstrated prejudice of specific factual issues sufficient to preclude his ability to serve as an impartial arbiter") (citing *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1155 (D.C. Cir. 1979)).

120. Herrine, *supra* note 115, at 503.

121. Contact authors for more information.

the employee from working on any investigations of that company. As a result, an important investigation of the company was conducted without the support of any FTC technologist for several months.

The agency's attempts to inoculate itself from charges of bias by industry are likely to fail because opportunistic companies raise such charges even when there is no reasonable basis for them. Nevertheless, a deep-seated agency culture of prudence—and a history of successful corporate interference—leads the agency to reflexively shy away from even the suggestion of possible conflict.

F. POSSIBLE POLITICAL CONFLICT BETWEEN FTC AND STATE ATTORNEYS GENERAL

It is also possible that perceived political conflict may contribute to the overly broad application of post-employment conflict restrictions to FTC technologists. To be clear, the FTC often works closely with state attorneys general, including in investigations into the practices of technology companies.¹²² For example, in 2012, the FTC and dozens of state attorneys general coordinated on cases brought against Google for its privacy policy practices.¹²³ Even though the state enforcers pressed arguably more aggressive theories than the FTC pursued in its investigation, FTC Commissioner Julie Brill praised the settlement extracted by the states.¹²⁴

Our interviewees downplayed the possibility of rivalry between the FTC and the states as playing a significant role in the FTC's application of post-employment restrictions. Many of our respondents thought it unlikely that perceived political conflict plays a meaningful role driving the FTC's broad application of post-employment conflict rules. Nevertheless, this is a possibility worth exploring.

Although the state attorneys general and the FTC frequently are well aligned, their respective goals and approaches sometimes diverge. A 2013

122. Paul M. Schwartz, *The Value of Privacy Federalism*, in *SOCIAL DIMENSIONS OF PRIVACY: INTERDISCIPLINARY PERSPECTIVES* 324 (Beate Roessler & Dorota Mokrosinska eds., 2015) (“When Congress enacts privacy law, it generally allows the states space for further action.”); Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 *NOTRE DAME L. REV.* 747, 791–94 (2016) (“Attorneys general have enjoyed a synergistic relationship with federal agencies working on privacy and data security issues.”); Bilyana Petkova, *The Safeguards of Privacy Federalism*, 20 *LEWIS & CLARK L. REV.* 595, 621–22 (2016) (“[T]he state attorneys general have not only coordinated their actions horizontally but have also joined efforts with the FTC.”).

123. Citron, *supra* note 122, at 793.

124. *Id.*; Letter from Twenty-three Att’y’s Gen. to Larry Page, Chief Exec. Officer, Google, Inc. (Feb. 22, 2012), <https://epic.org/privacy/google/20120222-Google-Privacy-Policy-Final.pdf>.

investigation of Google, regarding the company bypassing privacy settings in the Safari browser, led the FTC to enter a settlement with Google that required no limits on Google's future behavior.¹²⁵ State attorneys general declined the FTC's invitation to join the consent decree and continued to press a parallel case that led, arguably, to tougher restrictions on Google's conduct.¹²⁶

There are reasons to believe that some amount of competitiveness exists between these entities. In many ways, the FTC has become the *de facto* privacy and technology regulator in the United States, even though, outside of sectoral laws like the Children's Online Privacy Protection Act (COPPA) and the Fair Credit Reporting Act (FCRA), there is currently no comprehensive federal privacy law.¹²⁷ The FTC benefits from the appearance that it is the primary and most powerful enforcer of fair trade practices in the United States because, when a regulator has a reputation as being toothless, companies subject to their jurisdiction have no incentive to comply with the relevant rules. As a result, the FTC sometimes competes with state attorneys general when enforcing high-profile cases. When state enforcement agencies investigate and impose stronger perceived penalties on companies that the FTC has already investigated, charged, and settled, this could undermine the FTC's status as supreme enforcer.¹²⁸

The experiences of one interviewee who worked on consumer protection investigations with a state attorney general's office speak to the occasional tensions between the FTC and state attorneys general. The interviewee hypothesized that in certain, high-profile cases, the FTC's willingness to allow the former employee to consult on the state attorney general's case was hindered by the agency's interest in public credit for tackling certain cases. The interviewee hypothesized that the agency's desire for public credit was

125. Citron, *supra* note 122, at 770 (citing Press Release, Fed. Trade Comm'n, Google Will Pay \$22.5 Million to Settle FTC Charges It Misrepresented Privacy Assurances to Users of Apple's Safari Internet Browser (Aug. 9, 2012), <https://www.ftc.gov/news-events/press-releases/2012/08/google-will-pay-225-million-settle-ftc-charges-it-misrepresented>).

126. *Id.*

127. Solove & Hartzog, *supra* note 97, at 600–08.

128. See Justin Brookman, *State Attorneys General: Evading Privacy Settings Is Illegal*, CTR. FOR DEMOCRACY & TECH. (Nov. 20, 2013), <https://cdt.org/insights/state-attorneys-general-evading-privacy-settings-is-illegal/> (pointing out that the 2013 settlement by state attorneys general with Google was “considerably more expansive than the FTC’s,” and arguing that “it’s heartening to see states increasingly take action to protect consumer privacy”); Citron, *supra* note 122, at 756 n.42 (“In important areas, [state attorneys general (AG)] have set privacy policy in the absence of federal norms; in others, they have pressed the FTC to offer greater privacy protections to consumers than those afforded by federal agencies. In the near future, there may be more aggressive state AG privacy and data security enforcement than enforcement activity at the federal level.”).

