

FTC to Dealmakers: Don't Interfere with Investigations

Minding Your Business on July 11, 2023

On June 15, 2023, the Federal Trade Commission's Bureau of Competition issued a statement on the relationship between voluntary interviews with the agency and contractual provisions that require or limit the disclosure of information. The Bureau explains that voluntary interviews are a key aspect of investigations because they "are essential to help [them] understand real-world dynamics and effects," and "reduce unnecessary burdens on marketplace stakeholders and Bureau staff." In the statement, the Bureau asserts that certain contractual restrictions impede investigations, and should be considered void.

The Bureau identifies a range of contract provisions: "confidentiality agreements, nondisclosure agreements, and notice-of-agency-contact provisions." Confidentiality agreements are those which prohibit contracting parties from disclosing information to non-contracting parties. Nondisclosure agreements prevent a specified party from disclosing certain information. Notice-of-agency-contact provisions require a specified party to provide notice of any contact with a government agency. According to the Bureau, provisions that prevent or impeding a party from discussing information with the FTC, or requiring a party to disclose discussions with the FTC to a contract party, violates public policy and should be considered unenforceable.

The Bureau cites case law standing for the proposition that contracts cannot impede discussion with administrative agencies, and relies on rulemaking and interpretations from other agencies, including the Securities and Exchange Commission, the National Labor Relations Board, the Federal Aviation Administration, and the National Highway Transportation Safety Administration. While the Bureau does not cite rules published by the FTC, it notes that, for example, the SEC promulgated Rule 21F-17, developed from a section of the Securities Exchange Act titled “Whistleblower Incentives and Protection.” Rule 21F-17 prohibits enforcement of confidentiality agreements that interfere with communications with the agency. This rule [has been invoked](#) to penalize individuals and companies who impeded communication with the SEC. The statement also goes as far as to suggest that interference with agency investigations may potentially constitute a criminal violation, and could be subject to review by the Department of Justice. The Bureau has recently created its own Criminal Liaison Unit (“CLU”) to alert criminal prosecutors to potential unlawful conduct uncovered during FTC investigations. Director of the Bureau of Competition Holly Vedova [has stated](#) that the CLU “is particularly focused on deterring companies and their executives from obstructing FTC investigations.” While it remains to be seen where the FTC will go with this new initiative, certain existing contracts with employees and third parties could potentially become suspect to the extent prohibitions in those agreements implicate current or future investigation. Likewise, new NDA and confidentiality agreements, along with certain merger agreement provisions should be read with an eye on potential FTC scrutiny where they implicate participation in FTC investigations.

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Special thanks to summer associate Brandon McCoy for his contributions to the post.

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