Our Perspectives:
Commentary on the economy & regulatory policies affecting financial companies

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Information Sharing with the CFPB[*]

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October, 2011

The Federal banking agencies have essentially unfettered access to information and data held by regulated depository institutions. In exchange, these have developed confidentiality policies under which this information is, to a large extent, considered to be confidential and non-public. There are many reasons why these policies have been put in place.

Confidentiality enhances safety and soundness. It permits frank and open exchange of information between regulated institutions and the Federal banking agencies without concern that the disclosure of negative information could result in a run against the bank or savings association. Confidential treatment also assures the regulated companies that important trade and commercial information will not be publicly disclosed. Confidentiality reduces the potential that the public might reach misleading conclusions based on raw data that does not represent the true picture of the institution.

Under the Dodd-Frank Act, the Bureau may have access to confidential reports and data relating to insured depository institutions held by the banking agencies upon reasonable assurances of confidentiality. This has led the Bureau to negotiate Memoranda of Understandings (MOUs) with the agencies governing the Bureau's rights to obtain such data. Currently, the Bureau has entered into agreements with two agencies: the ***FDIC*** and the ***OCC***.

The MOU with the FDIC was initially signed on April 28, 2011, and was originally due to expire on the designated transfer date, July 21, 2011. However, it has since been extended until November 18, 2011. The MOU with the OCC was also due to expire on July 21, 2011, but was extended on that date indefinitely, and will remain in effect until terminated by either party.

[*]The information contained in this newsletter does not constitute legal advice. This newsletter is intended for educational and informational purposes only.

Both MOUs are similar, but with some important differences. Under the MOU with the OCC, examination-related information may only be used by the Bureau for purposes of conducting its supervisory, enforcement or regulatory functions. All non-public information provided by the OCC to the Bureau remains the property of the OCC, and that the Comptroller retains the discretion to determine the information that it will share. Further, unless permitted by the MOU, the Bureau may share non-public information with any outside party without the prior written approval of the OCC. The CFPB agrees to safeguard the information, and limit access to individuals that need the information for their official responsibilities. Information may be shared with consultants and contractors only with the OCC's prior written permission, and only if the consultant or contractor agrees to keep the information confidential. The MOU does not prevent the Bureau from complying with a legally valid subpoena, court order, or other compulsory demand for documents. To the extent permitted by law, the Bureau must notify the OCC of the document demand so that the Comptroller can seek to obtain a protective order. The parties agree sharing of non-public information under the MOU does not constitute a waiver of any privilege that may apply. In the event that the MOU is terminated, any non-public information disclosed under the MOU is to remain confidential and protected.

As noted, the MOU between the Bureau and the FDIC is very similar. However, there are differences. For example, while the OCC document states that non-public information may only be shared outside of the Bureau with the prior written consent of the Comptroller, the FDIC MOU adds that such consent shall "not be unreasonably withheld." Another difference relates to the treatment of information provided prior to the designated transfer date, and whether those documents remain the property of the banking agency or the Bureau.

While the MOUs serve an important role in limiting the disclosure of confidential information that the Bureau obtains from the OCC or the FDIC, these restrictions do not apply to information obtained by the Bureau under its own supervisory or examination authority.

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