responsible for the friction in that particular case because the interviewee had not encountered similar problems when working with FTC officials on previous lower-level cases. The interviewee explained that in response to a request for clearance to work with state AGs on a high-profile matter, the FTC denied clearance for the interviewee unless the interviewee was willing to work as an unpaid FTC employee and allow the FTC to mediate their recommendations to the state agencies.¹²⁹ Indeed, there is good reason for FTC staff to seek public credit for its enforcement efforts. In recent years, the FTC has been lambasted by a range of critics for its failure to take strong, decisive action to rein in unfair and deceptive trade practices.¹³⁰ Even the agency's record-breaking five-billion-dollar settlement with Facebook drew widespread criticism that it was simply not enough.¹³¹

Some critics have gone so far as to argue that what they consider to be the agency's too-weak enforcement efforts provide support to further constrain

129. Email from Alternate Designated Agency Ethics Official, Office of the General Counsel, Federal Trade Commission, to one of the authors (Mar. 07, 2019, 07:54 PST) (on file with authors).

130. See, e.g., *Hearing on Oversight of the Federal Trade Commission: Strengthening Protections for Americans' Privacy and Data Security Before House of Representatives Subcommittee on Consumer Protection and Commerce of the House Committee on Energy and Commerce*, 116th Cong. 1 (May 8, 2019) (opening statement of Frank Pallone, Jr., Chairman, Comm. on Energy & Commerce), <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/0508%20FP%20FTC%20Oversight%20Hrg%20Opening%20Remarks.pdf> (claiming the FTC “can dodo[es] little more than give a slap on the wrist to companies the first time they violate the law”); Emily Birnbaum, *GOP Senator Scolds FTC for ‘Toothless’ Response to Privacy Scandals*, THE HILL (Mar. 11, 2019, 1:41 PM), <https://thehill.com/policy/technology/433514-gop-senator-ftc-response-to-privacy-scandals-has-been-toothless>; Peter Maass, *Your FTC Privacy Watchdogs: Low-Tech, Defensive, Toothless*, WIRED (June 28, 2012, 6:30 AM), <https://www.wired.com/2012/06/ftc-fail/> (calling the FTC “low-tech, defensive, [and] toothless”).

131. See, e.g., Devin Coldewey, *9 Reasons the Facebook FTC Settlement Is a Joke*, TECHCRUNCH (July 24, 2019, 8:01 PM), <https://techcrunch.com/2019/07/24/9-reasons-the-facebook-ftc-settlement-is-a-joke/>; Editorial Board, Opinion, *A \$5 Billion Fine for Facebook Won't Fix Privacy*, N.Y. TIMES (July 25, 2019), <https://www.nytimes.com/2019/07/25/opinion/facebook-fine-5-billion.html>; Nilay Patel, *Facebook's \$5 Billion FTC Fine Is an Embarrassing Joke*, THE VERGE (July 12, 2019, 9:05 PM), <https://www.theverge.com/2019/7/12/20692524/facebook-five-billion-ftc-fine-embarrassing-joke>; Adam Schwartz, *The FTC-Facebook Settlement Does Too Little to Protect Your Privacy*, ELEC. FRONTIER FOUND. (July 24, 2019), <https://www.eff.org/deeplinks/2019/07/ftc-facebook-settlement-does-too-little-protect-your-privacy>; Siva Vaidhyanathan, *Billion-Dollar Fines Can't Stop Google and Facebook. That's Peanuts for Them*, GUARDIAN (July 26, 2019, 6:00 AM), <https://www.theguardian.com/commentisfree/2019/jul/26/google-facebook-regulation-ftc-settlement>; Press Release, H. Comm. on Energy & Commerce, Pallone Statement on the FTC's Facebook Settlement (July 24, 2019), <https://energycommerce.house.gov/newsroom/press-releases/pallone-statement-on-the-ftc-s-facebook-settlement> (“While \$5 billion is a record fine for the FTC, monetary damages are not enough.”).

the agency's authority. Indeed, a number of privacy advocates have called for Congress to create a new data protection authority to counteract the FTC's failures and hold technology companies accountable.¹³² Senator Gillibrand,¹³³ Senator Brown,¹³⁴ and Representatives Lofgren and Eshoo¹³⁵ heeded that call by offering legislation that would establish a new data protection agency in the United States.

The FTC could be concerned that if state attorneys general were to frequently pursue additional enforcement action against companies for practices that have already been the subject of FTC settlements, companies would have less of an incentive to agree to truly burdensome conditions when they are brought to the settlement negotiation table over alleged violations. It is not unusual for the FTC to release any claims it may have against the subjects of its enforcement actions as part of the negotiated settlement.¹³⁶ If a company

132. See, e.g., Caitriona Fitzgerald & Mary Stone Ross, *Now Is the Time for a US Data Protection Agency*, THE HILL (Feb. 21, 2020, 9:30 AM), <https://thehill.com/blogs/congress-blog/politics/483997-now-is-the-time-for-a-us-data-protection-agency> (“Congress needs to create a Data Protection Agency because the Federal Trade Commission is failing to protect privacy.”); PRIVACY & DIG. RIGHTS FOR ALL COAL., THE TIME IS NOW: A FRAMEWORK FOR COMPREHENSIVE PRIVACY PROTECTION AND DIGITAL RIGHTS IN THE UNITED STATES, <https://www.citizen.org/wp-content/uploads/migration/privacy-and-digital-rights-for-all-framework.pdf>; *The U.S Urgently Needs a Data Protection Agency*, ELEC. PRIVACY INFO. CTR., <https://epic.org/dpa/>; see also Natasha Singer, *The Government Protects Our Food and Cars. Why Not Our Data?*, N.Y. TIMES (Nov. 2, 2019), <https://www.nytimes.com/2019/11/02/sunday-review/data-protection-privacy.html> (describing critiques of the FTC and proposals for a new data protection agency).

