

"Stuffed" by Federal Regulation? 2017 May Not Bring the Relief Imagined

February 28, 2017 | Allen H. Denson & Lucy E. Morris

Anyone recovering from the holidays knows that sometimes there can be too much of a good thing. The Dodd-Frank Act leaves room for businesses to be "overserved" by their federal regulators, for example by allowing for overlapping jurisdiction between the Federal Trade Commission and the Consumer Financial Protection Bureau. In particular, the FTC and CFPB have joint authority over non-bank lenders, buy-here-pay-here dealers, and other consumer finance companies. Where this overlap exists, there is a possibility that these lenders and dealers could face *both* CFPB and FTC scrutiny. For anyone familiar with government investigations, responding to one agency alone can be a tall order. Responding to dual investigations can be a herculean effort.

But both agencies have finite resources. The FTC and CFPB therefore entered into a Memorandum of Understanding (MOU) to prevent the exact type of "double-teaming" described above. This benefits the agencies, by conserving resources, and it benefits lenders and dealers by avoiding duplicative federal investigations.

To accomplish this goal, the MOU requires certain types of coordination between the CFPB and FTC, which occurs in several ways. The agencies must provide notice to each other prior to initiating an investigation or filing a lawsuit or administrative complaint. Absent unusual circumstances, neither agency will initiate an investigation or file a lawsuit while the companion agency has an overlapping open investigation or lawsuit.

The CFPB and FTC's coordination efforts do not always live up to the lofty goals of the MOU; we have seen some clients receive civil investigative demands (CIDs) from both agencies at the same time. However, as a general rule, businesses who fall into the CFPB and FTC's joint areas of jurisdiction will not face investigations, enforcement actions, or litigation from both agencies at the same time (the MOU allows for joint investigations and permits both agencies to intervene in the others' actions).

Practically, coordination outlined in the MOU has led to a "me-first" approach rather than a "me-too" approach at both agencies. In a competition among regulators with overlapping jurisdiction, it has typically been the CFPB that has led the way in opening investigations, as it has attempted to establish the new agency as a tough regulator.

The recent election results may shift the balance of power between the FTC and the CFPB. We have heard many calls for transitioning the leadership at the CFPB from

Director Cordray to a more industry-friendly head, or transitioning to a commission-style structure, as is currently in place at the FTC. If such a change occurs, we expect to see the FTC assert itself in an attempt to recapture some of the regulatory "turf" many perceive it to have lost during recent years, such as in mortgage lending, servicing, fair lending, debt collection, and consumer privacy. The FTC is an experienced and proud agency that has been around for over 100 years. We can expect that it will continue to use its enforcement authority to protect consumers regardless of the political climate.

As a reminder, the FTC has authority to order restitution, disgorgement, or other equitable relief for unfair or deceptive practices-just like the CFPB minus its authority over "abusive" practices-and it may assess penalties for violations of FTC orders and rules. Thus, any FTC investigation can come with substantial consequences for perceived law violators. The FTC also has the same investigative tools as the CFPB, such as Civil Investigative Demands (CIDs).

Although the political climate has changed, now is not the time to stop focusing on compliance. A weakened CFPB could mean an empowered FTC. Ultimately, the enforcement staff at each agency will continue to do their jobs: investigate and bring cases against perceived law violators. So now is the time to remain vigilant and ensure that your compliance management system is in good order. Your primary lines of defense will continue to be: sound policies and procedures that the business actually follows and implements; careful attention to consumer complaints from all sources and providing remediation where necessary, and carefully scrutinized contracts, advertisements, and other points of consumer contact.

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