

FTC and CFTC to Share Confidential Information, Increases Investigation Risks

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The U.S. Federal Trade Commission and the U.S. Commodity Futures Trading Commission signed a memorandum of understanding that will facilitate the sharing of non-public information for “official law enforcement purposes,” and increase investigation risks for firms.

On April 12, 2011, the U.S. Federal Trade Commission (FTC) and the U.S. Commodity Futures Trading Commission (CFTC) announced they signed a memorandum of understanding (MOU) that will facilitate sharing of non-public information for “official law enforcement purposes.” The short (two page) MOU outlines the procedure by which the FTC and CFTC may request to exchange non-public information to assist them in enforcing the laws in their respective jurisdictions. During an investigation, the FTC and CFTC gather detailed information from the companies subject to the investigation, which can contain sensitive financial data, trade secrets, business strategy, commodity market evaluations, draft contracts and even personal information. The MOU requires that the agencies “take all actions reasonably necessary to preserve, protect and maintain all privileges and claims of confidentiality” related to the information collected. The MOU highlights some of the FTC’s enforcement priorities and raises strategic considerations for companies that provide confidential information to these agencies.

Enforcement in the Energy Sector is an FTC Priority

The agreement between the agencies provides additional evidence that enforcement in the energy sector is an FTC priority. The FTC indicated that part of its goal in reaching the agreement with the CFTC was to bolster the FTC’s ability to investigate and prosecute market manipulation—specifically market manipulation in the petroleum industry (16 C.F.R. §317).

Increased Coordination Among Agencies Creates Additional Considerations for Firms Producing Information to Either Agency

The interagency agreement continues a pattern of increased coordination between the FTC or U.S. Department of Justice (DOJ) and other regulatory agencies. For example, in 2010 the DOJ and U.S. Department of Agriculture (USDA) held a series of workshops to discuss competition in the agriculture industry in which the DOJ, among other things, provided input regarding rulemaking under the Packers and Stockyards Act. Similarly, in March 2011, the U.S. Federal Energy Regulatory Commission (FERC) issued a notice of inquiry seeking comments on whether it should revise its analysis of horizontal market power under the Federal Power Act to reflect the horizontal merger guidelines released last year by the FTC and DOJ.

The sharing by the FTC and CFTC creates additional considerations for a company under review and submitting materials to either agency. A party to a CFTC investigation may not be focused on the possible antitrust issues lurking in the documents submitted to that agency given the nature of the CFTC charter, which is not focused on enforcing antitrust laws. However, documents submitted in connection with a CFTC investigation could raise independent antitrust issues if reviewed by an antitrust regulator at the FTC. As parties review documents for submission to the CFTC, companies would be well advised to also take antitrust considerations into account as part of that review. The same would hold true for productions to the FTC as part of a proceeding such as a Hart-Scott-Rodino Act "Second Request." Even though the Second Request would focus on competition issues, it would involve production of broad ranging information, some of which could be relevant to a CFTC investigation. Now, there is a clearer path for agency information sharing.

Prerequisites for Agency Information Sharing

The agreement does not explicitly discuss the FTC's or CFTC's authority to disseminate confidential information. The MOU requires the agencies to "take all actions reasonably necessary" to preserve the confidentiality of a company's non-public information, but it does not specify any prerequisites for sharing the information between the agencies, such as a written request or assurance that the information will be used for a current investigation. The U.S. Internal Revenue Code and implementing rules of the agencies govern the extent to which an agency can release non-public information. Section 21 of

the FTC Act (51 U.S.C. §57b) permits the FTC to deliver copies of non-public information to other federal law enforcement agencies “for use in connection with an investigation or proceeding under the jurisdiction” of that agency. Under this section, disclosure is permitted only upon written request from the requesting agency. The implementing rules for the Commodity Exchange Act are broader and allow disclosure of nonpublic material gathered during the course of an investigation whenever the CFTC “directs or authorizes the public disclosure of the investigation” (17 C.F.R. §11.3); no written request is required.

No Additional Rights or Remedies to Limit Information Sharing

The MOU specifically states it does not give a third party (in other words, a company whose confidential information is being shared) any right to challenge a request made pursuant to the MOU. The memo also does not explicitly provide a remedy for inadvertent disclosure of non-public information. However, the MOU states that nothing in the agreement waives or alters any claim of confidentiality or other protection applicable to information shared pursuant to the MOU. Therefore, a company will need to enforce any rights to confidentiality of its information through the FTC Act or Commodity Exchange Act and implementing rules.

Conclusion

The MOU exemplifies the trend toward increased coordination and information sharing among agencies. As a result, companies must be aware of the potential that their confidential information will be shared with other agencies. Companies producing confidential information to the FTC and CFTC should be familiar with the rules governing those agencies’ ability to disclose confidential information and take steps necessary to ensure that confidentiality is being preserved to the fullest extent allowed. Companies also should consider their productions in light of the potential for that information to be used by both agencies, enforcing different sets of laws and regulations.

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