133. Press Release, Kirsten Gillibrand: U.S. Sen. for N.Y., Confronting a Data Privacy Crisis, Gillibrand Announces Landmark Legislation to Create a Data Protection Agency (Feb. 13, 2020), <https://www.gillibrand.senate.gov/news/press/release/confronting-a-data-privacy-crisis-gillibrand-announces-landmark-legislation-to-create-a-data-protection-agency>.

134. Press Release, Sherrod Brown: U.S. Sen. for Ohio, Brown Releases New Proposal That Would Protect Consumers' Privacy from Bad Actors (June 18, 2020), <https://www.brown.senate.gov/newsroom/press/release/brown-proposal-protect-consumers-privacy>.

135. Press Release, Congresswoman Anna G. Eshoo, Eshoo & Lofgren Introduce the Online Privacy Act (Nov. 5, 2019), <https://eshoo.house.gov/media/press-releases/eshoo-lofgren-introduce-online-privacy-act>.

136. See, e.g., FTC Facebook Order 2019, *supra* note 99; [Proposed] Stipulated Revised Order for Permanent Injunction and Equitable Monetary Relief at 17, Fed. Trade Comm'n v. Cephalon, Inc., No. 2:08-cv-2141-MSG (E.D. Pa. Feb. 19, 2019), https://www.ftc.gov/system/files/documents/cases/teva_proposed_stipulated_revised_order.pdf (“The Commission and the Cephalon Parties stipulate that upon entry of the Revised Order, the Commission and the Cephalon Parties each release the other from any and all claims, causes of actions and demands”); Stipulation at 2, United States v. Okumus, No. 1:17-cv-00104 (D.D.C. Jan. 17, 2017), https://www.ftc.gov/system/files/documents/cases/170117okumus_stipulation_filed.pdf (“The entry of the Final Judgment in accordance with

caught violating the FTC Act believed it was likely to just be sued again for the same behavior by another enforcer, then the FTC's avowal to release any claims related to the violation would have little value.

IV. IMPLICATIONS FOR AGENCY EFFICACY

As this Article has noted throughout, the broad application of the conflict rules undermines their purpose and the FTC's ability to fulfill its competition and consumer protection mission. The FTC is making it less attractive for technologists to work at the agency by disproportionately limiting the work they are able to do, including when the matters former employees are being precluded from participating in create neither an actual conflict nor the appearance of it. Unwieldy and unpredictable post-employment constraints will make it even less attractive, or frankly feasible, for technologists to work for the FTC than it already is, raising exactly the concerns that Congress has repeatedly noted when revising § 207.¹³⁷

This overbroad application of the FTC's rules also undermines the agency's broader mission of consumer protection by inhibiting other consumer protection actors, such as state attorneys general, from gaining the expertise to adequately seek remedies in areas the FTC itself was unable to obtain. For example, many organizations criticized the five-billion-dollar settlement with Facebook because the settlement includes very little in the way of injunctions to restrict the company's future practices with regards to privacy harm of third-party companies, like Cambridge Analytica.¹³⁸ In fact, the final settlement also precludes Facebook, its executives, and its board of directors from being held responsible for "any and all claims" prior to the settlement date.¹³⁹ Two FTC Commissioners criticized this point, and one implied the existence of other ongoing investigations into the company that were released

this Stipulation settles, discharges, and releases any and all claims of Plaintiff for civil penalties and equitable relief pursuant to Section 7A(g)(1) of the Clayton Act, 15 U.S.C. § 18a(g)(1) . . . in connection with Defendant's acquisitions of voting securities of Web.com Group, Inc. from 2014 through 2016."); Stipulated Order for Permanent Injunction and Monetary Judgement at 7, Fed. Trade Comm'n v. Hold Billing Services, Ltd., No. 5:98-cv-006292, (W.D. Tex. May 4, 2016), <https://www.ftc.gov/system/files/documents/cases/160504holdbillingstip.pdf> ("Upon entry of this Stipulated Order, the FTC releases [Defendant] from any and all Claims that it may have stemming from charges to consumers' landline telephone bills through or on behalf of any third-party seller of Enhanced Services.").

137. *Supra* notes 13, 17.

138. *See, e.g., supra* note 131 and sources cited therein.

139. FTC Facebook Order 2019, *supra* note 99, at 1, United States v. Facebook, Inc., No. 19-cv-2184 (D.D.C. July. 24, 2019), https://www.ftc.gov/system/files/documents/cases/182_3109_facebook_order_filed_7-24-19.pdf.

as a part of the settlement.¹⁴⁰ In addition, private plaintiffs already face steep hurdles to getting their privacy violations redressed due to years of judicial hostility toward privacy rights.¹⁴¹ Making it harder for private plaintiffs to find and retain technology experts will make the already minimal utility of courts to vindicate privacy rights less meaningful still.

Overbroad application even limits the efficacy of the few technologists the agency does employ. In the interviews we conducted, we heard from former employees who had recused themselves from working on certain cases for fear of being broadly precluded from ever working on a related matter once they left the agency, one citing market consolidation as the justification. As such, concerns of post-employment conflict checks are likely chilling the freedom that current FTC employees have to work on certain investigations while at the agency. This corrodes the agency's effectiveness given how few technologists it employs already. With the agency's current volume of technologists, if even one technologist declines to work on cases involving Facebook or Google, for example, the agency loses a significant fraction of its available technological expertise—expertise that it cannot afford to lose.

