



CENTER FOR CAPITAL MARKETS

C O M P E T I T I V E N E S S

DAVID T. HIRSCHMANN
PRESIDENT

1615 H STREET, NW
WASHINGTON, DC 20062-2000
(202) 463-5609 | (202) 463-3129 FAX

June 16, 2011

The Honorable Timothy Geithner
Secretary
United States Department of Treasury
1500 Pennsylvania Avenue, NW
Room 3330
Washington, DC 20220

The Honorable Jonathan Leibowitz
Chairman
The Commission
The Federal Trade Commission
600 Pennsylvania Avenue, NW
Room 338
Washington, DC 20580

Dear Secretary Geithner and Chairman Leibowitz:

We are pleased to submit these comments on behalf of the U.S. Chamber of Commerce's Center for Capital Markets Competitiveness ("CCMC"). The U.S. Chamber of Commerce (the "Chamber") is the world's largest business federation, representing the interests of more than three millions companies of every size, sector, and region. The Chamber created CCMC to promote a modern and effective regulatory structure for capital markets to drive economic growth and job creation. Effective consumer protection, including improved disclose and tough, fair enforcement against fraudulent actors are an integral part of well functioning capital markets.

Because Title X of the Dodd-Frank Act confers substantially overlapping enforcement authority upon the Consumer Financial Protection Bureau ("the Bureau" or "CFPB") and the Federal Trade Commission (the "Commission" or "FTC"), a large number of the Chamber's members—including numerous businesses outside the financial services sector—will be affected by how the two agencies coordinate their enforcement activities.

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The Chamber urges the CFPB and the FTC to accelerate their efforts to formalize a coordination plan through a memorandum of understanding (“MOU”), so as to avoid duplication, maximize enforcement resources, and provide clarity to both companies and consumers.

Since passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), CCMC has appreciated the opportunity to meet with implementation team members from the CFPB and the FTC. Most recently, Richard Cordray and David Vladeck joined the Chamber for an open meeting with other non-financial trade associations. We appreciated their candor and discussion, as they explained how the two agencies plan to work together with regards to enforcement. We were also encouraged when they solicited our feedback and input for the drafting of the MOU coordinating the exercise of this enforcement authority.

Following up to our various conversation, we are writing to urge the Bureau and the Commission to employ a transparent process, including an opportunity for public comment, in adopting the memorandum of understanding coordinating the exercise of this enforcement authority. We also urge the agencies to allocate enforcement authority based on their respective areas of principal focus, so that enforcement actions are grounded in expertise, duplication is minimized and precious taxpayer dollars used most efficiently, and legitimate businesses that want to comply with the law are able to obtain authoritative compliance guidance without undertaking a burdensome effort involving consultations with multiple federal agencies.

To begin with, it is clear that a very large number of businesses in all sectors of the economy are subject to the enforcement jurisdiction of both agencies. The Commission’s authority extends to businesses generally, with the exception of specifically exempted entities such as banks, savings and loans, and credit unions (FTC Act § 45(a)(2)). The Bureau’s authority encompasses businesses falling with the very broad statutory definitions of “covered persons” and “service providers” (Dodd-Frank Act § 1002(6) & (26))—which are not limited to the businesses engaged principally in the provision of financial services, but rather include any entity that engages in specified activities, or provides services to those that engage in those activities, even if their principal business has nothing to do with financial services.

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Other than federally regulated depository institutions, every business subject to the jurisdiction of the Bureau is also subject to the authority of the FTC.

Moreover, the two agencies' enforcement authority is virtually identical. In particular,

- The Bureau has the power to enforce the Dodd-Frank Act's general prohibition of unfair, abusive, or deceptive practices with respect to covered persons and service providers (Section 1031(a), 1036 & 1053-54); the FTC retains its power to enforce the FTC Act's general prohibition of unfair and deceptive practices with respect to all covered persons and service providers other than depository institutions and the other businesses specifically excluded from the Commission's jurisdiction (FTC Act § 45; Dodd-Frank Act § 1061(b)(5)(C)(i)).
- Both the Bureau and the FTC have the power to enforce the Bureau's regulations with respect to entities within their respective jurisdictions (Dodd-Frank Act §§ 1053-54 & 1061(b)(5)(C)(ii)).
- Both the FTC and the Bureau have the power to enforce the FTC's regulations with respect to entities within their jurisdiction (FTC Act § 45; Dodd-Frank Act § 1061(b)(5)(B)(ii)).
- Both the Bureau and the FTC have the power to enforce a variety of other federal consumer protection laws (Dodd-Frank Act §§ 1053-54, 1061(b)(5)(C)(i)¹).

