Consumer Finance Monitor (Season 6, Episode 6): A Close Look at the Federal Trade Commission's Proposal to Ban Non-Compete Agreements

Speakers: Alan Kaplinsky, David Fryman, and Karli Lubin

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor Podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. I'm your host, Alan Kaplinsky. I'm the former practice group leader for 25 years, and now Senior Counsel of the Consumer Financial Services Group at Ballard Spahr. I'm very pleased to be moderating today's program.

For those of you who want even more information, don't forget about our blog, consumerfinancemonitor.com. We've hosted our blog since 2011, so there's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry. So to subscribe to our blog or to get on the list for our webinars, please visit us at ballardspahr.com. And if you like our podcast, please let us know about it. Leave us a review on Apple Podcasts, Google, Spotify, or wherever you get your podcasts. Also, please let us know if you have any ideas for other topics that we should cover on our program or if you can recommend speakers that we should consider as potential guests on our program.

So let's turn to our topic today, and this is a little bit unusual for our Consumer Finance Monitor Podcast because it's not really a consumer financial services topic as such. However, we have blogged about this development and it's on our Consumer Finance Monitor blog because it impacts so much of the consumer financial services industry. And the topic is the FTC's recent notice of proposed rule making to ban non-compete clauses, which are often entered into between employers and employees and other circumstances that we'll describe to you in the program. And very recently, that is on January 12th, the FTC by a 4-1 vote, that is they did get one Republican to agree with this, which is somewhat surprising, but by a 4-1 vote they voted to publish this proposed rule for comment.

In their press release that they issued in connection with the proposed rule, they estimated that if this rule were to become final, it could increase workers' earnings by nearly $300 billion per year. That was the lead in their press release. So as I mentioned to you, it was a 4-1 vote. There was one Republican commissioner, Christine Wilson, who did what I thought was a very well-reasoned dissenting opinion. Let me just read to you the very first paragraph of what she wrote because I think it does a good job of sort of summarizing the concerns that at least one commissioner has.

"Today, the commissioner announced a notice of proposed rule making for a non-compete clause rule. The proposed rule would provide that it's unfair method of competition and therefore a violation of Section 5 of the Federal Trade Commission Act for an employer to enter into or attempt to enter into a non-compete clause with a worker or to maintain with a worker a non-compete clause." At that point, Christine Wilson goes into many, many reasons why she thinks that this is a very ill-considered thing for the FTC to do, but I will let our guest today give you all the details about that.

So I am very pleased to have on our program today two of my colleagues from Ballard Spahr. First of all, David Fryman. David is a member of Ballard Spahr's Labor and Employment Group and he's the former chair of that group. For more than 30 years, David has represented employers in all types of labor and employment matters including labor arbitrations, employment discrimination, wage and hour cases, union representation campaigns, and unfair labor practice proceedings, ERISA also, employ benefits litigation, restrictive covenant. There we go, that's right on the subject we're talking about today, and trade secret cases, and that of course is also related to the topic, and advice and training on a broad range of day-to-day human resources issues. So David, a very warm welcome to you. Thank you very much for spending some time with us today on our show.

David Fryman:

Pleasure, Alan. I've been waiting a long time for this invitation, so I'm thrilled to have received one and to be your guest today.

Alan Kaplinsky:

Well, I hope you are thrilled at the end of our show as you seem to be right now. Let me also introduce Karli Lubin. Karli is an associate in Ballard Spahr's litigation department who focuses her practice on labor and employment in antitrust matters. She represents both public and private employers in employment litigation involving claims under federal and state law and has experience in counseling clients on a wide range of matters including workplace investigations and the development of workplace policies, agreements, and handbooks. And just like David, Karli has had much experience in dealing with non-compete clauses. Karli was the main scribner, I guess is how I could put it, of the very good alert that was sent out by the Labor and Employment Group, which we were very happy to republish on our Consumer Finance Monitor blog.

So let's get to it. I've got a lot of questions for the two of you, but let's build a little bit of a foundation. Maybe I already answered the first question I was going to ask you Karli, but maybe you can embellish on a little bit of what I said, and that is what does this proposed rule actually prohibit?

