

FTC Reaffirms Importance of Narrowly Tailoring Non-Competes in M&A Transactions

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On June 14, 2022, the Federal Trade Commission (“FTC”) announced that it had required ARKO Corp. and its subsidiary GPM to roll back certain provisions of their acquisition of 60 Express Stop retail fuel outlets from Corrigan Oil Company, including limiting a broad non-compete provision.

The FTC has previously stated that simply because a restriction is ancillary to an otherwise legitimate business transaction, such as a merger or joint venture agreement, does not mean it is legal. Instead, such restrictions still need to be assessed to determine whether they are reasonably necessary to accomplish the benefits of the legitimate transaction. In other words, restrictive covenants, such as non-competes, need to be narrowly tailored to address legitimate business concerns, such as preserving the value of purchased assets.

According to the FTC complaint involving ARKO, GPM, and Corrigan, the non-compete signed as part of the acquisition of local retail gas stations in Michigan and Ohio was overbroad in geographic scope and duration, because it required Corrigan to not compete not only in the 60 local markets where Corrigan sold its fuel outlets to ARKO/GPM, but also in several other markets. To remedy the concerns about the overbroad non-compete, the proposed order settling the complaint against ARKO and GPM requires, in part, limiting the non-compete to apply only to the retail fuel businesses acquired by ARKO/GPM and limiting the terms to no more than three years.

The FTC’s complaint against ARKO and GPM serves as a useful reminder to pay attention when negotiating acquisition agreements—to ensure that any such non-compete provisions are narrowly targeted in both duration and geographic scope to address legitimate business concerns that preserve the benefit of the transaction—in order to best avoid potential enforcement action.

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