

Consumer Financial Protection Bureau and Federal Trade Commission Announce Memorandum of Understanding

On January 23, 2012, the Consumer Financial Protection Bureau (CFPB) and the Federal Trade Commission (FTC) announced that they had signed a memorandum of understanding (MOU). In doing so, the two agencies fulfilled requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) that they negotiate an agreement to coordinate enforcement actions against entities subject to both agencies' jurisdiction and harmonize certain rulemakings. The MOU also provides for coordination in other areas such as sharing supervisory information and consumer complaints, preserving the confidentiality of shared information, and consumer education. We provide a summary of the MOU below.

Law Enforcement

Under section 1024 of the Dodd-Frank Act, the CFPB has enforcement authority over nonbank entities that offer or provide consumer financial products or services. Because the FTC retains enforcement authority over such entities under the Dodd-Frank Act, both agencies could bring enforcement actions against the same entity over the same issue in the absence of coordination. Accordingly, the Dodd-Frank Act requires the CFPB and the FTC to negotiate an agreement to coordinate enforcement actions against nonbank entities subject to the enforcement authority of both agencies regarding the offering or provision of financial products or services.

Under the MOU, each agency will give notice to the other before commencing an investigation, filing an action or commencing a proceeding, settling an action or proceeding, or intervening in an action against a supervised entity where the other agency also has the authority to bring an enforcement action against the supervised entity. They will coordinate to avoid duplicative or conflicting enforcement actions.

Each agency will take the following steps before commencing an investigation of a supervised entity regarding the offering or provision of consumer financial services:

Brussels
+32 (0)2 290 7800

Denver
+1 303.863.1000

London
+44 (0)20 7786 6100

Los Angeles
+1 213.243.4000

New York
+1 212.715.1000

Northern Virginia
+1 703.720.7000

San Francisco
+1 415.356.3000

Silicon Valley
+1 415.356.3000

Washington, DC
+1 202.942.5000



How does the Dodd-Frank Act affect your business? The 2,300-page act requires or permits the creation of more than 250 new regulations. Read our: [Compendium of Advisories](#), [Rulemakings Weekly Update](#), and [Rulemakings Chart](#).

- Each agency will inquire or otherwise seek to determine whether the other agency: (i) has investigated or is investigating the supervised entity; (ii) has filed a court action or administrative proceeding against the entity; or (iii) has obtained an order or judgment against the entity. The agency receiving such an inquiry must respond within 10 business days.
- If one of the agencies decides to investigate a supervised entity, it generally must notify the other agency of the identity of the supervised entity and the topic or topics of the investigation five business days before commencing the investigation. If one agency seeks to investigate an entity because the entity may have violated an order or judgment that the other agency has obtained against the entity, it must articulate a rationale for commencing a new investigation.

To help identify pre-existing enforcement actions, each agency will provide the other with a list of currently binding orders and judgments against supervised entities within 60 days of the execution of the MOU. The agencies will provide each other with updated lists quarterly. Furthermore, the two agencies will develop a secure computerized system that each can independently search to determine whether the other agency has or had an investigation, action or proceeding, or order or judgment concerning a supervised entity.

The two agencies agree to provide each other with at least ten business days' notice before filing an action or commencing an administrative proceeding. If the agency initiating the action or proceeding seeks a finding of contempt, a temporary restraining order, expedited preliminary injunction, a temporary cease and desist order, or other similar relief and thus cannot provide ten business days' notice, it must provide at least three business days' notice.

Each agency agrees to give the other agency at least ten business days' notice before filing a consent decree, consent order, or settlement agreement in court to settle an action, or accepting for public comment a proposed consent order or issuing a final consent order to settle an administrative proceeding.

Each agency agrees to forward any notice of a state's intent to file an action against a supervised entity for violating the Mortgage Assistance Relief Services Rule or Mortgage Act and Practices – Advertising Rule of the CFPB as soon as practicable after receiving the notice from the state.

Each agency agrees to do its best to provide notice of its intention to intervene in a court action filed by the other agency and the reason for such intervention at least 20 days before moving to intervene.

If one of the agencies initiates a court action or administrative proceeding against a supervised entity, the other agency will not initiate such an action or proceeding against the same entity regarding the same alleged violations either at the same time or during the pendency of the first agency's action or proceeding. But the agencies may pursue parallel actions or proceedings after consultation in what they consider to be unusual circumstances. They may also pursue joint or coordinated court actions or administrative proceedings, and one agency may intervene in a court action filed by the other. Such coordination should help reduce the risk of duplicative enforcement actions against a supervised entity; at the same time, it could be an incentive for pursuing a case that one agency might otherwise forego.

Rulemaking and Guidelines

Section 1061(b)(5)(D) of the Dodd-Frank Act requires the two agencies to negotiate an agreement to coordinate the CFPB's rulemaking to prohibit "unfair, deceptive, or abusive acts or practices" under section 1031 of the Dodd-Frank Act and the FTC's rulemaking to prohibit "unfair or deceptive acts or practices" under section 18 of the Federal Trade Commission Act as applied to nonbank entities that are subject to the jurisdiction of both the CFPB and the FTC. Under the MOU, each agency will provide the other agency with at least 60 days' notice before publishing any proposed or final rules under these statutory provisions. They will discuss the proposed rules and comments received on the proposed rules. Each agency will provide the other with at least 30 days' notice before issuing any formal comprehensive guidance documents, whether proposed

or final, under these statutory provisions. They will consult on such guidance documents. Such coordination should help the two agencies formulate consistent standards for determining what constitutes an unfair, deceptive, or abusive act or practice.