The FTC is taking the population of employees that it has the hardest time recruiting and making it disproportionately even less attractive for them to work there. Technologists are subject to potential conflicts far more broadly than employees in other disciplines, even though technologists are much

140. See OFFICE OF COMM'R ROHIT CHOPRA, FED. TRADE COMM'N, COMM'N FILE NO. 1823109, DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA: *IN RE FACEBOOK, INC.* 17–18, (2019), https://www.ftc.gov/system/files/documents/public_statements/1536911/chopra_dissenting_statement_on_facebook_7-24-19.pdf (“This means that the proposed release not only shields Facebook from ‘known’ (an undefined term) Section 5 claims, but also ‘known’ claims under COPPA and other statutes. Given persistent questions about Facebook’s compliance with these statutes, the Commission should be transparent about which claims are being released—even if they are being released because they are seen as lacking viability.”); OFFICE OF COMM'R REBECCA KELLY SLAUGHTER, FED. TRADE COMM'N, DISSENTING STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER: *IN THE MATTER OF FTC VS. FACEBOOK 14* (2019), https://www.ftc.gov/system/files/documents/public_statements/1536918/182_3109_slaughter_statement_on_facebook_7-24-19.pdf (objecting “strenuously” to the settlement’s liability exculpation for Facebook’s executives and calling the scope of the liability release “unjustified by our investigation and unsupported by either precedent or sound public policy”).

141. Justin Brookman, *Protecting Privacy in an Era of Weakening Regulation*, 9 HARV. L. & POL'Y REV. 355, 356–65 (2015) (describing how courts have made it more and more difficult for privacy plaintiffs to receive redress through artificially narrow definitions of Article III standing and injury, and an expansive approach to First Amendment rights and the rights of corporations); Julie E. Cohen, *Information Privacy Litigation as Bellwether for Institutional Change*, 66 DEPAUL L. REV. 535, 575–77 (2017) (describing courts’ response to privacy litigants as “busily constructing classes of consumers who lack remedies before the law”).

harder for the agency to locate and retain than attorneys and economists.¹⁴² An entry-level engineer's compensation at Facebook with no post-collegiate work experience can reach \$166,000 and up to \$189,000 at Google in 2019, while senior staff roles at the FTC can only make up to around \$170,000.¹⁴³ This difference in potential salary in conjunction with the broad and opaque application of the conflict rules render it even less appealing for technologists to work at the FTC. Not only are the conflicts rules making it harder for the agency to recruit and retain the population of employees it needs most,¹⁴⁴ they seem fairly ineffective at reducing the revolving door problems for non-technologist employees and senior leadership.¹⁴⁵

In almost cruel irony, the lack of competition among the technology companies subject to the FTC's jurisdiction further hampers its ability to enforce antitrust laws. The technology companies that the FTC investigates, like Apple, Amazon, Facebook, and Google, are frequently repeat players.¹⁴⁶

142. Different factors, such as advance planning and unchanging subject matter, influence why non-technologists are easier for the agency to find and retain. For example, the Bureau of Economics at the FTC was proactive in its creation rather than reactive; that is, it was created all at once with many staff with the objective of changing the agency's focus, as opposed to bit by bit in reaction to subject matter changing beyond the agency's control.

143. Adam Janofsky & Matt Drange, *We Counted the FTC Employees who Moved Over to Tech. Is Reform Needed?*, PROTOCOL (Mar. 9, 2020), <https://www.protocol.com/ftc-tech-hawley-revolving-door/>; Kif Leswing, *Here's How Big Tech Companies Like Google and Facebook Set Salaries for Software Engineers*, CNBC (June 15, 2019, 9:30 AM), <https://www.cnbc.com/2019/06/14/how-much-google-facebook-other-tech-giants-pay-software-engineers.html>.

144. See generally McSweeney, *supra* note 50.

145. See generally *id.*; see also Rick Claypool, *The FTC's Big Tech Revolving Door Problem*, PUB. CITIZEN (May 23, 2019), <https://www.citizen.org/article/ftc-big-tech-revolving-door-problem-report>.

146. See, e.g., Agreement Containing Consent Order, Facebook, Inc., No. 0923184 (Fed. Trade Comm'n Nov. 29, 2011), <https://www.ftc.gov/sites/default/files/documents/cases/2011/11/111129facebookagree.pdf> (2011 Facebook consent order); Press Release, Fed. Trade Comm'n, Apple Inc. Will Provide Full Consumer Refunds of At Least \$32.5 Million to Settle FTC Complaint It Charged for Kids' In-App Purchases Without Parental Consent (Jan. 15, 2014), <https://www.ftc.gov/news-events/press-releases/2014/01/apple-inc-will-provide-full-consumer-refunds-least-325-million> (2014 Apple settlement); Press Release, Fed. Trade Comm'n, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search (Jan. 3, 2013), <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc> (2013 Google-specific antitrust settlement); Press Release, Fed. Trade Comm'n, Google and YouTube Will Pay Record \$170 Million for Alleged Violations of Children's Privacy Law (Sept. 4, 2019), <https://www.ftc.gov/news-events/press-releases/2019/09/google-youtube-will-pay-record-170-million-alleged-violations> (2019 Google and YouTube settlement); Press Release, Fed. Trade Comm'n, Google Will Pay \$22.5 Million to Settle FTC Charges It Misrepresented Privacy Assurances to

The size of these companies and the range of markets they have inserted themselves into makes overlap inevitable. When the FTC prohibits an employee from working on matters related to one technology company, that often means that the employee will be forbidden from working on a whole host of investigations across a wide gamut of sectors.¹⁴⁷ The lack of competition in the technology sector means that the agency's broad enforcement of the conflicts rules will significantly undercut its efforts to fulfil its consumer protection and competition missions.

