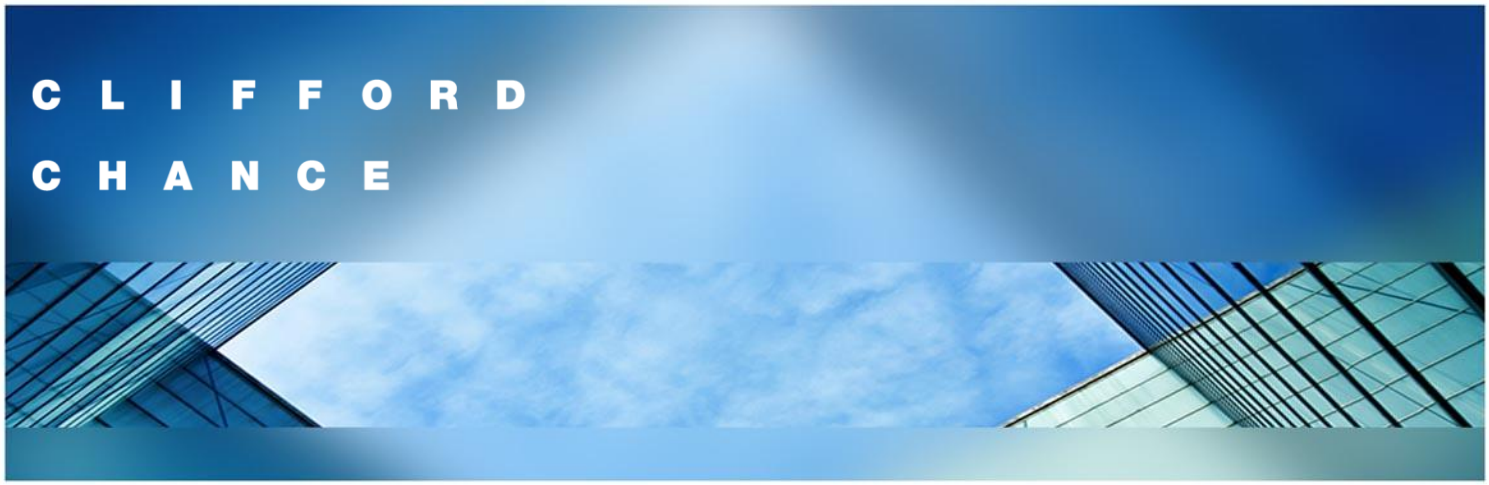

FTC'S CHALLENGE TO ARKO CORP.'S ACQUISITION OF RETAIL FUEL STATIONS IS A REMINDER THAT PARTIES MUST ENSURE NON-COMPETES ARE SUFFICIENTLY TAILORED TO PASS ANTITRUST SCRUTINY

The FTC's recent challenge to a transaction in the retail fuel sector demonstrates how the agency is scrutinizing non-compete agreements as part of its merger review. In this particular transaction, the FTC criticized the non-competes as overbroad in both duration and scope and indicated that it would continue to scrutinize non-compete provisions going forward. Parties engaging in M&A transactions should carefully examine any non-compete provisions that are part of the transaction to ensure that they are sufficiently tailored in scope and duration.

On June 14, 2022, the Federal Trade Commission ("FTC") issued a consent order resolving its investigation into the acquisition of 60 retail fuel outlets by ARKO Corp. and its subsidiary GPM in Michigan and Ohio. In addition to substantive concerns the FTC had with the acquisition of five of the locations, the FTC also focused on the non-compete clause of the purchase agreement. As part of the transaction, the seller "agreed not to compete for a period of time and within a specified radius" around both the acquired outlets and 190 locations already owned, operated, or leased by GPM.[1] The FTC's complaint alleged that the noncompete agreements violated both Section 7 of the Clayton Act[2] and Section 5 of the Federal Trade Commission Act[3] by "unreasonably lessening potential competition for the retail sale of gasoline and diesel fuel within the noncompete territories."[4]

The FTC took issue with two aspects of the parties' non-compete. First, without providing the specific details of the non-compete, the FTC claimed that the terms

