

Goodwill, Noncompete Provisions and the FTC

WRITTEN BY

Barbara T. Sicalides | Alexis N. Fennell

This article also appeared in [The Temple 10-Q](#).

On June 13, as a condition to allowing ARKO Corp. to acquire indirectly certain retail fuel assets, including 60 Express Stop retail locations from Corrigan Oil Company, the Federal Trade Commission (FTC) reduced the duration of the noncompetition provision. In addition to duration, the FTC challenged the geographic scope of the noncompete. The proposed consent decree also required the parties to rescind parts of their asset purchase agreement so as to release back to Corrigan five local retail fuel locations in Michigan.^[1] The vote of the commissioners was unanimous.^[2]

Although commissioners expressly acknowledged that noncompete clauses may protect a legitimate business interest, such as the goodwill acquired in a transaction, they made clear that such clauses must be “appropriately limited in geographic scope and duration.”^[3] They further noted “that noncompete clauses in a merger agreement may unduly and illegitimately restrain competition when both of the parties remain competitors in other markets.”

The FTC consent decree limited the ARKO/Corrigan noncompete to a duration of no longer than three years. Additionally, the offending noncompete covered a geography broader than that of the business sold; instead, the scope was coextensive with the buyer’s business. The consent decree, therefore, required that the noncompete cover only the geography of the assets being sold.^[4]

The FTC’s consent decree goes beyond the asset purchase agreement that was the subject of the investigation. The settlement prohibits the buyers from entering into or enforcing any noncompete agreement related to acquisitions of any retail business that restricts competition solely around a retail fuel business already owned or operated by the acquiring company, and it mandates that buyers notify third parties subject to similar noncompete agreements of the acquiring company’s obligations under the consent decree.^[5]

Takeaways

- In transactions involving competitors, the parties should limit the scope of noncompete provisions to the geography and scope of the operations actually being acquired in the transaction at issue;
- The parties should attempt to document the relationship between the duration of the noncompete and the value of the goodwill; and
- The acquiring party should resist any temptation to expand the noncompete provision to shield its pre-existing

business from competition.

[1] *In the Matter of ARKO Corp.*, Decision and Order, available [here](#).

[2] Press Release: FTC Acts to Restore Competitive Markets for Gasoline and Diesel in Michigan and Ohio, available [here](#).

[3] *In the Matter of ARKO Corp.*, Commission File No. 2110087, Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya, dated June 10, 2022, available [here](#).

[4] *In the Matter of ARKO Corp.*, Decision and Order, available [here](#).

[5] *Id.*

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