April 26, 2018

VIA EMAIL AND U.S. MAIL
Monica Jackson
Office of the Executive Secretary
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

Re: Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes, Docket No. CFPB-2018-0001

Dear Ms. Jackson,

The Financial Services Roundtable,[1] Consumer Bankers Association,[2] and Consumer Mortgage Coalition[3] (collectively, the Associations) appreciate the opportunity to comment on potential changes to the Bureau of Consumer Financial Protection (Bureau or CFPB) Civil Investigative Demands (CID) and associated processes.[4]

INTRODUCTION AND EXECUTIVE SUMMARY

The Associations and their members believe a well-functioning Bureau is critical to maintaining a thriving and stable consumer finance marketplace. Our concerns lie not with the Bureau's mission but with the methods the Bureau has used at times to pursue that mission.

At times, the Bureau has wielded its considerable investigation powers without first considering alternative and more tailored approaches and without sufficient regard for the impact on regulated entities, the long-term impact on the consumer financial marketplace, or the

[1] The Financial Services Roundtable represents the largest banking and payment companies financing the American economy. Member companies participate through the Chief Executive Officer (CEO) and other senior executives nominated by the CEO.

[2] The Consumer Bankers Association (CBA) is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

[3] The Consumer Mortgage Coalition is a mortgage industry trade association committed to safely expanding access to credit and reducing costs to consumers by streamlining the rules and regulations governing the industry.

[4] Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes, 83 Fed. Reg. 3686 (Jan. 26, 2018).

opportunity costs of the Bureau's use of enforcement resources. We believe that each of these factors should be weighed in the Bureau's strategy.

In our members' experience, the Bureau has used CIDs in a manner that has been opaque, burdensome, and often unfair to the financial services industry that the Bureau regulates. Although the Bureau's Rules Relating to Investigations (Rules) are similar to those of other federal enforcement agencies in some ways, the Bureau's practices are generally much more rigid, less efficient, and more burdensome than those of other federal agencies. In the experience of our members, the Bureau's CIDs are overbroad, issued after insufficient coordination with non-Bureau law enforcement partners, and often handled without regard to balancing burden on the CID recipient with the needs of the Bureau and the realities of the recipient's data management systems.

In addition, at times the CIDs have also been emblematic of the jurisdictional overreaching that has resulted in "regulation by enforcement" by the Bureau, both with respect to the nature of the business and conduct being targeted[5] and the theories upon which alleged legal violations have been predicated.[6] In particular, CIDs have been issued in pursuit of expansive theories of unfair, deceptive, or abusive acts or practices (UDAAP) to reach conduct that is not otherwise violative of federal law.[7] Indeed, the Bureau has used investigations and subsequent enforcement actions to announce new legal requirements for an entire industry—a practice that circumvents the procedural and substantive checks and balances of the Administrative Procedures Act. Such a course of action fails to provide the industry the opportunity for notice and comment, or enforcement subjects an opportunity to modify otherwise lawful conduct before it is determined to be unlawful. It also creates an uneven playing field by making an example of a single institution because enforcement is never pursued against every industry actor at the same time. We believe that proper reforms will empower the Bureau to provide vigilant consumer protection and enforcement across the consumer financial landscape in a manner that is fair to all parties. Institutions will know the "rules of the road" and will be confident that the Bureau stands ready to supervise, interpret, and enforce those rules consistently across the industry.

We commend the Bureau for its recent efforts to solicit industry feedback on burden reduction and improving transparency in agency investigations. Below we address those aspects of the Bureau's CID processes that the Associations' members view as particularly challenging

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[5] *See, e.g., CFPB v. Accrediting Council for Indep. Colleges & Schools (ACICS)*, 183 F. Supp. 3d 79, 82 (D.D.C. 2016), *aff'd*, 854 F.3d 683 (D.C. Cir. 2017) (CFPB issued CID to non-profit organization that accredits for-profit colleges seeking information relating to "unlawful acts and practices in connection with accrediting for-profit colleges").

[6] *See, e.g., CFPB v. Intercept Corp.*, No. 3:16-cv-144, 2017 WL 3774379, at *1-2 (D.N.D. Mar. 17, 2017) (CFPB issued CID to payment processor that initiated ACH transactions to consumer accounts on behalf of its merchant-customers and who allegedly caused consumers harm by ignoring certain "red flags" by its merchant partners in violation of the Consumer Financial Protection Act of 2010 (CFPA)).