Karli Lubin:

Sure, thanks, Alan. So the proposed rule at the end of the day is pretty simple. It's a categorical ban on non-compete agreements. The FTC defines a non-compete as a contractual term that prevents a worker from seeking or accepting employment with a person or operating a business after the conclusion of employment. So this is all focused on post-employment restrictions, but the FTC is clear that it's a functional definition. The name of the clause in question won't determine whether or not it would be prohibited under the proposed rule. So in essence, whatever you call it, if it functions to prohibit a worker from accepting employment within the same industry, it would be void under the proposed rule. The rule would prohibit covered employers from entering into maintaining or attempting to enter into a non-compete agreement with an employee or otherwise representing to a worker that they're covered by a non-compete. And if it goes into effect as drafted, employers would also be obligated to notify any employees with whom they have restrictive covenants in place, non-compete agreements in place that those are no longer in effect.

Alan Kaplinsky:

So this Karli purports to be fully retroactive? It would not only cover new non-compete clauses that an employer might want to enter into with an employee after the effective date of the rule, but it goes backwards and nullifies anything that's already out there?

Karli Lubin:

It does, and I expect that we'll get into the number of challenges we can expect to see to the proposed rule, but the rule would require employers to go back and nullify existing agreements and it provides some language that would comply with the rule in that respect.

David Fryman:

Hey Alan, you heard Karli use the word worker as opposed to employee, and this is consistent with this broad sweep of the rule. The FTC in its proposed rule seeks to cover agreements not just with traditional employees as that term is defined in any number of laws, but to go beyond that to these types of agreements with independent contractors and with interns. So they use the word worker and that is intentional and it is intended to be incredibly broad.

Alan Kaplinsky:

Yeah. So related to that I guess is the question of who does it purport to cover? I mean, it doesn't cover every employer in the country, and I assume it doesn't cover the government when they're acting as an employer either at the federal state or local

level. But tell us if you would, who is actually covered by it. And I guess that also ties in with the question of who does the FTC have jurisdiction over to issue this kind of a rule.

David Fryman:

Well, Alan, the answer to that question is that the FTC attempts to cover every employer within its jurisdiction, that is every employer it could possibly seek to cover. So again, it's consistent with the incredibly broad sweep of this rule. There are a couple of significant exceptions. One emanates outside the proposed rule, and that is simply the FTC's jurisdictional authority under the act. This would exempt, for example, all nonprofits, which the FTC does not have any jurisdiction over. And that would be significant, for example, with respect to large health systems.

Perhaps of greater interest to your listeners, the FTC does not have jurisdiction over banks or federal credit unions. And then there's a few additional ones on that list. Air carriers, common carriers, meat packers, poultry dealers. So there are some pockets here where the FTC is unable to go and therefore this rule does not seek to go.

The other important exception, and this goes more to the substance of the rule itself, there is an exception for these types of covenants that are entered into in connection with the sale of business. We often see this in transactions. And these are viewed somewhat differently. And of course these covenants start to run upon the close of the transaction as opposed to upon the termination of employment. The FTC recognizes that there are important reasons in conjunction with deals that if a buyer is buying a particular business, it's important when establishing its new ownership of that business that the next day the seller of that business who has presumably all sorts of experience operating that business the next day doesn't walk across the street and establish a new competing business.

So those are exempt, but it's interesting that the FTC sets an ownership threshold of 25% or greater in order to fall within this exception. The FTC itself in its notice of proposed rulemaking appears to recognize that this is somewhat of an arbitrary threshold and essentially justifies it with the Goldilocks rule. It kind of just feels right. Lower would be too low, higher would be too high. Why don't you send us comments on it? But we think this is the right threshold for exemption of sale of business restrictive covenants." But below that threshold, for example, somebody who is a 20% owner of a business, you would not be able to, in connection with the sale of business, prevent that particular individual from competing upon the close of the sale.

Alan Kaplinsky:

Even if that was the largest shareholder?

David Fryman:

Correct.