Meanwhile, the collateral effects of the FTC's overreaction hamper its ability to oversee those companies effectively. The agency simply does not employ enough technologists to be able to sideline them every time a subject or potential subject of investigation files a bad-faith complaint. As of 2019, the

Users of Apple's Safari Internet Browser (Aug. 9, 2012), <https://www.ftc.gov/news-events/press-releases/2012/08/google-will-pay-225-million-settle-ftc-charges-it-misrepresented> (2012 Google settlement); *Facebook, Inc., In the Matter of*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/cases-proceedings/092-3184/facebook-inc> (last updated Apr. 28, 2020) (2019 Facebook settlement); Lesley Fair, *FTC Settlement with Amazon Yields \$70 Million for Consumers, Advice for Business*, FED. TRADE COMM'N: BUS. BLOG (May 30, 2017, 12:07 PM), <https://www.ftc.gov/news-events/blogs/business-blog/2017/05/ftc-settlement-amazon-yields-70-million-consumers-advice> (2017 Amazon settlement); Cecilia Kang & David McCabe, *F.T.C. Broadens Review of Tech Giants, Homing in on Their Deals*, N.Y. TIMES (Feb. 11, 2020), <https://www.nytimes.com/2020/02/11/technology/ftc-tech-giants-acquisitions.html> (2020 Amazon, Apple, Facebook, Alphabet, and Microsoft investigation); *Microsoft Corp.*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/cases-proceedings/002-3331/microsoft-corporation> (last updated May 18, 2001) (2001 Microsoft settlement); Spencer Soper & Ben Brody, *Amazon Probed by U.S. Antitrust Officials over Marketplace*, BLOOMBERG (July 24, 2019, 5:00 AM), <https://www.bloomberg.com/news/articles/2019-09-11/amazon-antitrust-probe-ftc-investigators-interview-merchants> (2019 Amazon-specific antitrust investigation); Nick Statt, *Facebook Confirms New FTC Antitrust Investigation After Posting Strong Earnings*, THE VERGE (July 24, 2019, 4:27 PM), <https://www.theverge.com/2019/7/24/20726371/facebook-ftc-antitrust-earnings-q2-2019-privacy-regulation-mark-zuckerberg> (2019 Facebook-specific antitrust investigation).

147. Between the enormous range of sectors Amazon is involved in through its provision of cloud services and the range of sectors that sell products through its site, and the fact that online advertising is overwhelmingly dominated by Facebook and Google, all kinds of competition and consumer protection investigations will necessarily involve these companies. *See, e.g.*, Khan, *supra* note 61, at 768–78 (describing how Amazon leverages its delivery infrastructure into outpricing competitors in a range of industries, such as when it eliminated its biggest competitor in diapers and other baby care goods through a carefully orchestrated predatory pricing scheme and ultimate acquisition). Amazon accounted for over a third of online retail sales in the United States last year. Jessica Young, *US Ecommerce Sales Grow 14.9% in 2019*, DIGITAL COM. 360 (Feb. 19, 2020), <https://www.digitalcommerce360.com/article/us-ecommerce-sales/>. The FTC is also currently undergoing a review of Amazon, Apple, Facebook, Alphabet, and Microsoft's reliance on "killer acquisitions"—i.e., the practice of buying a nascent competitor to neutralize the threat posed by the smaller company's product. Kang & McCabe, *supra* note 146.

FTC only employed five full-time technologists in total, for an agency that oversees digital consumer protection issues for a nation of 330 million people and handles a range of other issues beyond privacy, security, and digital competition.¹⁴⁸ The FTC's lack of sufficient technologists on staff has been a frequent point of criticism by advocates,¹⁴⁹ former¹⁵⁰ and current¹⁵¹ FTC officials, and Congress,¹⁵² and the agency has acknowledged the deleterious effects of the lack of technologists on its effectiveness.¹⁵³ The overly broad application of the conflict rules exacerbates this problem.

V. POLICY RECOMMENDATIONS

We offer policy recommendations to address this problem and help pave the way for the FTC and other federal agencies to increase their technical

148. Memorandum from the Comm. on Energy & Commerce Staff, *supra* note 75.

149. BECKY CHAO, ERIC NULL & CLAIRE PARK, OPEN TECH. INST., ENFORCING A NEW PRIVACY LAW: WHO SHOULD COMPANIES HOLD ACCOUNTABLE? (2019), <https://www.newamerica.org/oti/reports/enforcing-new-privacy-law/> (noting the paucity of technologists at the agency and noting that it is “unclear whether the FTC has the technological expertise it needs to enforce privacy laws”).

150. McSweeney, *supra* note 50, at 530 (recommending that the FTC “scale[] up its in-house technology and research expertise”); Jessica Rich, *Give the FTC Some Teeth to Guard Our Privacy*, N.Y. TIMES (Aug. 12, 2019), <https://www.nytimes.com/2019/08/12/opinion/ftc-privacy-congress.html> (“To adequately police privacy in this country, the F.T.C. needs more lawyers, more investigators, more technologists and state-of-the-art tech tools. Otherwise, it will continue to operate on a shoestring, foregoing certain investigations and understaffing others.”).

151. *See, e.g.*, OFFICE OF COMM’R ROHIT CHOPRA, FED. TRADE COMM’N, COMM’N FILE NO. P065404, STATEMENT OF COMMISSIONER ROHIT CHOPRA: REGARDING THE REPORT TO CONGRESS ON THE FTC’S USE OF ITS AUTHORITIES TO PROTECT CONSUMER PRIVACY AND SECURITY 4–5 (2020), https://www.ftc.gov/system/files/documents/public_statements/1577067/p065404dpipchoprastatement.pdf.