[7] *See, e.g.*, Complaint, *CFPB v. Navient Corp.*, No. 3:17-cv-00101 (M.D. Pa. filed Jan. 18, 2017); Consent Order, *In re Wells Fargo Bank, N.A.*, CFPB No. 2016-CFPB-0013 (filed Aug. 22, 2016) (in both matters, the CFPB pursued student servicers for allegedly "unfair" payment allocation and aggregation practices, despite the fact that no laws promulgated through the formal rulemaking process otherwise prohibited such practices).

and offer suggestions for improvement. To that end, and as discussed below, the Associations make the following recommendations to improve the Bureau's CID processes:

Recommendations on Initiating Investigations

When the Bureau has supervisory authority over the CID subject, the Associations recommend that the Bureau focus its enforcement activities on issues discovered through the course of its supervisory examinations after the Bureau has had time to closely examine those issues, allowed the institution to respond, and determined no alternative resolution is possible. The Associations recommend increased transparency regarding the basis for escalation to the Office of Enforcement (Enforcement) through standardized publicly available protocols for nature and content of communication to the institution. We also recommend providing more extensive information to the institution regarding why a CID has been issued after transfer to Enforcement, and more closely aligning CID requests, to the extent they are made, with the issues that resulted in referral to Enforcement.

When the Bureau does not have supervisory authority over the CID subject, the Associations recommend that the Bureau utilize all tools in its disposal, including opening research matters or issuing targeted CIDs to more thoroughly vet information before issuance of a more fulsome CID. We also recommend that the Bureau consider ways in which it can better explore pre-investigation resolution with potential subjects.

Finally, regardless of whether the Bureau has supervisory authority over the CID subject, the Associations recommend that the Bureau enhance transparency regarding internal coordination between the Bureau's various divisions, require more formal approval from the Bureau's Legal Division (Legal) prior to initiating an investigation, and enhance external coordination with non-Bureau government agencies involved in overlapping investigations before issuance of a CID.

Recommendations on Issuance of CIDs

The Associations recommend that the Bureau increase safeguards to ensure the meaningful review of CIDs by Enforcement prior to issuance, including the requirement that Enforcement considers: (i) the proportionality of the requests to the potential consumer harm; (ii) whether the requests as written are described with sufficient particularity and narrowly targeted; (iii) whether prior CIDs have been issued and the burden associated with responding to the prior CIDs and pending CID; and (iv) whether other government agencies conducting parallel investigations already have issued CIDs or supervisory information requests and the potential overlap between those agencies' requests and the Bureau's CID. The Associations also recommend that the Bureau cease utilizing CIDs to "understand" a product or service and consider less burdensome means to do so such as informal requests.

The Associations recommend that the Bureau adopt procedures that ensure that the subject has a full and fair opportunity to respond. This includes considering the days and times at which CIDs are received, making all deadlines in business days rather than calendar days, and considering a CID to have been served on the following business day if served after 5pm ET.

Finally, the Associations recommend that the Bureau prohibit the transmission of privileged information provided to the Office of Supervision (Supervision) in the examination context to Enforcement.

Recommendations on Improving CID Recipients' Understanding of Investigations

The Associations believe there are a number of steps the Bureau can take to improve a CID recipients' understanding of an investigation. First, the Bureau should enhance communication with the CID recipient by improving the information set forth in the Notification of Purpose (NOP). The NOP should include: (i) the specific conduct being investigated; (ii) the specific laws and regulations at issue and, where the law is broad, the relevant legal theory; (iii) how the specific conduct may violate the specific laws; and (iv) whether the recipient is the subject of the investigation or a third-party recipient in possession of relevant information. Second, the Bureau should discuss the basis and nature of the investigation with the CID recipient at the outset and at periodic touchpoints as the investigation progresses, not less than once a quarter. Third, Bureau investigators should be required to revisit the scope of an investigation if the nature of the investigation evolves and update the NOP accordingly. Fourth, Bureau investigators should seek tolling agreements after sufficient fact-finding and when an enforcement action appears inevitable or a statute of limitations is going to expire imminently and the parties need additional time to reach a consensual resolution.

Recommendations on the Nature and Scope of Requests

The Associations believe that CIDs and the requests contained therein should be proportional to the potential harm being investigated. In order to reduce burden and ensure narrowly tailored CIDs, the Associations recommend that the Bureau update its procedures to ensure that the relevant time period for responsive materials is tailored to the relevant statute of limitations, ensure that all relevant terms are defined and that all definitions are consistent with their use by the industry and not overbroad in their scope, limit the definition of "Company" to the CID recipient institution absent compelling reasons otherwise, narrowly tailor any requests for emails by both timeframe and subject matter, and adopt a standard protocol in connection with the CID recipient's use of alternative document review protocols. With respect to data requests, the Associations recommend issuing targeted data requests once the scope of the investigation is more readily understood and limiting data requests to data reasonably maintained in the normal course of business and readily extractable. With respect to interrogatories, the Associations recommend that the Bureau draft interrogatories in order to learn facts as opposed to a manner that assumes facts that may not exist. The Associations also suggest incorporating a rule similar to Federal Rule of Civil Procedure 33(d) to allow a CID recipient to produce business records in lieu of a response and adopting new protocols, which will allow the Bureau or institutions to point to publicly available information.

