



United States of America  
FEDERAL TRADE COMMISSION  
WASHINGTON, DC 20580

Bureau of Competition  
Office of the Director

June 15, 2023

## **Re: Contracts That Impede Bureau of Competition Investigations**

---

### **SUMMARY**

Bureau of Competition staff have learned that the targets of our investigations are increasingly imposing and invoking certain types of contract terms that can impede our ability to conduct voluntary interviews with market participants. Voluntary interviews are a crucial investigative tool for carrying out our mandate from Congress. As a result, the Bureau believes that contractual requirements and limitations that impede Bureau investigations are contrary to public policy and therefore unenforceable.

### **IMPORTANCE AND BENEFITS OF VOLUNTARY INTERVIEWS**

The Federal Trade Commission's Bureau of Competition investigates potentially unfair methods of competition across a wide variety of industries. A core aspect of Bureau investigations is outreach to the people and businesses affected by the activity we are investigating. While the FTC has authority to obtain information through compulsory methods, speaking on a voluntary basis with stakeholders is a critical investigative tool. During an investigation, FTC staff may speak to dozens of individuals—competing businesses, customers, suppliers, trade organizations, labor unions, financial institutions, analysts, and more. These voluntary interviews are essential to help us understand real-world dynamics and effects. They allow the Bureau to get up to speed—and stay up to speed—quickly and effectively. They can also help to reduce unnecessary burdens on marketplace stakeholders and Bureau staff. As explained fully below, contractual requirements and restrictions that hinder or obstruct the voluntary-interview process impede the Bureau's ability to fulfill our congressional mandate.

### **RELEVANT TYPES OF CONTRACT PROVISIONS**

Although exact terms vary, the following general types of contract provisions can impede Bureau investigations: confidentiality agreements, nondisclosure agreements, and notice-of-agency-contact provisions. Confidentiality agreements purport to prohibit all of the contracting parties from disclosing certain information to others. Nondisclosure agreements prohibit a specified party from disclosing information to others. Notice-of-agency-contact provisions require the covered person or business to give notice of any contact with a government agency. They sometimes also require a summary of any discussions with law enforcers and regulators.



Transportation Safety Administration, have all reached the same conclusion: these contractual provisions can impede agencies' ability to conduct lawful investigations and, as a result, run contrary to public policy.<sup>6</sup>

In addition, investigation targets and their attorneys should be aware that attempts to obstruct FTC investigations and enforcement actions may be viewed as unlawful efforts to discourage or influence cooperation with the FTC. Such conduct can potentially rise to the level of a criminal violation, and the FTC may refer appropriate matters to the U.S. Department of Justice.<sup>7</sup>

The Bureau of Competition takes very seriously its statutory obligation to investigate potential violations of the antitrust laws and § 5 of the FTC Act. Contractual provisions that inhibit law-enforcement investigations do a disservice to the American consumers, workers, and honest businesses the Bureau is tasked with protecting.

---

<sup>6</sup> The U.S. Securities and Exchange Commission adopted Rule 21F-17, which prohibits enforcing or threatening to enforce a confidentiality agreement that would impede communications with the agency. 17 C.R.F. § 240.21F-17. The National Highway Transportation Safety Administration has stated that it is unlawful to use confidentiality and non-disclosure provisions to impede oversight and enforcement-related regulatory obligations. <https://www.nytimes.com/2016/06/10/business/tesla-model-s-nhtsa-suspension-failure.html>; Neal Boudette, [https://www.faa.gov/about/office\\_org/headquarters\\_offices/agc/practice\\_areas/enforcement/media/Non\\_Disclosure\\_Guidance.pdf](https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/enforcement/media/Non_Disclosure_Guidance.pdf), N.Y. TIMES, June 9, 2016, Fed. Aviation Admin., Impact of Non-Disclosure and Confidentiality Covenants on Agency Investigations, No. 13-cv-03729, documents #1 and 14 (N.D. Ill. May 20, 2013) (requiring that employee agreements include language protecting the right to communicate with the EEOC and comparable regulatory agencies); <https://www.ftc.gov/enforcement/competition-matters/2023/03/bcs-criminal-liaison-unit-races>, 361 N.L.R.B. No. 94 (Nov. 3, 2014) (invalidating the use of non-disclosure and confidentiality clauses in employee handbooks and other agreements).

<sup>7</sup> Holly Vedova, BC's Criminal Liaison Unit is Off to the Races, Mar. 24, 2023, <https://www.ftc.gov/enforcement/competition-matters/2023/03/bcs-criminal-liaison-unit-races>.