1 Analysis of Agreement Containing Consent Order to Aid Public Comment, In the Matter of ARKO Corp., Fed. Trade Comm'n No. 211-0087 (Jun. 14, 2022) ("Analysis").
2 15 U.S.C. § 18.
3 15 U.S.C. § 45.
4 Analysis.

pertaining to the 60 locations the buyers were acquiring were "too broad" in geographic scope and "too long in duration."[5] Second, the FTC took issue with the non-compete clause prohibiting the seller from competing against 190 of the buyer's existing locations. As the FTC noted, "[f]ew of the approximately 190 GPM locations subject to the noncompete agreement were anywhere near an acquired Corrigan retail fuel station," and thus the provisions prohibiting Corrigan, the seller, from "competing in the sale, marketing, or supply of gasoline" near these stations was "unreasonable" and "b[ore] no relation to" the acquisition.[6] Using language paralleling a recent statement of interest filed by the U.S. Department of Justice,[7] the FTC noted that a "mere general desire to be free from competition following a transaction is not a legitimate business interest."[8] In a separate statement, FTC Chair Lina Khan warned that "noncompete agreements between competing businesses are suspect" and that "an agreement not to compete may constitute a thinly veiled market allocation scheme, a per se violation of the antitrust laws."[9]

To resolve the FTC's concerns, the parties entered into a consent agreement. Under the terms of that agreement, the buyer agreed to rescind the asset purchase agreement pertaining to five of the retail fuel assets. The consent agreement also addressed the FTC's concerns with the non-compete. First, the buyer was required to amend its non-compete agreement to only apply to those locations that it was acquiring from the seller pursuant to the acquisition (and excluding the five locations the seller was required to keep). Second, the amended non-compete could apply for no more than three years and no more than three miles beyond each acquired retail fuel location. Finally, the buyer was prohibited from entering into, or enforcing, any non-compete agreement related to acquisitions of a retail fuel business that would restrict competition around another fuel station already owned by the buyer, and was required to notify third parties subject to such agreements.[10] Through this latter requirement, the FTC limited the terms of any non-compete the buyer had entered into as part of previous transactions.

By allowing the buyer to amend the non-compete to three years and within three miles of the purchased assets, the FTC implicitly acknowledged non-competition clauses in purchase agreements can still be lawful, if properly limited in scope and duration. Indeed, the FTC Chair's statement noted that transacting parties "sometimes assert that noncompete clauses are necessary to protect a legitimate business interest in connection with the sale of a business, such as the goodwill acquired in a transaction," and acknowledged that "[w]hen the seller is exiting the business or selling off assets needed to compete with the buyer, a noncompete that limits prospects for reentry may in certain instances reflect that goodwill, if appropriately limited in geographic scope and duration."[11]

The consent agreement in this matter comes during a time of greater scrutiny of non-competes, particularly non-compete clauses in employee contracts, and how

5 Complaint.
6 Complaint.
7 Statement of Interest in *Beck v. Pickert Medical Group*, P.C., No. CV21-02092 (Nev. Sup. Ct. Feb. 25, 2022).
8 Complaint.
9 Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya in the Matter of ARKO/Express (Jun. 14, 2022).
10 Decision and Order, In the Matter of ARKO Corp., Fed. Trade Comm'n No. 211-0087 (Jun. 14, 2022).
11 Statement of Chair Lina M. Khan.

they impact the "labor market." On Thursday, June 9, FTC Chair Khan sent a letter to Senator Elizabeth Warren acknowledging that the FTC was investigating how Microsoft Corporation's acquisition of Activision Blizzard Inc. would affect workers, with a specific focus on non-compete clauses and non-disclosure clauses within employment contracts.[12] Therefore, in addition to carefully crafting non-compete clauses within purchase agreements, parties should also be wary of: (i) whether any existing non-compete clauses in employment contracts may invite unnecessary scrutiny; and (ii) whether the US antitrust agencies may question, as part of their antitrust review, the impact the deal will have on employees.

[12] Letter from Chair Lina M. Khan to The Honorable Elizabeth Warren (Jun. 9, 2022).

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