Prior to the enactment of Dodd-Frank, the FTC vigorously exercised its authority in the financial services area: the Commission's FY2011 budget justification emphasized its "focus on protecting consumers of financial services, especially consumers in financial distress, stepping-up efforts to address prohibited practices in the financial services marketplace."² Dodd-Frank then *expanded* the Commission's

¹ See also Dodd-Frank Act §§ 1084(5)(C), 1085(4)(B), 1088(a)(10)(A), 1089(3)(A), 1090(2)(D), 1093(4), 1097, 1100A(8)(B), 1100C.

² FTC, *Fiscal Year 2011 Congressional Budget Justification Summary* at 2.

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enforcement authority in this area. The likelihood of overlapping and duplicative activities by the Commission and the Bureau is therefore very substantial.

Indeed, Congress recognized this risk. Section 1024(c)(3)(A) of the Dodd-Frank Wall Street Reform and Consumer Protection Act specifically requires the Bureau of Consumer Financial Protection and the Federal Trade Commission to “negotiate an agreement for coordinating with respect to enforcement actions by each agency” with respect to specified covered persons and service providers.

Although the statute sets a deadline of six months from the designated transfer date for the negotiation of this FTC-Bureau agreement, the Chamber urges you to adopt an agreement as soon as possible. An expedited agreement is the best way to ensure that precious taxpayer funds will not be wasted on duplicative actions and to inform legitimate businesses seeking guidance which agency to turn to in order to obtain clarification of the often-vague provisions of the Dodd-Frank Act and other federal consumer protection laws and regulations.

With respect to process, we suggest that the agencies begin by soliciting public comment regarding the contents of the agreement, then publish for comment a proposed agreement, and finalize the agreement based on the comments received on the agencies’ proposal. On January 20, 2011, in public comments at the Chamber of Commerce, Chairman Leibowitz agreed that it would be appropriate to provide an opportunity for public comment prior to finalization of the agreement between the two agencies. Other agencies have employed this commendably transparent approach in implementing provisions of the Dodd-Frank Act, providing an initial opportunity for broad comment and then a second opportunity for more focused comment on an agency proposal.³ The Bureau and the Commission should not adopt a less transparent process with respect to this important issue.

³ SEC Chairman Schapiro Announces Open Process for Regulatory Reform Rulemaking (press release, July 27, 2010), available at <http://www.sec.gov/news/press/2010/2010-135.htm>; CFTC and SEC Issue Joint Advance Notice of Proposed Rulemaking and Request for Comment Regarding Definitions and the Regulation of Mixed Swaps as Part of Dodd-Frank Act Rulemaking (Aug. 13, 2010), available at <http://www.cftc.gov/PressRoom/PressReleases/pr5871-10.html>.

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As to the substance of the agreement, we believe strongly that the best way to prevent duplication and maximize the efficient and effective use of taxpayer funds is to allocate enforcement responsibility based on the nature of the business involved. The Bureau should be responsible for enforcement activity with respect to entities whose primary business involves the provision of financial services to consumers—depository institutions, and other entities whose principal business is to provide consumer credit. The Commission should be responsible for all other categories of businesses—the “Main Street” businesses that are included within the definition of “covered person” or “service provider” because they provide a consumer financial product or service as an adjunct to their principal, non-financial business, or because they are service providers to financial services companies. This approach will have four important benefits.

First, it builds upon the agencies’ respective expertise. The Bureau’s overall focus necessarily will be on financial services businesses—those are the businesses that provide the lion’s share of consumer financial products and services, even under the broad statutory definition of that term. Indeed, the Bureau will exercise examination authority with respect to many such entities. The Commission, on the other hand, has deep experience overseeing Main Street businesses operating in the other sectors of the economy. Giving the FTC responsibility in this area means that it will be able to continue to utilize its expertise and avoids the need for the Bureau to develop expertise with respect to both financial services businesses and Main Street businesses.

In addition, the Commission will continue to exercise enforcement authority with respect to the activities of Main Street businesses that do not fall under the Dodd-Frank Act. Failing to allocate to the FTC the Dodd-Frank enforcement responsibility with respect to these businesses will create a strong likelihood of time-consuming consultations (possibly occurring well after an investigation has begun) and, possibly, duplicative enforcement actions if the Bureau decides to take control of the Dodd-Frank aspects of the matter and leave the Commission to proceed with respect to other issues.