152. *See, e.g.*, Memorandum from the Comm. on Energy & Commerce Staff, *supra* note 75; *Hearing on “Oversight of the Federal Trade Commission: Strengthening Protections for Americans’ Privacy and Data Security” Before the Subcommittee on Consumer Protection and Commerce of the House Committee on Energy and Commerce*, 116th Cong. (2019) (opening statement of Rep. Jan Schakowsky, Chair), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/2019.5.8.SCHAKOWSKY.%20FTC%20Oversight%20Hearing.CPC_0.pdf (noting a contributing factor to the agency’s struggle to conduct meaningful enforcement is the mere five technologists and lack of a Chief Technologist).

153. *The Technology 202: The Government’s Top Silicon Valley Watchdog Only Has Five Full-Time Technologists. Now It’s Asking Congress for More*, WASH. POST (Apr. 4, 2019, 8:47 AM), <https://www.washingtonpost.com/news/powerpost/paloma/the-technology-202/2019/04/04/the-technology-202-the-government-s-top-silicon-valley-watchdog-only-has-five-full-time-technologists-now-it-s-asking-congress-for-more/5ca512661b326b0f7f38f30d/> (discussing a letter from FTC Chairman Joseph Simons to the House Committee on Energy and Commerce “request[ing] funding for 10 to 15 more technologists”).

capacity. The FTC has joined Congress and civil society in bemoaning its lack of technical experts, and it must mitigate the obstacles that currently make correcting this problem so difficult. We offer specific suggestions and broader objectives that will help mitigate the current obstacles the agency faces in order to attract and retain technology expertise.

To be clear, we do not mean to diminish the need for conflict of interest laws, nor do we support watering down the efficacy of those laws to prevent corruption or slow the revolving door. We see civil service as an important, if not sacred, calling, and we endorse the strong use of conflicts rules to discourage cynical or opportunistic people from trading on government service for personal gain. In fact, we think in some cases conflict of interest laws may need to be strengthened as there are still a great deal of former employees that “switch sides” and join companies the agency is tasked to oversee.¹⁵⁴

However, we believe that the FTC-administered rules go far beyond these important goals, especially when applied to technologists.¹⁵⁵ As discussed above, in many cases, former FTC technologists seek simply to work on the same side as the agency in the furtherance of consumer protection.¹⁵⁶ In those situations, we think a reevaluation of priorities is warranted.

First, the FTC should address the current vagueness in determining when different projects comprise either the same “proceeding or investigation” under 16 C.F.R. § 4.1(b) or the same “particular matter” under 18 U.S.C. § 207(a). Under the current formulation of the rule, in making this determination the FTC considers “the extent to which the matters involve the same or related facts, issues, confidential information and parties; the time elapsed; and the continuing existence of an important Federal interest.”¹⁵⁷ The FTC could interpret this broad set of factors as permitting it the latitude to determine that “same side” investigations that take place after an FTC settlement complaint has already been brought constitute new and separate “proceeding[s] or investigation[s].” At present, however, the FTC interprets the vagueness of this multi-factor test to apply post-employment restrictions

154. Janofsky & Drange, *supra* note 143.

155. *See* discussion in *supra* Section III.A.

156. *Id.*

157. 16 C.F.R. § 4.1(b)(1) n.1. In setting forth these factors, the FTC refers to an analogous section of the Office of Government Ethic’s regulations setting forth the factors considered to determine whether two particular matters are the same under § 207: “the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest.” 5 C.F.R. § 2641.201(h)(5)(i).

extremely broadly, in a way that we believe ultimately runs counter to the public interest.

Second, the FTC should clarify that whether or not one particular “proceeding or investigation” is the same turns more narrowly on the specific facts of the underlying investigation. The 2012 consent decree with Facebook speaks to this.¹⁵⁸ The consent decree stemmed from an investigation into, among other things, changes to Facebook’s privacy policies that made more information about its users visible to the public than before and misled consumers about the amount of information third-party apps could obtain about users.¹⁵⁹ The investigation led to a settlement and twenty-year consent decree that obligated Facebook to create a “comprehensive privacy program” and to report to the FTC for twenty years.¹⁶⁰

For former FTC officials who worked on the 2012 consent decree, what is the underlying matter that might trigger conflicts review today? We contend that the matter should be closely related to the facts that existed in 2012, which was largely premised on changes to privacy policies in 2009 and 2010 as well as aspects of Facebook’s architecture in 2011. In contrast, the FTC seems to take a much broader interpretation, treating the underlying “matter” as “Facebook and privacy.” For example, the FTC has prevented at least one of us from working on cases related to Cambridge Analytica, the company that notoriously mined Facebook user data in the 2016 election, by claiming they were too closely related to the 2012 consent decree matter, even though Cambridge Analytica did not even exist in 2011.¹⁶¹ The FTC allowed another of us to participate in a matter related to Cambridge Analytica but only after a two-week delay that prevented a more meaningful role in the case. A definition of “proceeding or investigation” as expansive as “Facebook and privacy” or

158. Decision and Order, 5–8, In the Matter of Facebook, Inc., Fed. Trade Comm’n (Aug. 10, 2012) (Docket No. C-4365), <https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf>

159. Press Release, Fed. Trade Comm’n, Facebook Settles FTC Charges that It Deceived Consumers by Failing to Keep Privacy Promises (Nov. 29, 2011), <https://www.ftc.gov/news-events/press-releases/2011/11/facebook-settles-ftc-charges-it-deceived-consumers-failing-keep>.

160. Decision and Order at 5–8, Facebook, Inc., No. C-4365 (Fed. Trade Comm’n Aug. 10, 2012), <https://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf>; Press Release, Fed. Trade Comm’n, FTC Approves Final Settlement with Facebook (Aug. 10, 2012), <https://www.ftc.gov/news-events/press-releases/2012/08/ftc-approves-final-settlement-facebook>.

