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Enforcement

FTC and CFPB Sign MOU to Pledge Coordination for Protection of Consumers

The newly minted Consumer Financial Protection Bureau and the Federal Trade Commission on Jan. 20 signed a memorandum of understanding to promote effective cooperation in their dual roles of protecting consumers, the FTC announced in a Jan. 23 statement.

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, which created the Consumer Financial Protection Bureau (CFPB), the two agencies are obligated to “prevent duplication of efforts, provide consistency, and ensure a vibrant marketplace for Consumer Financial Products or Services,” according to the memorandum of understanding (MOU).

FTC Chairman Jon Leibowitz remarked that the commission “has always been committed to protecting consumers and legitimate companies from bad actors in the financial marketplace.” He quipped: “Now, we have another cop on the beat, and this agreement ensures that businesses will not be double-teamed by the two agencies.”

Richard Cordray, Director of the CFPB, noted that entering into the MOU with the FTC “is important to making sure markets for consumer financial products are getting efficient and effective federal government oversight.” Furthermore, both agencies are “motivated by the same thing: to do right by consumers. We look forward to this partnership.”

MOU. The MOU describes the CFPB as:

an independent agency with the authority to implement and enforce Federal consumer financial law for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that the markets for consumer financial products and services are fair, transparent, and competitive.

The provisions of the MOU require the FTC and CFPB to coordinate law enforcement activities, potential court actions, and administrative proceedings—thereby minimizing duplication, maximizing efficiencies and resources, and eliminating redundancies.

Prior to commencing an investigation where both agencies would have jurisdiction, the MOU requires each agency to determine whether the other agency has:

- investigated or is investigating the target of the investigation, also referred to as an MOU Covered Per-

son, for violations in connection with offering or providing Consumer Financial Products or Services;

- filed a court action or administrative proceeding against that MOU Covered Person alleging violations of an MOU Consumer Financial Law in connection with offering or providing Consumer Financial Products or Services; or

- obtained an order or judgment against that MOU Covered Person in a court action or administrative proceeding based on violations or alleged violations of an MOU Consumer Financial Law in connection with offering or providing Consumer Financial Products or Services.

The MOU also includes provisions regarding consultation on rulemakings and guidelines concerning the prohibition on unfair, deceptive, and abusive acts or practices as well as cooperation on consumer education efforts to promote consistency of messages and maximum use of resources. The MOU is designed “to create a strong and comprehensive framework” to achieve their newly shared goals.

The agencies indicated that they look forward to receiving feedback on the agreement from consumers, industry, and other members of the public and are committed to finding ways to further strengthen their coordination efforts.

The commission’s vote approving the MOU with the CFPB was 4-0.

Reactions. Robert M. Langer, of the Hartford, Conn., office of Wiggin & Dana LLP, told Bloomberg BNA that both agencies should be commended for producing the MOU.

Langer, who formerly directed consumer protection and antitrust enforcement for the Connecticut attorney general’s office, explained that the FTC/CFPB MOU satisfies the statutory directive for them “to coordinate their activities to avoid duplication of effort”

The MOU, he asserted, “is an important document in that it signals to the business community and the public at large that the agencies have begun to carry out the mandate of Dodd-Frank.”

Barry J. Cutler, of the Washington, D.C., office of Baker & Hostetler LLP, observed that the terms of the MOU “are not as important as how it will work out in actual practice.”

Cutler, who served as Director of the FTC’s Bureau of Consumer Protection from 1990 to 1993, pointed out that it’s hard to predict the likelihood of success with this MOU because of several key differences from other longstanding agreements.

The MOU between the FTC and Food and Drug Administration, he added, divides “administrative convenience responsibilities for which both agencies have statutory jurisdiction—for example, ads and labels for OTC drugs versus prescription drugs. Although he acknowledged that the FTC and the CFPB enjoy no such division in the new MOU, Cutler cited “a remarkable sharing of information about studies, rules, and law enforcement—in many cases, before they become public.”

Cutler cautioned that, in Washington, D.C., a city legendary for “leaks” of government documents, there will be a lot of “sensitive financial and law enforcement information shared between both agencies, neither of which will likely be able to withhold it from Congress.” In light of agency oversight conducted by different standing committees, the agencies may experience tag-team efforts by congressional staffs to achieve “back-door access” to the FTC’s work on CFPB projects or the CFPB’s work on FTC projects, he warned.

The informal relationships developed between agency staffers and legislators is another complicating

factor, Cutler posited. In contrast to hostile relations between Capitol Hill and the FTC in the 1970s, the FTC for more than two decades has experienced “seamless transitions” and enjoyed “good relations with the Hill.” By comparison, he pointed out, the FCPB has been operating under a “standing 8-count” from the Congress since before an agency head could even be appointed.

Finally, Cutler cited the migration of “many very talented FTC staffers . . . to the FCPB in the last year or so.” He predicted that the influx of veteran FTC staffers “should ensure good relations as well as a close-up view of how a mature agency like the FTC handles all aspects of its work—political, administrative, enforcement.”

BY CECELIA M. ASSAM

The memorandum of understanding between the FTC and the CFPB is available at <http://www.ftc.gov/os/2012/01/120123ftc-cfpb-mou.pdf> — on the FTC’s website.