

LEGAL UPDATES AND NEWS

FTC Bans Most Non-Compete Agreements – What Financial Institutions Need to Know

On April 23, 2024, the Federal Trade Commission (the “FTC”) issued a final [rule](#) (the “Final Rule”) that bans most non-competition agreements (“Non-Competes”).

The Final Rule defines a Non-Compete as a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from (i) seeking or accepting the work in the United States with a different person where the work would begin after the conclusion of the worker’s employment, or (ii) operating a business in the United States after the conclusion of employment.

Overview of Final Rule

- **Non-Compete Ban:** Absent an exception, the Final Rule bans employers from entering into a Non-Compete with employees on or after the effective date of the Final Rule. The FTC issued the Final Rule pursuant to its authority under Sections 5 and 6(g) of the Federal Trade Commission Act, which provides the FTC with the authority to make rules and regulations to prohibit unfair methods of competition.
- **Effective Date:** The Final Rule’s effective date is 120 days after its publication in the Federal Register. The Final Rule has not yet been published in the Federal Register, but this is expected to occur soon.
- **Financial Institutions Not Subject to the Final Rule:** The Final Rule does not, by its own terms, apply to the following entities:
 - Banks insured by the Federal Deposit Insurance Corporation,
 - National Banks, Federal branches and Federal agencies of foreign banks,
 - Savings and Loan Associations, and
 - Federal Credit Unions.

However, the Final Rule does not foreclose the possibility that the federal banking agencies will take enforcement actions against financial institutions subject to their supervision for violations of the Final Rule. The federal banking agencies utilize Section 5 of the FTC Act to take enforcement actions against financial institutions engaging in unfair or deceptive acts or practices. In the Final Rule, the FTC stated that although ultimate interpretive authority of the FTC Act rests with it, “[w]hether other agencies enforce section 5 or apply the rule to entities under their own jurisdiction is a question for those agencies.” Therefore, absent public guidance or interpretation from the federal banking regulators, the possibility exists for an enforcement action against a financial institution under Section 5 of the FTC Act for non-compliance with the Final Rule.

Bank holding companies and savings and loan holding companies remain subject to the Final Rule. In the preamble to the Final Rule, the FTC stated that it declined to exclude bank holding companies, subsidiaries, and other affiliates of federally-regulated banks that fall within the FTC’s jurisdiction. The FTC suggested that if banks become concerned about disparate treatment

of workers employed by their own different affiliates, they “have the option to stop using non-competes across all their affiliates.”

- **Final Rule Does Not Apply to Certain Non-Competes Entered into in Connection with a Sale of a Business:** The Final Rule does not apply to a Non-Compete entered into pursuant to a “bona fide sale of a business entity.” The Final Rule defines a “bona fide sale of a business entity” as a sale made between two independent parties at arm’s length, and in which the seller has a reasonable opportunity to negotiate the sale. This exemption should be available to non-competes entered into in connection with merger and acquisition transactions.
- **Final Rule Does Not Apply to a Non-Compete Entered Into with Senior Executives Before the Effective Date:**
 - The Final Rule defines a “senior executive” as a worker who was in a “policy-making position” and who received total annual compensation of at least \$151,164 in the preceding year.
 - The Final Rule defines a “policy-making position” as a business entity’s president, chief executive officer or the equivalent, any other officer of a business entity who has “policy-making authority,” or any other natural person who has policy-making authority for the business entity similar to an officer with policy-making authority.
 - The Final Rule defines “policy-making authority” to mean final authority to make policy decisions that control significant aspects of a business entity or common enterprise, but does not include authority if it is limited to advising or exerting influence over policy decisions of, or having final authority to make policy decisions for, only a subsidiary of or affiliate of a common enterprise.
 - The Final Rule allows existing Non-Competes with senior executives to remain in effect, but existing Non-Competes with workers who are not senior executives are no longer enforceable after the Final Rule’s effective date.
- **Notice Requirement:** Absent an exception, and if the Final Rule applies, an employer must provide a notice to all employees covered by a Non-Compete no later than the Effective Date. The notice must state that the Non-Compete will not be and cannot be legally enforced against the employee. The Final Rule provides a model notice.
- **Non-Compete Ban Does Not Apply to “Non-Solicitation” Agreements:** The Final Rule does not prohibit the use of non-solicitation agreements, which prohibit a worker from soliciting former clients or customers of an employer, non-disclosure agreements and confidentiality agreements. If a non-solicitation agreement prevents a worker from seeking or accepting other work or starting a business after a worker’s employment ends, such a restriction could be deemed to be a prohibited non-competition restriction.
- **Next Steps:** Companies and their affiliates with Non-Competes should determine whether the Final Rule applies to their agreements. In addition, companies should review their non-solicitation agreements to ensure compliance with the Final Rule. If the Final Rule applies, companies should be prepared to provide the required notice, when necessary. Given the pending litigation described below, it is possible that the Effective Date may be delayed or that the Final Rule may never take effect; however, until the Effective Date is postponed, or the Final Rules is judicially nullified, employers should plan to comply with the Final Rule.

Pending Litigation

At least two lawsuits have been filed which contest the validity of the Final Rule. One lawsuit was filed in the U.S. District Court for the Northern District of Texas seeking a declaratory judgment and injunction that would prevent the implementation of the Final Rule. In addition, the U. S. Chamber of Commerce has filed a lawsuit in the U.S. District Court for the Eastern District of Texas seeking to vacate the Final Rule on similar grounds. It is possible that the Effective Date will be delayed while the legal challenges to the Final Rule are litigated.

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