Alan Kaplinsky:

And even if that person was the CEO and basically founded the business?

David Fryman:

You got it.

Alan Kaplinsky:

It demonstrates a surprising lack of sophistication on the part of the four commissioners of the FTC. Let me ask you this. Forget about owners of businesses that are thinking of selling, but what about executive officers, very senior executives who typically enter into these kinds of agreements because that's what a company is paying for when they hire somebody. They don't want to just educate the individual and let them, after they're educated, go across the street and establish a competing business. But how the FTC handle that, David?

David Fryman:

They make no distinction, Alan, based on the level of the worker, the access to confidential information. However, and I think we'll talk about this a little bit more down the road, they do throw out some proposed alternatives that would create distinctions based on the level of the worker in terms of compensation or based on the type of worker. But in its proposed form, no such distinctions are made.

Alan Kaplinsky:

Okay. So Karli, we've been talking so far about non-compete agreements or restrictive covenants. What other restrictive covenants are there other than non-compete agreements that could apply where the rule would apply?

Karli Lubin:

Sure. So the rule does distinguish between non-compete agreements and other restrictive covenants like non-solicitation provisions or non-disclosure agreements. Those are not specifically covered. However, as we've sort of talked about so far, the definition of a non-compete under the proposed rule is a functional one. So if there are other restrictive covenants that are so broad as to function as a non-compete, then the FTC would consider them de facto non-competes that would be void under the rule. The notice of proposed rule rulemaking provides a few examples of where this might happen or what it would consider a de facto non-compete. It cites to one case in California about a non-disclosure agreement in the securities industry where the provision at issue was a non-disclosure agreement that prevented the plaintiff or the worker from disclosing information that would be usable in or related to the securities industry.

So it basically prevents the worker from using any securities knowledge in any job. The FTC thinks this would be a de facto non-compete because it would effectively preclude the worker from working in that industry. Same thing in a liquidated damages provision where if for instance a worker were to leave and take clients in violation of a non-solicitation provision and liquidated damages were so extraordinary as to effectively prevent that, that would be a de facto non-compete and void under the rule as well.

So at the end of the day, it's very fact specific depending on the employer and the employee or the worker and the market and industry that they're in.

Alan Kaplinsky:

Yeah, I'm particularly interested, Karli, in your reference to non-disclosure agreements or they're often referred to as NDAs. We've been hearing a lot about that in the mainstream press, particularly in connection with sexual harassment claims that got settled and there's a non-disclosure agreement that gets entered into when a settlement is made without individual. Would that type of thing be covered under this rule too?

David Fryman:

I think that would be a bit of a stretch, Alan. I think it would be difficult for the FTC to suggest that a non-disclosure limited to facts about a particular claim or incident translates into deterring that employee from being able to join a competitor. But we often find in conjunction with broader restrictive covenant agreements, they almost without fail, include a non-disclosure or confidential information provision.

Alan Kaplinsky:

Right. Right. So I take it if you've got one agreement and it's got a whole bunch of things in it and a non-compete agreement, a non-disclosure agreement, it may be the portions of that agreement are enforceable but not everything.

David Fryman:

Exactly.

Alan Kaplinsky:

Okay. So David, let's talk about restrictive covenants and other kinds of agreements other than employment agreements, right? It comes up in other contexts as well.

David Fryman:

It does. Reading the FTC's rule, the title of the agreement or where it is actually found the nature of the agreement, if the clause is such that it seeks to ban an individual post-employment from joining a competitor, it would be banned. It would be prohibited unless it falls into one of those exceptions. We talk about the entity is not subject to the FTC's jurisdiction or it falls within the sale of business exception. But getting back to this functional approach, there are some of these other types of agreements, couple that come to mind in particular, equity agreements. Oftentimes for senior type of executives, they are given equity in the company. And as part of those equity grants, there are non-compete provisions. Sometimes there are severance agreements that have non-compete provisions.

Sometimes even though those provisions require the employee to agree not to join a competitor post-employment, the consequences of the employee doing so are not necessarily enforcement of that provision. For example, through injunctive relief that the employer has the ability to go to court and seek to enjoin the employee from joining the competitor.

