



Three-Year Extension of Memorandum of Understanding

By John D. Huh and Erin Keltz

Although the MOU provides more consistency and stability, it may mean a greater risk of becoming the subject of an investigation or an enforcement action.

CFPB and FTC Agree to Coordinate Enforcement Efforts

On March 6, 2015, the Consumer Financial Protection Bureau (CFPB) and the U.S. Federal Trade Commission (FTC) reauthorized their ongoing memorandum of understanding (MOU), originally executed in January 2012.

The MOU was reauthorized for a three-year term with just a “few small administrative tweaks.” When the MOU was first executed, the director of the CFPB, Richard Cordray, explained that “[e]ntering this agreement with the FTC is important to making sure markets for consumer financial products are getting efficient and effective federal government oversight. We are both motivated by the same thing: to do right by consumers. We look forward to this partnership.” Jon Liebowitz, former Chairman of the FTC, added that “[t]he FTC has always been committed to protecting consumers and legitimate companies from bad actors in the financial marketplace. Now we have another cop on the beat.” The MOU, however, is not aimed at protecting only consumers. Indeed, as Liebowitz explained, “this agreement ensures that businesses will not be double-teamed by the two agencies.” In general,

the MOU solidifies the desire of the agencies to coordinate their efforts while not stepping on each other’s toes.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) was enacted in 2010 in response to the financial collapse of 2008–2009. Specifically, the Dodd-Frank Act was implemented to “promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘too big to fail,’ to protect the American taxpayer by ending bailouts, [and] to protect consumers from abusive financial services practices.” The CFPB was formed under the Dodd-Frank Act, and it has enforcement as well as supervisory and rulemaking authority over non-bank entities offering consumer financial products and services, such as entities that extend credit and servicing loans, provide real estate settlement services, and engage



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in deposit-taking activities. Pointedly, the Dodd-Frank Act created clear jurisdictional boundaries between the CFPB and regulatory agencies with the authority to enforce consumer financial laws governing banks and depository institutions. The FTC's oversight of both financial and non-financial institutions, however, was left untouched. Because the FTC retains the authority to commence enforcement actions over the same non-bank entities as the CFPB, both the CFPB and the FTC could theoretically initiate investigations and enforcement actions against the same entity over the same illegal act. For that reason, the Dodd-Frank Act mandates that the CFPB and the FTC work together to coordinate their enforcement activities and to promote consistent regulatory treatment of non-bank consumer financial products and services, thereby providing regulated entities with more stability and consistency.

Both the CFPB and the FTC share responsibilities for protecting consumers as they shop for consumer financial products and services. Specifically, the CFPB has the task of implementing and enforcing federal consumer financial law to ensure that all consumers have access to consumer financial products and services markets and that those markets are fair, transparent, and competitive. The CFPB's authority is generally limited to any individual, partnership, corporation, or other entity that offers or provides consumer financial products or services. Similarly, the FTC has the task of preventing anticompetitive, deceptive, and unfair business practices in the financial marketplace. The FTC's primary focus in the financial marketplace is pursuing enforcement actions against those who violate statutes and regulations—primarily non-depository institutions. Additionally, the FTC conducts research and policy development related to the financial services that are encompassed by these statutes and regulations. The FTC also provides educational materials that are intended to promote compliance with laws and to help consumers protect themselves from non-compliant businesses.

The MOU memorializes the CFPB's and the FTC's coordination of efforts to "protect consumers, prevent duplication efforts, provide consistency, and ensure a vibrant mar-

ketplace for Consumer Financial Products or Services." Indeed, the several stated purposes of the MOU include protecting consumers from harmful acts while preventing the duplication of efforts and unnecessary burdens on businesses; formulating policy to assist consumers; coordinating law enforcement efforts; avoiding duplication and conflict of rulemaking; consulting one another prior to rulemaking; sharing consumer complaint information and ensuring the routing of complaints to the appropriate agency; ensuring military service members are properly educated; and providing access to certain reports upon reasonable assurances of confidentiality. Specifically, the MOU specifies that the agencies must cooperate, consult, and share information in the following eight areas of authority: (1) law enforcement; (2) rulemaking and guidelines; (3) supervision and examination; (4) coordination in operational planning; (5) consumer complaints; (6) consumer education; (7) research; and (8) information sharing and confidentiality.