161. Cambridge Analytica was founded in 2013. See David Ingram, *Factbox: Who Is Cambridge Analytica and What Did It Do?*, REUTERS (Mar. 19, 2018, 10:00 PM), <https://www.reuters.com/article/us-facebook-cambridge-analytica-factbox/factbox-who-is-cambridge-analytica-and-what-did-it-do-idUSKBN1GW07F>.

“Amazon and predatory pricing” will disqualify the FTC’s technologists from working on crucial investigations, even as these companies consistently repeat the same kind of exploitative practices and necessary technological expertise becomes harder and harder for enforcers to find, attract, and retain.

Third, to bring even more clarity to its conflicts analysis, the FTC should consider announcing a bright-line rule in the form of a time limit on conduct that will be considered the same “matter” or “proceeding or investigation.” For example, the FTC might decide that, for investigations into the conduct of platforms, such as social networking services or search engines, it is not the same “matter” if it occurs more than two years after an earlier matter, nor is an investigation the same “proceeding or investigation” if it arises more than two years later. This approach finds support in the rhetoric of the FTC itself, which regularly publishes paeans to the speed and dynamism of innovation in the technology industry.¹⁶²

To blunt the potential arbitrariness of a rigid two-year deadline, this gloss on the FTC rules can be presented as a rebuttable presumption: facts will be presumed not to involve the same matter after two years, but the FTC can

162. See, e.g., Request for Public Comment on the Federal Trade Commission’s Implementation of the Children’s Online Privacy Protection Rule, 84 FED. REG. 35,842, 35,843 (July 25, 2019); FED. TRADE COMM’N, BIG DATA: A TOOL FOR INCLUSION OR EXCLUSION? i (2016) (“With a smartphone now in nearly every pocket, a computer in nearly every household, and an ever-increasing number of Internet-connected devices in the marketplace, the amount of consumer data flowing throughout the economy continues to increase rapidly.”); STAFF OF THE FED. TRADE COMM’N, PROTECTING CONSUMERS IN THE NEXT TECH-AGE 2 (2008) (“Consumers’ roles are changing in this new marketplace, as are the products they buy, how those products are marketed and advertised, and how they are paid for . . . [and] at a dizzying pace . . .”); Maureen K. Ohlhausen, *The Procrustean Problem with Prescriptive Regulation*, 23 COMM’LAW CONCEPTUS 1, 2 (2014) (“When the regulated industry is rapidly evolving, yesterday’s comfortable regulatory bed can quickly become a torture rack for tomorrow’s technologies.”); Maureen K. Ohlhausen, Acting Chairman, Fed. Trade Comm’n, Antitrust Enforcement in the Digital Age, Remarks Before the Global Antitrust Enforcement Symposium 6, 11 (Sept. 12, 2017) (describing technology markets as “fast-moving”); Neil Brady, *‘Velocity’ of Technological Change ‘Speeding Up’ Says FTC Commissioner*, MEDIUM (July 11, 2017), <https://medium.com/@neil.brady/speed-of-technological-change-increasing-sense-of-loss-of-control-says-ftc-commissioner-259265f4389f> (accounting how the former FTC Commissioner Terrell McSweeney noted that the “velocity of technological change is speeding up”); Lesley Fair, *Future of the COPPA Rule: What’s on the Agenda*, FED. TRADE COMM’N: BUS. BLOG (Oct. 1, 2019, 11:46 AM), <https://ftc.gov/news-events/blogs/business-blog/2019/10/future-coppa-rule-whats-agenda> (“Technology changes at the speed of light, but the touchstone of the Children’s Online Privacy Protection Rule remains constant.”); *Financial Technology: Protecting Consumers on the Cutting Edge of Financial Transaction*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/media-resources/consumer-finance/financial-technology> (last visited Aug. 23, 2020) (describing the agency’s approach to the “fast-moving realm of financial technology”).

rebut the presumption by marshaling specific facts demonstrating the same matter.

Fourth, the FTC should also revise its rules to make it easier for former technologists to consult on “same side” investigations, such as those conducted by state attorneys general. To do this, the FTC should revise its definition of “communicate to or appear before”—a key definition that serves to specify which types of activities by former employees are subject to restriction.¹⁶³ Under the current definition, the FTC’s rules are triggered when a former employee engages in “any oral communication or written communication to, or any formal or informal appearance before, the Commission or any of its members or employees on behalf of any person (except the United States) with the intent to influence.”¹⁶⁴ We recommend that the agency add “or the Government of one of the States” to the parenthetical exception. The purpose of the rules is to enable more effective enforcement of the law by preventing agency capture or the appearance of corruption, and the exception acknowledges that other work on behalf of the government does not present that concern. The exception easily could—and should—be extended to work on behalf of state attorneys general, which support the agency’s consumer protection and competition mission.

The FTC’s rules must be revised, but in the meantime, the OGC can also simply exercise its discretion to grant more clearance requests from former technologists seeking to work on investigations on behalf of state attorneys general. In laying out prohibited conduct for former employees, the text of the rules clarifies that post-employment conduct may be “otherwise specifically authorized by the Commission,” though the rules do not elaborate further about what those circumstances might be.¹⁶⁵ In addition, § 207 includes a specific exception for former employees that provide scientific or technological information. That exception states in part that certain § 207 restrictions do not apply “with respect to the making of communications solely for the purpose of furnishing scientific or technological information, if such communications are made under procedures acceptable to the department or agency concerned.”¹⁶⁶ In many instances, state attorneys general seek former technologists’ advice on policy and strategy, not solely for scientific or technological information. However, there are circumstances in which the

163. See 16 C.F.R. § 4.1(b)(1) (restricting when a “former member or employee . . . of the Commission may communicate to or appear before the Commission, as attorney or counsel, or otherwise assist or advise behind-the-scenes, regarding a formal or informal proceeding or investigation”).