Rather, sometimes the consequence or the penalty is, "Okay, you can join a competitor, but you're going to lose that equity. You're going to forfeit it or you're going to have to pay it back. The same with the severance." And that raises the question, "Well, is this one of these banned non-compete provisions?" Because the employer could certainly argue the individual, the worker, is free to join that competitor. There's nothing in here that prevents the individual from doing so. But at the same time, I think the individual, depending on the circumstances could argue persuasively that, "Well, that's a Hobson's choice. You're asking me on the one hand to forego joining the employer of my choice, or on the other to forfeit what could be significant compensation." And that effectively, functionally de facto is one of these non-compete provisions that is prohibited under the rule.

Alan Kaplinsky:

Got it. Before we move on to some of the other things I have in mind, just to make sure that our audience is clear on this, banks are not subject to FTC jurisdiction and therefore would not be subject to this rule if it ever gets finalized. Same goes for credit unions and savings and loan associations. I think probably operating subsidiaries of banks and credit unions and savings loans are probably also exempt. So while operating subsidiaries of depository institutions also are not subject to FTC jurisdiction, affiliates of banks that are part of a bank holding company could be subject to FTC jurisdiction, I believe, and could be covered by this rule. Even more importantly, for purposes of our audience, non-bank, all of them are covered. Fintechs are covered. IT doesn't matter whether you operate through branch offices and bricks and mortar or whether you operate completely online, that is going to cover you.

Okay. So Karli, why is the FTC going down this rabbit hole?

Karli Lubin:

Well, so the notice of proposed rulemaking reads almost more like of white paper setting forth its justifications and research supporting the elimination of non-competes. But really the commission's position is that non-compete agreements and non-compete clauses hurt workers and consumers alike. It asserts that non-competes can be coercive to workers because they take advantage of unequal bargaining power between a worker and an employer, and that they also cause harm to competition in labor markets and products and services markets.

There's a number of financial statistics and data. The FTC asserts that eliminating non-competes, I think you mentioned this, would increase workers earnings by close to $300 billion per year. It also says that it would save consumers billions of dollars. It looks in particular to studies in the healthcare sector and suggests that the rule could save consumers up to close to $150 billion annually on healthcare costs. It asserts that eliminating non-competes would help to close racial and gender wage gaps and is generally consistent with FTCs focus in the labor market over the last few years. It really just lays out several pages of justifications to both the labor industry's workers and consumers on eliminating non-competes. But also, as you noted, it

doesn't have unanimous support from the FTC. Christine Smith Wilson, one of the FTC commissioners, issued a dissenting opinion that called the proposed rule a radical departure from hundreds of years of legal precedent.

Alan Kaplinsky:

Well, let me ask you a follow-up on that one, Karli. What do they mean by a hundred years of legal precedent that is not being followed? Or I guess put a little differently, what's the situation today where we don't have any FTC rule dealing with this subject? But there are various restrictions on non-compete agreements, right? Employers can't do whatever they want to do.

Karli Lubin:

That's true. Currently, non-compete agreements and whether they're valid, enforceable, are largely exclusively really dealt with under state law.

Alan Kaplinsky:

Yeah. What would that state law in general be in terms of... I mean I'm not a labor lawyer, but I used to believe that you might have to sign a restrictive covenant, but it would be limited as to duration. It wouldn't be totally open-ended and it would be limited by geography, that if you're going to move from one part of the country to a completely different part to open up a cleaning store or a grocery store, something like that would be unreasonable, right? I mean, isn't that the sort of, I don't know if you would call it the common law of non-compete clauses today?

Karli Lubin:

Sure. I think that there are nuances and differences between each state, but generally the factors to consider are geographic scope that you mentioned, temporal duration and what specifically is covered by the non-compete, what it prevents a worker from doing.

Alan Kaplinsky:

I understand. I mean, from looking at some of the literature of the FTC published, there are some statutes that exist in some states. I actually saw that three states today ban non-compete agreements. I don't recall what they were. But I'd be curious whether the FTC is looked at what the impact of the ban has been in the three states that have already banned it.