Law Enforcement

"We aim to coordinate our efforts to protect consumers from illegal practices while avoiding unnecessary burdens on business. To that end, we let each other know about companies we're planning to investigate and do our best to use resources efficiently. We also share lists of entities subject to orders or judgments."

Lesley Fair, *Peace, love, and understanding*, FTC Business Blog, (Mar.12, 2015), <https://www.ftc.gov/news-events/blogs/business-blog>.

In the most robust section of the agreement, the MOU specifies that the agencies are to coordinate their law enforcement activities regarding persons or entities covered by the MOU (covered person) and to confer at least quarterly to discuss how to coordinate future law enforcement activities. The two agencies are even urged to conduct joint investigations in appropriate situations so as to minimize duplication of efforts and burdens on covered persons. Similarly, they are required to coordinate with each other regarding court actions and administrative proceedings. In addi-

tion, they are urged to share resources and law enforcement materials, and conduct joint training.

To ensure effective and efficient coordination and cooperation efforts, each agency is required to notify the other when an investigation is commenced against a covered person. Even before an investigation is commenced, however, the agency commencing the action is required to take steps to ensure that the other agency has not already commenced an investigation, filed an action, or obtained a judgment against the same covered person. To assist this process, each agency provided to the other a list of binding orders and judgments obtained within 60 days of the execution of the MOU. Further, when an agency decides to investigate a covered person, that agency must notify the other at least five business days before commencing that investigation. The agencies are then required to consult with each other to avoid duplicative and inefficient law enforcement.

Similarly, each agency is required to provide sufficient notice to the other agency before an action or proceeding is instituted against a covered person. Further, if the agency commencing the action plans to seek a finding of contempt, a restraining order, or other equitable relief, notice must be provided to the other agency 10 days before filing, if possible. If that is not possible, then three days is acceptable. Similar notice is also required if an agency has settled an action or proceeding with a covered person. The settling agency is required to provide to the other agency such notice no later than 10 days before filing a settlement agreement or similar document with the court or administrative tribunal. Additionally, if either agency learns that a state intends to commence an action against a covered person, the agency must inform the other agency.

In addition, the MOU provides that either agency is permitted to intervene in any court proceeding against a covered person when it shares jurisdiction over that covered person, and both agencies must coordinate regarding such actions and administrative proceedings. On top of protecting consumers, another important goal in coordination of law enforcement efforts is to minimize duplicative or



unnecessarily burdensome actions against covered persons.

Rulemaking and Guidelines

“We keep the lines of communication open about planned or ongoing rulemakings and industry guidance.”

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The “Rulemaking and Guidelines” section of the MOU is similarly substantial, but it is less about coordination and cooperation than about consultation and communication. Indeed, both agencies are required to consult with the other regarding rulemaking. The CFPB is required to consult with the FTC regarding rulemaking under consumer financial laws covering the conduct of covered persons. Similarly, the FTC is required to consult with the CFPB regarding rulemaking under the Telemarketing and Consumer Fraud and Abuse Prevention Act covering the conduct of covered persons.

Moreover, in the event that the CFPB or the FTC chooses to publish an advanced notice of proposed rulemaking (ANPR) under the Omnibus Appropriations Act, the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, or the Telemarketing and Consumer Fraud Abuse Prevention Act, the agency doing so must notify the other agency no later than 30 days before the publication of the ANPR or as soon as practicable. Further, each agency is required to consult with and notify the other in the event that it intends to issue proposed or final rules. And the agencies are required to confer periodically to discuss initiatives regarding agency advisory opinions, agency guides, and comprehensive guidance documents or commentaries.

