Cahill

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In the Matter of ARKO: Non-Competes in Mergers & Acquisitions

The Federal Trade Commission ("FTC") recently agreed to settle its allegations that a non-compete agreement between parties to a transaction to acquire gas stations was anticompetitive, demonstrating that the FTC will continue to scrutinize all aspects of a merger or acquisition. The FTC and the Antitrust Division of the U.S. Department of Justice have expressed heightened concerns over non-compete agreements (as well as non-solicitation agreements) over the past few years. While this decision is not the first to address a non-compete agreement within the context of an acquisition or merger, it illustrates the FTC's continued efforts to rein in non-compete agreements that it considers to be overbroad in scope or duration. In this matter, the FTC found the non-compete agreement was overbroad in several respects.[1] Aside from concerns with the non-compete, the FTC also found the transaction harmed competition in five markets for retail gasoline and one market for diesel by reducing the number of competitors to two or fewer and required the acquiring company to divest five gas stations in these markets.[2]

The Settlement

In March 2021, GPM Petroleum, LLC, and GPM Southeast, LLC (collectively "GPM") acquired 60 Express Stop-branded gas stations in Michigan and Ohio from Corrigan Oil Company ("Corrigan").[3] GPM and Corrigan own, operate, and lease retail gas stations. The asset purchase agreement included a clause that prohibited Corrigan (the seller) from competing against 190 gas stations that the buyer owned, operated, or leased but that were not part of the transaction and the 60 Express Stop that the buyer purchased in the transaction.

The FTC alleged that the acquisition violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by reducing the number of competitors in the retail gasoline and diesel market to two or fewer in five markets, increasing the likelihood that GPM would unilaterally exercise market power.[4] The FTC also alleged that the non-compete agreement was overbroad in several respects, including that the non-compete was not reasonably limited in scope to protect a legitimate business interest because the non-compete applied to 190 GPM locations that were not part of the transaction, the non-compete was too broad in geographic scope, and the duration was too long.

[1] *In the Matter of ARKO Corp.*, File No. 211-0087 (hereinafter "ARKO"), available at https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0187-arkogpm-investments-matter.

[2] *In the Matter of ARKO Corp.*, File No. 211-0087, Analysis of Agreement Containing Consent Order to Aid Public Comment at 2, available at https://www.ftc.gov/system/files/ftc_gov/pdf/2110087GPMAAPC.pdf.

[3] The transaction was not reportable and not reviewed by the FTC prior to closing.

[4] *In the Matter of ARKO Corp.*, File No. 211-0087, Complaint at 4, available at https://www.ftc.gov/system/files/ftc_gov/pdf/2110087GPMComplaint.pdf.

The FTC's order limited the terms of the non-compete agreement to apply only to gas stations acquired in the transaction and reduced the relevant scope to a radius of three miles within the gas stations for a duration of three years.[5] The FTC also required GPM to divest gas stations from five markets where the transaction resulted in two or fewer competitors.[6]

The FTC stated that the amended non-compete "resolves the competition concerns" raised by the non-compete as originally drafted.[7] The FTC found that the three year, three mile radius non-compete agreement was reasonable in light of the local retail fuel competition, which varies based on many factors, including driving patterns, population density, and consumer demand.

Generally, a non-compete agreement related to a genuine business venture, such as an acquisition or joint venture, should protect a legitimate business interest and be reasonable in scope and duration. Legitimate interests include, among other things, trade secrets and goodwill. FTC Chair Lina M. Khan noted that, in the context of a merger or acquisition, parties use non-compete agreements to protect goodwill acquired in the acquisition.[8] However, Chair Khan stated that "[a] general desire to be free from competition following a transaction is not a legitimate business interest."[9] Whether an agreement is reasonable will depend on the "unique facts and conditions" of the relevant market.[10]

Conclusion

In negotiating a transaction, companies should ensure that any non-compete agreements between the parties protect legitimate business interests and are reasonably narrow in scope and duration. The FTC and other antitrust agencies have demonstrated that they will be examining non-compete agreements in the context of mergers and acquisitions. Indeed, an overbroad non-compete may complicate approval of an otherwise pro-competitive transaction. Companies and their counsel should carefully scrutinize these non-compete agreements, particularly to assess whether the non-compete could apply to assets or interests outside of the scope of the transaction. Further, any non-compete agreement should be reasonable in duration and geographic scope to ensure it does not unnecessarily impede competition. Parties to a transaction should consult antitrust counsel when drafting and negotiating these provisions, even in transactions that do not otherwise raise competitive concerns or require antitrust approvals.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Elai Katz (Partner) at 212.701.3039 or ekatz@cahill.com; or Lauren Rackow (Counsel) at 212.701.3725 or lrackow@cahill.com; or Taylor Elicegui (Associate) at 212.701.3062 or telicegui@cahill.com; or email publications@cahill.com.

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[5] *In the Matter of ARKO Corp.*, File No. 211-0087, Decision and Order at 7, available at https://www.ftc.gov/system/files/ftc_gov/pdf/2110087GPMOrder.pdf.

[6] *In the Matter of ARKO Corp.*, File No. 211-0087, Analysis of Agreement Containing Consent Order to Aid Public Comment at 1, available at https://www.ftc.gov/system/files/ftc_gov/pdf/2110087GPMAAPC.pdf.

[7] *Id.* at 4.

[8] Statement of Chair Lina M. Khan, at 1.

[9] Analysis of Agreement Containing Consent Order to Aid Public Comment at 3.

[10] *Id.*