Karli Lubin:

They did. It's set out actually in the notice of proposed rulemaking as support for eliminating non-compete agreements. They point in particular to California where non-competes have been banned for several years and say, "Look at the tech industry actually banning non-competes here might have increased the ability of tech companies to expand there and increased worker mobility and hiring capabilities." So look at all these great things that have happened in California despite the fact that they don't permit employers to enter into non-compete agreements.

Alan Kaplinsky:

One other thing, is this the brainchild of the Chairwoman Lina Khan? Or is this really come from the Biden administration? I hadn't seen anything coming out of the White House dealing with this subject, and I'm just wondering where this idea emanated from.

David Fryman:

I think this has been percolating through the administration. Clearly, they found a willing participant in the FTC chair to carry this forward, but I think this is part of a broader initiative within the Biden administration reflective of its pro-employee and pro worker initiatives and views.

Alan Kaplinsky:

Yeah. So David, let's start talking a little legalese here. What is the legal authority that the FTC has when it comes to issuing this kind of a rule?

David Fryman:

Well, Alan, I don't think you'll be surprised to hear that many in responding to the publication of this proposed rule, myself included, feel pretty strongly that the FTC does not have the authority to engage in this type of rulemaking, both as a general matter and more specifically with respect to what it's doing. And as we've already alluded, perhaps the most prominent of those dissenting voices is Commissioner Wilson, who as part of her dissent, effectively laid out a roadmap of the types of challenges that could be mounted. The first being that the FTC effectively lacks authority to engage in what she calls unfair methods of competition rulemaking, that it simply lacks that authority.

She also points to something called the Major questions doctrine. The legal nerds out there may be familiar with that doctrine given a recent supreme court decision involving the Environmental Protection Agency with respect to its clean power plan where it engaged in quite broad and sweeping regulation with respect to how electricity should be generated going forward. And the supreme court struck that down under this major questions doctrine ruling that when an agency is attempting to swing that far and wide, we must hesitate and first assess whether there is clear congressional authorization for that type of broad rulemaking. Related to that theme, even if the FTC could establish that it has the authority to engage in this type of rule making, there is the question of whether this is what's called an impermissible delegation of legislative authority under the non-delegation doctrine, that the FTC is effectively usurping Congress's role here, that this is a matter that should be subject to congressional action, congressional legislation.

So I can't predict how these challenges will shake out, but I can say unequivocally there will be challenges. And in fact, the US Chamber of Commerce, the day after the FTC announced its proposed rule came out swinging and essentially declared that it found this rule blatantly unlawful and that it was prepared to challenge it. And I'm sure there will be several others.

Alan Kaplinsky:

And just to make it clear for members of our audience who may not be familiar with how these legal challenges work, while the chamber has expressed their displeasure with this notion of proposed rulemaking, it is only a proposed rulemaking. Until there is actually a final rule, nobody can really challenge it. I mean, you could bring a lawsuit, but it would get thrown out on the basis of it being premature.

David Fryman:

And just to put a finer point on that, Alan, so we're in a period now where the commission, as it must, solicits comments on the rule. There will be a barrage of comments. It's even conceivable that they might extend the period for comments, which is currently 60 days. They will then take the time to potentially tweak the proposed rule. Maybe they will, maybe they will not, and then they will publish the final rule. And it's at that point that we will likely see these legal challenges.

Alan Kaplinsky:

Yeah. I mean, you mentioned what Commissioner Wilson, what she had to say in her dissenting opinion. But there is another problem with the rule too I sort of alluded to a little bit earlier, and that is the fact that it purports to be fully retroactive, right?

David Fryman:

Sure. There is likely to be a lot that will be said about that aspect of the rule, both in the comments as well as I think in the legal challenges that this is effectively the federal government seeking to impair validly entered private agreements, private contracts, while it's not necessarily the constitutional state impairment of contracts issue, where under the constitution states cannot enact laws that impair contracts. I nonetheless believe that there will most certainly be challenges to the FTC's attempt to make this rule not only prospective but retroactive and seek to essentially nullify thousands, hundreds of thousands potentially, existing agreements. And not just with employers' current employees, but of course it would require them to

effectively go out to former employees with whom they still have existing non-compete agreements and knock on their doors and say, "Hey, by the way, you don't have to worry about this anymore."

