Proposed Federal Reserve Banker Ban: A Chilling Effect on Banker Mobility?

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AUTHORED ARTICLE | Winter 2019

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(Published in the Winter 2019 issue of *The Bankers' Statement*)

Bankers, and lenders in particular, have enjoyed relatively broad opportunities for mobility between institutions for decades. General common law fiduciary principles and generally applicable statutory provisions, such as statutory customer privacy protections and protection of trade secrets, have always imposed some limits, but were usually relatively simple to navigate. In some situations, bankers and lenders may have had the added complexity of contractual limitations on their ability to compete with a prior employer or to solicit business from a prior employer's customers. Violations historically entailed civil actions for damages and/or restraints on use of tahe protected information of the prior employer. And employers who might have sued former employees and/or their new employer on some or all of these theories sometimes declined to do so under the "throwing stones in glass houses" risk analysis.

In December 2018, however, the risk analysis for bank employees considering moving to a new employer changed dramatically when the Federal Reserve published a notice of intent to institute proceedings for a permanent industry bar for two bankers in Wyoming. The notice recites a laundry list of alleged misdeeds by one or both of the bankers, such as:

- Misappropriating their former employer's confidential and proprietary information, including trade secrets;
- Conspiring with one another to obtain their former employer's confidential and proprietary information;
- Secretly providing services to the new employer while still employed by the former employer;
- Contacting borrowers of the former employer, while still employed by the former employer, to obtain the borrowers' consent to transfer their loans to the new employer;

- Taking steps to hide their misappropriation of the former employer's information by deleting certain files from the former employer's computer system;
- Using loan form documents belonging to the former employer once employment began at the new employer; and
- Testifying falsely in a civil lawsuit the former employer brought against them as a result of their conduct.

On the basis of these, and other, factual assertions, the Federal Reserve has alleged that, among other things, the bankers engaged in an "unsafe and unsound banking practice" and breached the employees' fiduciary obligations to their former employer in favor of the competing institution that hired the bankers. While the matter has yet to be finally adjudicated, the fact that the Federal Reserve has taken the action should cause banks and bankers to pause and take notice.

Regulatory Action and Impact on Banker Mobility

Banker mobility has typically brought with it the potential for some level of risk if the banker attempts to bring or use confidential proprietary information of his or her former employer. Things like customer information and lists, loan and other documents and forms, loan and customer information including loan terms and payoffs, bank and affiliate business plans, etc., are commonly granted protection, either by law, regulation, contract, employer policy, or a trade secret statute. The Federal Reserve's recent notice, however, brings the risk analysis to a new level by upping the ante to include the potential for regulatory action that could jeopardize the entire future industry career of the banker.

The notice does not explain or provide any type of guidance or threshold for consideration of when the Federal Reserve will find such conduct to be so egregious as to warrant this type of action. Bad facts make bad law, and the facts in the Federal Reserve's notice involve particularly egregious allegations of actions by the bankers who were executive officers and directors of their former institution. It leaves bankers in the lurch with respect to whether this action represents a new agency approach to enforcement with respect to this type of action, or whether this is simply a one-off situation. Therefore, the action is likely to have a chilling effect on the mobility of bankers contemplating a move to a competitor institution.

Whether every such situation is now likely to receive regulatory scrutiny and investigation is impossible to tell. Perhaps this type of action would apply only to high-level executives and directors, or perhaps it will be brought in the future against any institution-affiliated party who violates trade secrets protections available to a bank. Both bankers and their new prospective employers, however, should be taking care to ascertain that no confidential and proprietary information is taken to the new employer. If that is the message the Federal Reserve is sending, the notion of hiring a banker based on their current customer base and industry know-how, which is arguably proprietary and confidential to their former employer, brings with it very real new risk which may have a chilling effect on the mobility of bankers especially within their own markets.

Employment Law Issues

The Federal Reserve's notice also highlights some proactive, employment-related steps financial institutions can take to address these risks. These are steps that would make sense regardless of whether a bank may be the "new" employer or the "former" employer in any given situation.

First, financial institutions should check their employee handbooks or similar policy pronouncements. Ensure that those documents contain a confidentiality policy that is clear and applicable to all employees. Consider whether stronger provisions are necessary for certain positions or groups of employees (e.g., executives or lenders/originators). Make sure the policy includes at least the items discussed above, and then provide training about the obligations if not already covered during new employee orientation or otherwise.

Second, even if an institution doesn't have an employment agreement that relates to competition or solicitation, consider whether a contractual confidentiality obligation is appropriate. Since most handbooks and policy manuals will disclaim that they are contracts, activity that may be harmful to a bank, but not so harmful as to meet whatever standard the Federal Reserve may now be applying, will not be as easily addressed if there is no contract on which to base a post-employment claim.

Third, when hiring, make sure to do your due diligence. **Ask** if the incoming employee has any contractual limitations on employment with (e.g., a "non-compete"), or the scope of job duties that can be performed for (e.g., restrictions on customer solicitation), your financial institution. When you get the answer, **document** the response in an offer letter, or employment agreement if you use one. Remember the old adage: If you hear a pitch that sounds "too good to be true," it probably is!

Finally, if your bank doesn't have procedures in place for departing employees to remind them of their obligations, consider adopting those. If your bank does have these procedures, review them to consider whether to include, in appropriate cases, reference to the potential regulatory impact of engaging in unsafe banking practices or breaching one's legal and fiduciary responsibilities in connection with customer confidentiality obligations and non-competition obligations owed to the former employer. It will be interesting to see whether the Federal Reserve's action ends up tipping the balance in close litigation cases involving non-competition and non-solicitation by raising the stakes too high to chance an adverse determination for the mobile banker.

Conclusions

The Federal Reserve action should cause banks to review and tighten their protections on proprietary information through employee policies, training and contracts. It should also cause bankers to be very careful as they consider opportunities for movement within the industry and especially between institutions in the same market.

Bankers would be wise to also consider the plethora of other enforcement mechanisms that the regulators have in their arsenals, including the ability to impose very significant civil money penalties against institutions and institution-affiliated parties. An industry ban could be the tip of the proverbial iceberg of potential regulatory enforcement actions for this type of behavior.

The Federal Reserve action has not yet been adjudicated, but will be important to watch. Whether the action is indicative of a "new normal" in this area, or is a one-off example of the reaction of the Federal Reserve to this type of behavior, remains to be seen.