Generally, the agencies also are required to consult on various rulemaking and advisory procedures and documents, specifically with respect to practices that are treated as unfair, deceptive, or abusive under the Dodd-Frank Act, the FTC Act, the Omnibus Appropriations Act, the Fair Debt Collection Practices Act, and the Fair Credit Reporting Act. Thus, if either agency intends to issue a proposed or final rule under either the Dodd-Frank Act or the FTC Act, it is required to provide sufficient notice as early as practicable. And, if an agency is publishing an ANPR, the publishing agency must provide sufficient notice to the other agency

no later than 60 days before publication of the ANPR. With respect to proposed or final rules and any comments filed in response to an ANPR, the agencies are required to consult promptly. Likewise, the agencies are required to consult promptly regarding agency advisory opinions, agency guides, comprehensive guidance documents, and comprehensive commentaries by either agency that address any of the unfair, deceptive, or abusive acts prohibited by the above federal statutes. And no later than 30 days before the issuance of any proposed or final opinion, guide, or commentary, the issuing agency is required to provide sufficient notice.

Supervision and Examination

Although the “Law Enforcement” and “Rulemaking and Guidelines” sections require cooperation and consultation, the “Supervision and Examination” section primarily requires sharing. First, this section of the MOU calls for the agencies to meet at least quarterly to discuss the CFPB’s plans to examine covered persons, the results of such examinations, and coordination and cooperation of future activities in light of the results. The CFPB is also required to share with the FTC notice of any significant changes to any examination plans as soon as possible. And, within two days of a request by the FTC, the CFPB is required to share information regarding the anticipated start date of any planned examinations.

In conjunction with these quarterly meetings, the CFPB also has agreed to share with the FTC information that the CFPB obtains during the course of any supervision or examination process of any covered person. Specifically, upon written request by the FTC, the CFPB is required to share any examination reports (and any revisions of them) of covered persons subject to FTC jurisdiction. Similarly, upon written request by the FTC, the CFPB is required to share any information collected by the CFPB through its supervision of a covered person subject to FTC jurisdiction, unless it has good cause to withhold such information.

Coordination in Operational Planning

“We talk over big-picture matters at least twice a year. The kind of things we discuss: emerging issues consumers face

in the financial marketplace, the remedies we use, and task forces or working groups we participate in.”

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Cooperation between the agencies and coordination on projects will help to avoid duplication of efforts and placing unnecessary burdens on covered persons. To nurture and facilitate this teamwork, the agencies are required to meet to discuss the following: (1) important problems facing consumers searching for consumer financial products; (2) the status of all coordination efforts, including rulemaking, guidance, law enforcement, and other activities undertaken by an agency with respect to a covered person; (3) any other significant initiatives undertaken by an agency or planned to be undertaken involving a covered person; (4) joint task forces or working groups established by the agencies or other entities and their activities regarding covered persons; and (5) remedies that the agencies have obtained or intend to seek in actions and proceedings against covered persons and whether such remedies have been effective and consistent.

Consumer Complaints

“We share consumer complaints about financial products and services. CFPB’s participation in the FTC-administered Consumer Sentinel Network is an important part of that. We also work together to make sure consumers with a concern get routed to the right agency.”

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Not unlike the preceding sections, the “Consumer Complaints” section requires the agencies to cooperate in the “receipt, handling, maintenance, monitoring, routing and reporting” of consumer complaints about consumer financial products or services. The CFPB, in particular, agrees to share consumer complaint information that it receives with the FTC via the Consumer Sentinel Network. Likewise, the FTC agrees to make available to the CFPB all consumer complaints that it receives via the Consumer Sentinel Network. The Consumer Sentinel Network is an investigative cyber tool managed by the FTC that provides its members with access to consumer complaints about various illegal

acts, including identify theft, Do-Not-Call Registry violations, telemarketing scams, advance-fee loans and credit card scams, and business opportunities and work-at-home schemes. The Consumer Sentinel Network also houses complaints regarding computers, the Internet, and online auctions; immigration services; sweepstakes, lotteries, and prizes; health and weight loss products; and debt collection, credit reports, and financial matters. Similar to the MOU, the Consumer Sentinel Network was formed so that law enforcement can be more effective and less duplicative. Notably, even if one of the agencies decides not to initiate an investigation or enforcement proceedings in response to a consumer complaint, the other agency could do so.