Alan Kaplinsky:

Right. Right. So we've talked about the legal challenges and we've talked a lot about the, I guess you would say, the non-legal objections, the objections to the rule other than the legal authority issue. Is there anything we've overlooked in terms of what the chamber and other business interests don't like about this rule?

David Fryman:

There is, and they will have a lot to say in the comments about that. Their view is quite contrary to the view expressed in what Karli described as this white paper of the notice of proposed rulemaking. The view being that this effectively would stifle competition and innovation because it's through these types of provisions that employers are incentivized to provide training to workers to expose them to and share with them confidential information. And if they have less protection because employees are free to take this information and this training to competitors, then they're going to be less inclined to share that information and to provide that training. I think there's also a view of, and we've alluded to this earlier in the discussion, a view of if it ain't broke, why does it need fixing? That this has been effectively regulated at a state level. There is case law that provides protection in terms of reasonableness of covenants. There are several states that provide even greater restrictions either in terms of types of covenants or types of workers that can be covered.

And then I think the final piece where the FTC is going to get a lot of pushback in these comments is its suggestion that existing trade secret laws provide the protection that employers need. They don't need these non-compete provisions. I think that is misguided in that trade secret laws are only good insofar as the employer is able to discover and then prove that the employee has misappropriated its trade secrets. That's fine if you have the case of the employee on his or her way out the door downloading all sorts of files or taking things with them. But oftentimes they have a lot of top secret, trade secret information in their head in terms of strategy, in terms of customers. And it's very difficult to monitor whether they in fact are using that information at a competitor or disclosing it or sharing it.

What the non-compete provides is protection to that employer without having to monitor. Without having to prove, it gives it the peace of mind that at least for some limited period of time, a year, 18 months, post employment. We don't have to worry about that employee walking across the street to our competitor and using or sharing that information.

Alan Kaplinsky:

Right. Right. Right. One other thing that just occurred to me really relates to something we talked about a little earlier, but let me put the question out to you. And this, I guess, it might depend on FTC jurisdiction again, but what about accounting firms, law firms, other professional kinds of organizations? Does the FTC rule purport to apply to them as well?

David Fryman:

It does. Now, there are potentially certain restrictions outside of the FTC rule that might limit non-competes in those particular industry. For example, for lawyers.

Alan Kaplinsky:

Yeah, for lawyers. But accounting firms are notorious because my wife, I know this, she used to be an accountant with a large firm and they made everybody, I think even secretaries who get employed have to sign non-compete agreements and you can't take any clients with you if you leave.

David Fryman:

Yep, absolutely. So no exceptions there.

Alan Kaplinsky:

Yeah. Okay. So we've, up to this point, talked about I think we've really gone into a lot of detail about the proposed rule. And it is only proposed, so we have to emphasize that. Is there anything that companies ought to be doing right now in order to deal with this potential train wreck that's ahead of us other than commenting, right? I would encourage everybody, trade association's, employers, comment, build a record that will be helpful when this eventually gets litigated. But what do you think, David? What are you telling me your clients to do now?

David Fryman:

So there's nothing they have to do at this point. There's no reason in my mind that they should necessarily stop entering into these agreements. As we've discussed, we think there will be legal challenges. We think there's a good chance those legal challenges will succeed, but I think there's certainly is some value in reviewing the agreements, taking a look to see what protections might be on the chopping block, what might be at risk, whether the non-compete provisions that is these other types of provisions that we've talked about, non disclosure, non solicitation, whether they are drafted in such a way that they might be considered functional non-competes and whether there is any tweaking to be done there, and certainly on a prospective basis that might put them on more secure footing if this proposed rule were to become final and to survive legal challenges.

