



Consumer Protection, Banking, and Financial Services Alert



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CFPB and FTC Enter into MOU

By Jay Levine, Wendell Allen, and Michael Denniston

Since its inception, the Consumer Financial Protection Bureau (“CFPB”) has had concurrent responsibility with the Federal Trade Commission (“FTC”) in regulating the activities of nondepository institutions as they apply to consumer financial products or services. Last week, the CFPB and FTC executed a Memorandum of Understanding (“MOU”) that provides a mechanism to “prevent duplication of efforts, provide consistency and ensure a vibrant marketplace for consumer financial products or services.” The MOU, which lasts for 3 years, generally outlines the agencies’ responsibilities towards each other in terms of coordination, consultation, and notice. It is unclear, however, whether such cooperation will result in more or less aggressive rulemaking, supervision, or enforcement actions overall.

In general, the MOU calls for the agencies to meet at regular intervals to discuss, among other things, future law enforcement activities, CFPB’s plans to examine entities under its jurisdiction and the results of any such examinations, making recommendations to amend consumer financial laws, the creation of task forces, and the efficacy and consistency of the remedies that the agencies have obtained. Additionally, the agencies are to:

- coordinate their law enforcement activities and jointly conduct training;
- coordinate regarding potential court actions and administrative proceedings;
- consult with each other regarding rulemaking under their respective statutory authorities;
- provide 60 days notice before publishing proposed rulemaking or final rules;
- consult promptly on formal comprehensive agency guidance documents that address unfair, deceptive, or abusive acts or practices regarding consumer financial products or services;
- cooperate in the receipt and handling of consumer complaints, as well as share such complaints with each other; and
- develop methods and procedures for guiding consumers to the agency best suited to assist them with their issues, complaints, or needs

The MOU also spells out how the agencies hope to avoid stepping on each other’s toes, from the investigation phase through litigation and settlement. For instance, prior to commencing an investigation, each agency must determine whether the other agency (i) has investigated or is investigating the target; (ii) has filed a court action or administrative proceeding against the target; or (iii) has obtained an order or judgment against that target. A response is due within 10 business days. To facilitate matters, the agencies are to develop a searchable database that will list each agency’s investigations, actions, and orders. Furthermore, each agency must provide to the other 5 business days notice, providing the identity of the person to be investigated and the intended topic or topics of the investigation, before commencing an investigation. If the other agency has investigated or litigated against that target, the agencies must consult in order to reduce the risk of inefficient, duplicative, or conflicting law enforcement activities.

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With respect to enforcement actions, the agencies must provide each other with 10 business days notice prior to filing a complaint. The MOU also ensures that regulated entities cannot be sued by both agencies independently, though the agencies can elect to proceed jointly. Interestingly, either agency may intervene in any court action initiated by the other, provided that it gives 20 days notice. Once an agency intervenes, that agency may be heard on all matters. Finally, consistent with the MOU's cooperation theme, each agency must provide the other with 10 business days notice before filing a consent decree, consent order, or settlement agreement.

Finally, the CFPB agrees to share confidential information it obtains in the course of its examinations with the FTC upon request. The MOU provides confidentiality assurances and also provides exceptions to CFPB's obligation to provide the FTC with the requested material. How and when the FTC may use this information is left undecided at this point and may well have to be determined by the courts. Furthermore, the FTC's mission as an enforcement agency, coupled with its ability to view the CFPB's examination material, may create a more adversarial climate between the entity being examined and the CFPB from the outset; however, this remains to be seen.

Conclusion

The MOU is interesting for what it says and for what it does not say. Indeed, it is long on generalities and short on specifics. For example, it is still unclear which issues or activities will be dealt with by which agency, or how quickly a conflict between the two will be resolved. Nevertheless, the fact that a framework is in place, as well as the fact that many CFPB staffers came from the FTC, should provide some measure of comfort that those entities subject to this concurrent jurisdiction will not be subject to simultaneous investigation and enforcement by both agencies.

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