The CFPB will consult with the FTC in exercising its rulemaking authority in general. With respect to certain consumer financial laws for which the FTC had rulemaking authority before that authority was transferred to the CFPB, the CFPB will give the FTC at least 30 days' notice before publishing an Advance Notice of Proposed Rulemaking. The FTC's input should be valuable in imparting the CFPB with relevant practical experience in interpreting and enforcing such statutes in various contexts. The agencies also will meet periodically to discuss interpretive guidance under consumer financial laws that both agencies enforce.

Supervision and Examination

The two agencies agree to meet at least quarterly to discuss the CFPB's plans to examine supervised entities that are also subject to FTC jurisdiction, as well as results of examinations and proposed activities to address the results. The CFPB will update the FTC on any significant changes to the examination plans between meetings. In addition, the CFPB will tell the FTC the anticipated start date of an examination within two business days after receiving the FTC's request.

Within ten business days of receiving a written request from the FTC, the CFPB will provide the FTC with an examination report on a supervised entity that is also subject to FTC jurisdiction; it will also provide updates on any revisions to the report. Moreover, the CFPB will provide the FTC with other information collected through its supervision of an entity that is also subject to FTC jurisdiction unless it articulates good cause not to do so.

Consumer Complaints

The CFPB agrees to share consumer complaints with the FTC through the Consumer Sentinel Network, which

is the secure and searchable Internet-based consumer complaint database that the FTC administers and makes available to federal, state, local, and foreign law enforcement agencies, including the CFPB. As a result, consumer complaints collected by the CFPB will also be available to all law enforcement agencies that have access to the FTC's Consumer Sentinel Network. A larger number of consumer complaints could increase the interest of law enforcement in the entities or issues involved in the complaints. One might expect this to have more impact than, for example, the sharing by state officials of consumer complaints they receive with the Office of the Comptroller of the Currency for purposes of investigations and enforcement actions against national banks.

The two agencies will develop guidance to help consumers determine the proper agency to complain to, as well as procedures to transfer consumers with complaints to the agency best situated to assist. They will consult on methods to help ensure that any processes they establish to respond to individual consumer complaints do not prejudice future enforcement or legal action. The agencies agree to revisit the procedures for sharing and handling consumer complaints by July 21, 2013.

Information Sharing and Confidentiality

The two agencies agree to take all actions reasonably necessary to preserve all privileges and claims of confidentiality related to all nonpublic information they share with each other. Each agency agrees not to disclose nonpublic information received from the other to third parties without written permission. In the event of a third-party request, the agency that has received the requested information from the other agency will take the following steps:

- The recipient agency will notify the other agency of the third-party request.
- If the request is made pursuant to the Freedom of Information Act or the Privacy Act, the recipient agency will refer the request to the providing agency for a direct

response if practicable; otherwise, it will consult with the providing agency in responding.

- If the request is not made pursuant to the Freedom of Information Act or the Privacy Act, the recipient agency will consult with the providing agency before responding, and to the extent applicable, give the providing agency a reasonable opportunity to assert legal exemptions or privileges that it wants the recipient agency to assert on its behalf.
- The recipient agency will consent to an application by the providing agency to intervene in any action to preserve the confidentiality of the shared information or any related privilege.

Other Areas of Coordination

The two agencies agree to meet at least twice a year to coordinate their regulation and supervision of entities over which they both have jurisdiction with respect to the offering and provision of consumer financial products or services. They also agree to meet at least quarterly to coordinate initiatives to educate consumers on consumer financial products and services, including initiatives for military service members and their families and older Americans. They will also coordinate research projects on consumer financial products or services offered or provided by entities subject to their jurisdiction.

Implications

Under previous coordination agreements between the FTC and other federal agencies, the agencies have tended to allocate their respective responsibilities along subject-matter lines. For example, in a memorandum of understanding between the FTC and the Food and Drug Administration (FDA), the two agencies agreed that the FTC would assume primary responsibility for regulating food, cosmetic, medical device, and dietary supplement advertising, while the FDA would take primary responsibility for regulating the labeling of such products. Under the Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations, the

agencies allocate the review of proposed mergers or other competition matters to one or the other agency based on industry lines.

The MOU between the FTC and the CFPB, in contrast, generally does not require either agency to defer to the other with respect to any entities or subject matters within its jurisdiction. Handling the matters over which they share jurisdiction could prove a test of personal relationships as well as mutual professional respect—in that regard, it may help that many CFPB officials were previously members of the FTC staff. Banks and other regulated financial institutions will want to pay close attention to how the agencies implement the MOU, including which agency appears to dominate on certain decisions and which may be more aggressive in the investigatory and enforcement contexts.

Arnold & Porter LLP is available to assist you with compliance with the federal consumer financial laws and with preparation for examinations by the CFPB. For further information, please contact your Arnold & Porter attorney or:

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