164. 16 C.F.R. § 4.1(b)(5)(ii).

165. 16 C.F.R. § 4.1(b)(1).

166. 18 U.S.C. § 207(j)(5).

FTC could rely on this exception to quickly bless requests from former technologists to provide scientific or technological information to other parties, particularly those on the “same side.” Yet FTC staff never even mentioned the existence of this exception to those of us who are former technologists when we sought advice on possible conflicts.

In addition, the FTC should create greater transparency into its substantive evaluation of clearance requests, as well as into the procedures it applies in considering those requests. At present, it is difficult for members of the public and, indeed, former technologists themselves to gain insight into this process. Under the FTC’s rules, “[a]ny request for clearance filed by a former member or employee pursuant to this section, as well as any written response, are part of the public records of the Commission, except for information exempt from disclosure under § 4.10(a) of [the] chapter.”¹⁶⁷ However, documents related to clearance requests are not available on the FTC’s website or in its “FOIA Reading Room.” We submitted a request to the FTC under the Freedom of Information Act for “[a]ll documents relating to clearance requests filed by former FTC employees under 16 C.F.R. § 4.1(b)(2)” from January 2017 to March 2020, but our request was denied on the basis that “the resources required to process your request would cause an unreasonably burdensome review process for the agency.”¹⁶⁸

The agency’s clearance process should also be clarified so that ex-employees know what to expect. The FTC’s rules set forth particular procedures for FTC consideration of clearance requests filed by former employees. But in our experience, the staff of OGC frequently dismiss clearance requests informally over email, without either directing former employees to file formal requests pursuant to the FTC’s rules or referring the matter to the Commission for approval.¹⁶⁹

We also propose that OGE revise its regulations under § 207. In particular, OGE should vest federal agencies, including the FTC, with clearer authority to determine when a particular “matter” is the same as another for purposes of applying § 207. At least where independent agencies are concerned, we propose that this interpretative authority lie with the specific agency where a former federal employee previously served. This would constitute a modest shift from OGE’s current guidance that the agency where an employee previously served may advise the employee as to the application of § 207 but

167. 16 C.F.R. § 4.1(c).

168. Freedom of Information Act (FOIA) request and response on file with authors.

169. *See* 16 C.F.R. §§ 4.1(b)(6)–(7).

that any advice it provides will not be binding on the DOJ.¹⁷⁰ Granting clearer deference to federal agencies—including the FTC—on the question of whether or not two particular matters are the same may empower the FTC to make the determination based on whether or not it believes there is a true conflict of interest, rather than based on the agency’s over-prudent estimation of the broadest way in which the DOJ could possibly construe the question itself.

Finally, parallel reforms would also help alleviate the problems we have outlined, or at least they would help ensure that even if former technologists continue to be broadly precluded from contributing to similar work with other agencies, this disincentive does not completely halt the influx of technologists interested in public service. For example, a modest raise to the pay scale for government employees would help attract technologists. It is a tall order to expect recently graduated computer scientists to turn down six-figure salaries working for technology companies in the background of financial burdens like substantial student debt or supporting families.¹⁷¹ Students with fewer resources are disproportionately deterred from government service, which results in a federal service that is disproportionately wealthier than the rest of the population. Public service should not be a vocation reserved for the independently wealthy. The practices of technology companies implicate every part of society, and we need enforcers with diverse backgrounds and prior experiences. Moreover, paying public servants at rates more comparable with the private sector would help to reduce the revolving door problem. Agency employees, congressional aides, and public servants at all levels of government would not need to leave the government out of financial necessity if government service paid comparable rates to the private sector. Public service may be a calling, but a calling cannot feed children or pay a landlord.

170. 5 C.F.R. §§ 2641.105(a), (c). This would also be consistent with at least one federal appellate case that considered a “same particular matter” question in an instance where the agency in question had advised the former employee that two matters were not the same. *CACI, Inc.-Federal v. United States*, 719 F.2d 1567, 1576 (Fed. Cir. 1983) (“This ruling is entitled to weight. It would be most unusual to disqualify [former employee] Sterling from bidding on the proposal because of Stevens’ participation for Sterling after the Assistant Attorney General in charge of the Antitrust Division had advised Sterling that Stevens’ handling of the proposal for Sterling would not be improper.”).

171. See Adam Janofsky & Matt Drange, *We Counted the FTC Employees who Moved Over to Tech. Is Reform Needed?*, PROTOCOL (Mar. 9, 2020), <https://www.protocol.com/ftc-tech-hawley-revolving-door/> (quoting one former FTC employee who now works for Electronic Arts as saying that it can be “very difficult to live there on a government salary, especially if you have student loan debt”).

VI. CONCLUSION

Few question the dire need for technological expertise at the U.S. consumer protection and competition agency. Yet, the FTC is exacerbating its existing difficulty in recruiting and retaining technologists by unduly limiting the kind of work technologists can undertake after leaving government service. The FTC's interpretation and uneven application of well-intentioned conflict rules further undermine not only its own efficacy, but also the efficacy of complementary enforcement bodies that support the agency's mission. We urge a series of modest reforms to prevent post-employment restrictions from hamstringing the FTC's enforcement efforts as well as those of other agencies. We hope these reforms will also help pave the way for skilled technologists to seek and secure meaningful careers in public service without unnecessarily hemming in their future career prospects.

