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FTC Proposes Banning Noncompete Agreements. What It Means for Advisors.

BARRON'SBy [Andrew Welsch](#) Follow

Jan. 6, 2023 4:01 pm ET

The Federal Trade Commission's push to ban employers from imposing noncompete agreements on their workers could have significant ramifications for the wealth management industry, according to legal experts.

The government agency on Thursday [proposed a new rule](#) banning noncompete agreements, [saying they suppress wages](#), hamper innovation, and block entrepreneurs from starting new businesses.

The agreements affect some 30 million Americans across a range of jobs and industries, the FTC said. Some lawyers are already parsing the specific impact on the wealth management sector.

"Obviously, it will be a long way before this happens, but I think it could completely change the business," says Ross Intelisano, an attorney at New York law firm Rich, Intelisano & Katz. "So many firms don't recruit advisors from competitors such as private banks because [those competitors'] employees have noncompete agreements."

That's just one way [the proposal](#) could change the industry, says Intelisano. It could also affect advisor retirement programs, particularly at the large national brokerage firms known as wirehouses. Under those programs, advisors are typically required to sign noncompete agreements and are paid handsome sums to transfer lucrative client relationships to younger colleagues prior to their retirement. "There are always strict noncompetes in there," Intelisano says.

How the FTC proposal would affect so-called garden leave provisions remains unclear, says Tom Lewis, an attorney at law firm Stephens & Lee. These provisions often apply to private bankers who work with very wealthy clients. Under garden leave, private bankers are required to give advance notice of their resignation. They are then paid to stay at home while the firm transitions client relationships to other employees.

“They are effectively sitting on the sidelines and they can’t talk to clients,” Lewis says. “I’m not sure what the FTC will do with garden leaves because they are effectively paid noncompetes.”

A spokesperson for the FTC could not be reached for immediate comment.



The logo of the U.S. Federal Trade Commission
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A spokeswoman for Sifma, a Wall Street trade group, said the organization was still reviewing the FTC proposal.

Brian Hamburger, CEO of MarketCounsel Consulting and founder of the Hamburger Law Firm, says he doesn’t anticipate that the FTC proposal would prohibit garden leave provisions since they do not prevent workers from taking up employment with a

competitor after a waiting period.

The proposed ban has serious implications for firms that provide services to registered investment advisory firms, or RIAs, Hamburger says. “Where you tend to see a lot of noncompetes is among custodians and fintech providers who are concerned about trade secrets walking out the door and going to a competitor.”

Among RIA firms, which tend to manage fewer assets than their wirehouse and private bank rivals, noncompete agreements are less common, according to attorney Max Schatzow, a partner at RIA Lawyers. “Most aren’t interested in punishing employees if they leave. They are more interested in protecting their businesses and client information,” Schatzow says.

Notably, the FTC proposal would not negate noncompetes that are part of an agreement to sell a business entity or an ownership stake, according to the regulator. That is likely welcome news to RIA owners. M&A activity among RIAs has been hot in recent years as large aggregators seek to roll up competitors.

“When companies acquire a business, they want to make sure they are not acquiring temporary goodwill that will go out the door and rebuild what they just bought,” Hamburger says.

In addition, the FTC proposal would not eliminate nonsolicitation agreements, which prohibit advisors who switch employers from contacting former clients. Wealth management firms typically require advisors to sign such agreements as a condition of employment. Allegations of nonsolicitation violations are frequently at the heart of [legal disputes](#) between employers and departing advisors.

To be sure, clients are free to transfer their accounts, attorneys note. The FTC proposal would not change that.

The proposed rule would also not apply to other types of employment restrictions, such as nondisclosure agreements, according to the regulator. Other types of employment restrictions could be subject to the rule, however, if they are so broad in scope that they function as noncompetes.

The regulator is currently seeking public comment on its proposal, which, if finalized, would go into effect 180 days after publication of the final rule.

“The freedom to change jobs is core to economic liberty and to a competitive, thriving economy,” FTC Chair Lina Khan said in a statement. “Noncompetes block workers from freely switching jobs, depriving them of higher wages and better working conditions, and depriving businesses of a talent pool that they need to build and expand. By ending this practice, the FTC’s proposed rule would promote greater dynamism, innovation, and healthy competition.”

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