Second, the division of authority we suggest is consistent with the rationale for creation of the Bureau. The Bureau’s proponents argued that it was needed for two

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basic reasons: that the federal bank supervisory agencies had not sufficiently enforced consumer protection requirements with respect to entities within their jurisdiction and that both federal and state consumer protection laws were not enforced sufficiently with respect to non-bank providers of consumer credit. No one asserted that a lack of attention to non-financial Main Street businesses was part of the problem.

Focusing the Bureau's enforcement activities on financial services businesses will further Congress's goal by directing the Bureau's resources toward the issue that led to its creation. And there can be no federal "enforcement gap" because the FTC has full authority to enforce the law with respect to other types of businesses.

Third, this division of authority will promote compliance with federal consumer laws and regulations. Legitimate businesses want to act in accordance with the law. Often, however, it is difficult for them to determine what the law requires in a particular context. Consumer laws are often broad and general—embodying a principle rather than providing detailed "rules of the road" for specific situations. Consultation with the entity with enforcement responsibility is often required. Businesses frequently consult with the FTC staff, for example, with respect to the requirements imposed in a particular context by the FTC Act's prohibition of unfair and deceptive practices.

If enforcement responsibility is allocated based on the nature of the business involved, legitimate businesses will know where to go to obtain this essential advice. Otherwise, they will have to approach both federal agencies—making it more expensive, more time-consuming, and more confusing to obtain compliance information.

Fourth, it would be sensible to adopt an allocation of enforcement authority that would enable consumers to determine which agency to approach when they have a problem—the suggested approach will provide an understandable division of responsibility that would foster that result. The alternative is that consumers will randomly choose to bring the concerns to the Bureau or the Commission, just the opposite of what is required to analyze trends, identify bad actors, and ensure that resources are not wasted on duplicative preliminary investigations.

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During her comments on April 11, 2011 at the recent conference on Dodd-Frank held by the National Association of Attorneys General, Elizabeth Warren seemed to indicate that the Bureau and the Commission are considering an ad hoc approach to allocating enforcement responsibility on a case-by-case basis. That approach inevitably will produce waste and confusion: costly creation of duplicative expertise in the two agencies; imposition of unnecessary duplicative costs on legitimate businesses seeking to comply with the law; and uncertainty for consumers.

Moreover, there is no countervailing benefit from an ad hoc approach. We recognize that the implementation of a new statute necessarily engenders uncertainty. But the agencies' initial memorandum of understanding need not be graven in stone. It can and should be subject to annual review (including an annual opportunity for comment by the public) and, if appropriate, revision. Any initial agreement that the agencies adopt can thus be amended to address deficiencies that are identified. And the initial agreement could even establish only a presumptive allocation of enforcement authority, permitting the agencies to agree upon a different assignment when appropriate in particular cases. We understand that it is difficult for any government agency to agree that it will not exercise authority that it possesses, but in this situation, where Congress recognized the duplication and directed the agencies to adopt an agreement addressing it, an unwillingness to defer to one another—even on a presumptive basis—is unjustified and, in today's era of greatly constrained government resources, an irresponsible use of valuable taxpayer funds.

FTC Commissioner Brill, also speaking at the National Association of Attorneys General conference referenced above, seemed to indicate that an ad hoc approach was appropriate because Congress indicated in Dodd-Frank a preference for overlapping authority in order to avoid the perceived enforcement failures of the past. However, by specifically requiring an MOU with respect to enforcement, Congress recognized the need for coordination between the Bureau and the Commission in Dodd-Frank. And, as just discussed, an agreement regarding the presumptive allocation of responsibility need not prevent one agency or another from acting in a particular case and could be revoked by either party if it were found to adversely affect consumer protection.

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The Chamber strongly believes that there simply is no basis for the view that only an ad hoc process can ensure that consumers are protected. Rather, as discussed above, the division of authority we suggest will avoid waste, help legitimate businesses comply with the law, and fully protect consumers. That approach should be the basis of the MOU adopted by the agencies.

We are pleased to have the opportunity to submit these comments look forward to the opportunity to provide additional ideas on the MOU and other issues during the public comment process. We thank you for your consideration and would be happy to discuss these issues and other Dodd-Frank implementation issues further with you and your staff.

Sincerely,

A handwritten signature in black ink that reads "David Hirschmann". The signature is written in a cursive, slightly slanted style.

David T. Hirschmann
President and CEO
Center for Capital Markets Competitiveness

Cc: The Honorable Richard Cordray
David Vladeck, Esq.
The Honorable Elizabeth Warren