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FTC Enforcement Action Limits Noncompetition Agreements in "Sale of Business" Transactions

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On July 9, 2021, President Biden issued an Executive Order, in which he described the nation's antitrust laws as the "first line of defense against the monopolization of the American economy" and encouraged the Federal Trade Commission ("FTC") to "curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility." Until recently, the FTC had not issued any formal guidance on its plans to act upon the President's Order, but has informally signaled enhanced attention and scrutiny of non-competition agreements, including by holding a two-day workshop in December 2021, titled "Making Competition Work: Promoting Competition in Labor Markets," where industry leaders and professionals presented panels on antitrust and labor issues.

Now, however, the FTC is beginning to act in accordance with the President's Executive Order. On June 14, 2022, the FTC published an administrative complaint challenging an acquisition by Arko Corporation ("Arko") and its subsidiary GPM Investments LLC ("GPM") to purchase 60 gasoline and diesel fuel outlets from Corrigan Oil Company ("Corrigan") as anticompetitive because of the inclusion of certain non-compete provisions in the asset purchase agreement. All 60 fuel outlets that are part of the purchase are located in Michigan and Ohio. However, as part of the $94 million transaction, Corrigan agreed not to compete in the sale, marketing, and supply of gasoline and diesel fuel in the areas surrounding the 60 purchased fuel outlets, **as well as** more than 190 additional GPM locations. The FTC alleged that the non-compete provisions reduced (or eliminated) GPM's competitors in market territories throughout Michigan, and lacked any "reasonable procompetitive justification" for their application to the 190 GPM locations unrelated to the transaction, in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

As part of a Consent Agreement and proposed Decision and Order published alongside the FTC's complaint, Arko and GPM agreed to: 1) return five of the acquired outlets to Corrigan; 2) limit the non-compete provisions to apply only to the retail outlets acquired by GPM, and exclude the returned outlets and the 190 additional GPM locations; 3) restrict the duration of the non-compete to 3 years following the transaction and its geographic scope to 3 miles surrounding the acquired outlets; 4) for a period of 10 years, obtain prior approval from the FTC before acquiring retail fuel assets within 3 miles of the outlets returned to Corrigan; 5) in connection with other retail fuel business acquisitions, not enter into or enforce any non-competition provisions that would restrict competition in areas other than those surrounding the acquired locations; and 6) notify third parties subject to similar non-competition agreements with GPM of GPM's obligations under the Order. The Decision and Order will be made final following a period for public comment.

In a statement released alongside the FTC's complaint, FTC Chair Lina Khan noted that recent discussion surrounding non-compete clauses have focused on their use in employment contracts, particularly for low-wage workers. The Chair indicated that the FTC's enhanced scrutiny of non-competes would not be limited to the employment context, but also to business sales and mergers, particularly where the two parties are "actual and potential rivals" who will "remain competitors in other markets" after the transaction. The Chair further stated that "firms may not use a merger as an excuse to impose overbroad restrictions on competition or competitors. The Commission will evaluate agreements not to compete in merger agreements with a critical eye."

Historically, non-compete provisions contained in corporate acquisition agreements have been subjected to less scrutiny compared to similar provisions in employment contracts. *See e.g., E.T. Products, LLC v. D.E. Miller Holdings, Inc.*, 872 F.3d 464 (7th Cir. 2017). This is because in a sale transaction, one of the transferred assets is typically "goodwill," or the value of a company's reputation and customer relationships. However, this value is diminished for the buyer if the seller, who developed that "goodwill," is subsequently able to compete with the buyer in the same market. Thus, a buyer commonly requires that, as part of the transaction, the seller, often including its executives and key employees, will not compete with the business they just sold.

The FTC's recent action against Arko is a significant departure from court precedents which have typically enforced non-competes related to the sale or dissolution of a business. Even California, which generally invalidates non-compete agreements under state law, maintains a limited exception related to the "sale of goodwill of business or ownership interest." *See* Cal. Bus. & Prof. Code §16601. The FTC's action illustrates that sale-related non-competes are not immune from scrutiny, and must still be reasonably necessary to protect a legitimate business interest and appropriately limited in geographic scope and duration.

The FTC's use of its Section 7 and Section 5 powers to try and rewrite asset purchase agreements due to the inclusion of overbroad non-compete provisions represents a notable shift from how these types of agreements have been treated historically. We expect that noncompetition agreements will continue to be a priority of the FTC during the Biden administration, which may take shape in the form of further enforcement actions or potential rulemaking. We will continue to monitor developments in this area.

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