

FCC and FTC Announce Consumer Protection Memorandum of Understanding

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On Monday, the FCC and FTC published a [Memorandum of Understanding](#) in which the two agencies agreed to engage in greater coordination and collaboration on consumer protection issues, with greater respect for each agency's jurisdiction. The MOU comes at a time when both agencies are seeking to position themselves as protectors of consumers in the digital economy.

In the MOU, the agencies agreed to coordinate with one another "to protect consumers from acts and practices that are deceptive, unfair, unjust and/or unreasonable" and, specifically, to:

- Coordinate on initiatives where one agency's action will have a significant effect on the other agency's authority or programs;
- Consult on investigations or actions that implicate the jurisdiction of the other agency;
- Meet regularly to review current marketplace practices, to share each agency's work on consumer protection matters of common interest, and to exchange information about "the evolution of communications markets";
- Share enforcement techniques, tools, intelligence, expertise, and best practices in response to reasonable requests for assistance;
- Collaborate on consumer and industry outreach and education efforts;
- Engage in joint enforcement actions, where appropriate, and coordinate public statements; and
- Share data regarding consumer complaints to the extent feasible, including through the FTC's Consumer Sentinel Network.

The agencies also addressed the scope of the common carrier exemption, which exempts from the FTC's jurisdiction common carriers subject to the Communications Act. Specifically, the FCC and FTC "expressed their belief" that the exemption does not extend to non-common carrier activities engaged in by common carriers, and that exercise of enforcement authority within one agency's jurisdiction should not be taken to limit the authority of the other. While approaching jurisdictional issues more gingerly will certainly promote better relations between the agencies in the near term, ultimately, the scope of the "common carrier exemption" is an issue for the courts and Congress, and is unlikely to be solved soon.

The MOU comes after an unprecedented year of consumer protection activity at the FCC. Earlier this year, the FCC reclassified broadband Internet access service (BIAS) as a common carrier service—

effectively bringing BIAS-related activities outside the scope of FTC jurisdiction—and imposed a host of “open Internet” and other consumer protection obligations on BIAS providers. Some of these open Internet issues were the subject of ongoing FTC enforcement actions, including a lawsuit challenging AT&T’s throttling practices for its “unlimited” plans, which is now the subject of a \$100 million FCC proposed forfeiture. The FCC also has dramatically expanded its privacy and data security enforcement activities against carriers. Indeed, the FCC’s Enforcement Chief has stated that he views Section 201(b) of the Communications Act—which prohibits “unjust and unreasonable” practices of common carriers—as coextensive with Section 5 of the FTC Act. No wonder, then, that the FCC’s recent privacy and security enforcement actions have taken on the look and feel of traditional FTC enforcement actions.

The MOU will have a number of benefits for the two agencies. For the FCC, the MOU will enable it to learn from the wealth of institutional knowledge that the FTC has gained from years of privacy and data security enforcement under Section 5. As the consumer protection provisions of the 2015 Open Internet Order take an increasingly central role in FCC enforcement actions, this sort of information sharing will be critical. For the FTC, the agency will gain some assurance that the FCC will not further expand its own jurisdiction—as it did in the 2015 Open Internet Order—before coordinating and consulting with its sister agency. Above all, the MOU will also promote administrative efficiency, a goal that underlays a similar MOU between the FTC and CFPB.

Kelley Drye’s attorneys have significant experience representing clients before the FCC and FTC on a wide range of consumer protection issues. Should you have any questions about this MOU and what it means for your business, feel free to contact the author of this post or your usual Kelley Drye contact.