And then the other thing, and this is something that I constantly remind clients even outside of this rulemaking, is to regularly review how your organization treats its confidential and trade secret information. I can't tell you how many times, Alan, we've had a situation where there is a concern about misappropriation of trade secrets and we review how the employer has taken steps to protect that information. And then I pull up the website and there that information is on the website. So it's also a good time for employers if in fact down the road they would lose this particular tool in their toolkit that is the non-compete and had to rely increasingly on trade secret protection. It's very important that they are taking the steps necessary to ensure that they treat that information as trade secrets and take steps to ensure that access is limited, that it's not widely disseminated, and that they have the protocols and the security features in place such that it will be considered truly trade secret and the chances that it can be misappropriated or minimized.

Alan Kaplinsky:

This I guess you could view this as a wake up call for the industry to take a fresh look at a lot of the practices that it's been engaging in. It's something that probably ought to be regularly examined. But this is probably a really good time to look at that. So Karli, I understand... And by the way, the rule is several hundred pages in length. When I first heard about the rule, I'm thinking, "Oh, this is going to be a few pages," right? There'll be a ban on non-compete agreements, but they really wrote a tome here. This is obviously something they've been working on for a long time. In addition to proposing what amounts to pretty clear outright ban, except a very limited exceptions, they have proposed some of other alternatives that are not quite as draconian to business. What are they?

Karli Lubin:

They do. They have a few alternative proposals that they see comments on. One is instead of a ban on non-competes, there'd be no ban but a rebuttable presumption that non-compete agreements are illegal for all employees. Another iteration is a categorical ban on non-compete agreements for employees earning below $100,000 for example, or another wage threshold with no changes to the rule for all other employees. The FTC also asks whether the rule should apply uniformly to all workers, or I think we've been discussing a bit, whether it should differentiate between categories of workers based perhaps on seniority or level of exposure to trade secrets and things like that.

Alan Kaplinsky:

Yeah. So it'll be interesting to see how all that plays out. It sort of suggests to me that if something does go through, they're going to do... I was going to call it tweaking. It's more than tweaking, probably some major surgery to the proposed rule before it becomes final. Now I understand, I think I read that the comment period extends through March 12th. I don't know if my memory is correct there, although there is going to be, I think, an attempt to get the FTC to extend that by probably 60

days on top of that. But regardless, sometimes the FTC doesn't extend deadlines. I think very recently in connection with another trade regulation rule affecting the auto industry, I think they refused to extend the deadline even though that also was a very, very big rule that covered a lot of things pertaining to auto dealers.

So I take it, David, that if anybody listening to this podcast has any interest in weighing informally with the FTC, you'd be happy to help them, am I right?

David Fryman:

We would be delighted to do so.

Alan Kaplinsky:

Yeah. Okay. That's the right answer. Okay, well, we've drawn to the end of our program today, but I guess I'll ask both of you one final question. Did we overlook anything? I mean, I tried to cover all the major points that people ought to be aware of, but is there anything finally that either of you want to add to what we've covered that we may not have had the time to delve into?

David Fryman:

Alan, the only thing I'll add is that we over in the Labor and Employment Group have our own blog. We aspire to reach the heights of the consumer finance blog, but your listeners should check it out. They can find it at hrlawwatch.com. That's hrlawwatch.com, and you can find it on the ballardspahr.com website.

Alan Kaplinsky:

Okay. So to make sure that you don't miss any of our future episodes. Subscribe to our show on your favorite podcast platform. It's a weekly show. You can get the show on any major podcast platform, Apple, Google, Spotify, and even our firm website, ballardspahr.com. And also, don't forget to check out our blog, consumerfinancemonitor.com for daily insights about the consumer financial services industry. And if you have any questions for the show, please email the questions to podcast, that's singular, @ballardspahr.com.

I want to thank both of you for being very generous with your time this morning and just sharing a lot of insight about this proposed rule of the FTC. So thank you once again. And I also of course want to thank all of our loyal listeners who really listen to every show that we come out with every Thursday. We really appreciate your loyalty. All I can say is stay tuned because we've got a lot of interesting shows that we're going to be involved in for the remainder of this year.