In addition to the mutual sharing of consumer complaints, the agencies are required to develop guidelines to assist consumers in determining the proper agency to which they should submit complaints. To that end, the agencies also are required to develop procedures to direct consumer complaints to the agency in the best position to assist a particular consumer. To the extent that the agencies develop procedures to respond to individual consumer complaints, they are required to consult with each other to ensure that future law enforcement efforts are not compromised by such responses. When shared consumer complaint information provides the basis for reports to Congress, each agency is required to provide copies of their respective sections of the report to the other agency in advance of publication so that the other agency can provide feedback.

Consumer Education

“We talk at least quarterly about what we’re doing to educate consumers, including the special financial issues facing military families and older Americans.”

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As with other sections of the MOU, the “Consumer Education” section specifies that the agencies are to meet quarterly to keep one another informed about current and upcoming activities, to identify opportunities for greater distribution of consumer education materials, and to ensure the consistency of information found in consumer education materials. To min-

imize waste, this quarterly meeting can be held at the same time the quarterly law enforcement meeting is held.

Although the agencies, generally, seek to protect all consumers, they appear to place a greater emphasis on protecting service members and older Americans. Accordingly, during their quarterly meetings, the agencies are encouraged to consider outreach, education, and other initiatives to enable older Americans and military service members and their families to make well-informed decisions regarding consumer financial products.

Research

“We meet periodically to discuss ongoing research and share the results before any public announcement.”

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In keeping with the spirit of the MOU, particularly promoting coordination and avoiding duplication, the agencies are required to meet periodically to discuss projected and current research projects and other agency research activities. If an agency initiates a research project regarding a covered person, that agency is required to notify the other agency within 30 days. In addition, an agency planning on releasing to the public the results of a research project must, again, notify the other agency no later than 30 days before the release of those results.

Information Sharing and Confidentiality

“We follow set procedures to maintain the confidentiality of nonpublic information and appropriately address third-party requests for information.”

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The agencies’ efforts to protect nonpublic and confidential information is designed to prevent third parties from sidestepping one agency and requesting such information directly from the other. Accordingly, all information shared between the agencies is to be used for only official regulatory, supervisory, or law enforcement purposes. It is inevitable that nonpublic or confidential information will be shared between the agencies in accordance with the MOU. Thus, all nonpublic information shared between the agencies will remain

the property of the sharing agency, unless that agency states otherwise in writing. Further, the agencies are required to take all reasonably necessary steps to “preserve, protect, and maintain all privileges and claims of confidentiality related to all nonpublic information provided pursuant to this MOU.” The MOU does not waive any of these privileges or claims of confidentiality.

If a third party requests nonpublic information through a subpoena or a request made under the Freedom of Information Act, for example, the agency receiving the request is required to inform the other agency if the information sought is, in fact, the property of the other agency. Specifically, if the request is made under the Freedom of Information Act or the Privacy Act, the receiving agency is permitted to simply forward the request to the other agency so that the other agency can communicate directly with the requester.

Importantly, the MOU does not preclude or otherwise modify compliance with a legally binding and enforceable order of a court of the United States, an official mandatory request from the United States Congress or any one of its committees, any existing statutory or regulatory laws regarding nonpublic information.

Conclusion

Generally, the MOU is a manifestation of the good intentions of both the CFPB and the FTC and their willingness to cooperate with each other to minimize duplication of law enforcement and regulatory efforts as well as the burdens these may place on covered persons. And, because the MOU was reauthorized for another three-year term with only minor adjustments, it is apparent that the agreement between the CFPB and the FTC is thriving. With regard to the individuals and entities regulated by both agencies, the MOU provides more consistency and stability, and it eliminates the possibility that a covered person would face two different enforcement actions or investigations. On the other hand, however, the MOU exposes such individuals or entities to a greater risk of becoming the subject of an investigation or an enforcement action. More specifically, even if one of the entities declines to respond to a particular consumer complaint, the other entity will be notified of the complaint and have an opportunity to do so. 