In addition, the Associations recommend that the Bureau require the production of only a single privilege log upon completion of document production and allow institutions to provide categorical privilege logs rather than document-by-document privilege logs. We further recommend that the Bureau adopt a policy similar to that adopted by the U.S. Department of Justice (DOJ), which prohibits the demand for privilege waivers.

Finally, the Associations recommend that the Bureau increase training to Bureau investigators to enhance the productivity of the "meet and confer" process and establish a mechanism whereby the CID recipient can more easily interface with additional senior staff when necessary.

Recommendations on Timeframes

The Associations recommend changing the deadlines associated with the CID process as follows: (i) with respect to the "meet and confer" deadline, requiring CID recipients to contact the Bureau within ten days to confirm receipt of the CID and set a time for an initial "meet and confer" to occur within a reasonable, specified window thereafter of at least 21 days absent good cause; (ii) with respect to petitions to modify or set aside, tie the timing for the petition filing to the conclusion of "meet and confer" discussions rather than service of the CID and deleting any language stating or suggesting that extensions are disfavored; and (iii) with respect to return dates, setting return dates no sooner than 60 to 90 days after CID receipt, with longer timeframes needed based on the depth and breadth of the CID.

Recommendations on the Taking of Testimony

The Associations believe that it is necessary to have a set of rules dealing with the taking of testimony akin to those addressed in the Federal Rules of Civil Procedure. Thus, the Associations recommend adopting the Federal Rules absent good cause. The Associations also recommend that the Bureau: (i) identify matters for oral testimony with particularity; (ii) limit testimony to topics identified in the CID; (iii) ensure that corporate testimony is narrowly-tailored to appropriate corporate witnesses who can speak to specific topics; (iv) limit hearings to one seven-hour day; and (v) in order to streamline testimony and allow effective representation, permit counsel to object more fully.

Recommendations on the Inadvertent Production of Privileged Information

The Associations believe that the Bureau should expressly make clear that Federal Rule of Evidence 502 standards apply to the inadvertent production of privileged information and modify its processes for handling such inadvertent disclosures accordingly.

Recommendations on the Rights Afforded to Witnesses

The Bureau's Rules provide very few rights to witnesses and should be significantly revised. The Associations recommend that: (i) the Bureau allow a witness' counsel to make limited, appropriate objections or seek clarification where necessary; (ii) allow the witness' counsel to ask clarifying questions upon completion of the Bureau's questioning; (iii) prohibit questions from more than one questioner during the investigational hearings; and (iv) allow the institution's counsel to attend the hearing where consent is granted by the witness and witness' counsel.

Recommendations on the "Meet and Confer" Process

Given the importance of the "meet and confer" process, the Associations recommend a number of enhancements. First, the Bureau should consider the entire scope of the CID—not just the individual request—when assessing whether a modification is needed. Second, the Associations recommend that the Bureau investigator make it a customary practice to inform the CID recipient whether he or she will recommend to the Deputy Assistant Director of Enforcement that a modification be approved or denied. Finally, we recommend considering whether there are certain types of modification requests that the Bureau investigator, as opposed to the Deputy, can grant in order to provide more flexibility to the investigator and greater clarity to both sides.

Recommendations on Requirements for Responding to CIDs

The Associations believe that the Bureau should modify its certification requirements to allow certifications to be made to the best of the signator's knowledge and after a reasonable investigation. With respect to document submission standards, the Associations recommend providing greater flexibility for when native files are required.

Recommendation on Petitions to Modify or Set Aside CIDs

In order to improve the process of filing petitions to modify or set aside CIDs, the Associations make the following recommendations. First, the Rules should require Bureau investigators to serve petitioners with the same statement that is provided to the Director in response to a petition to modify or set aside a CID. Then, the petitioner should be allowed to file a short reply to any response within 7 days of receipt of the response. Second, the Bureau should discontinue the practice of making petitions and resulting orders public as this has led to a chilling effect in filing petitions. Finally, the Associations recommend that the Bureau consider the appointment and use of administrative law judges to decide the validity of petitions and provide guidance materials that include the important considerations the Bureau weighs when it determines whether a CID should be modified or set aside.

The Associations discuss each of these recommendations in more detail below.

DISCUSSION

1. *The Bureau's processes for initiating investigations, including CFR 1080.4's delegation of authority to initiate investigations to the Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Employment*

The Bureau's processes for initiating investigations may vary depending on whether the issue arose from Supervision or was initiated *sua sponte* by Enforcement. The Associations recommend enhancements with respect to initiation of investigations, transparency related to the commencement of an investigation, enhanced transparency regarding internal communication related to investigations within the Bureau, and external coordination with other agencies.

- **Improvements When Investigations Arise Out of the Bureau's Supervision of the CID Recipient**

When an investigation arises out of the Bureau's supervision of the CID recipient, Enforcement should be particularly well-positioned to initiate a narrowly tailored investigation targeted at the perceived misconduct after consultation with colleagues who have thoroughly examined the institution, in communication with the regulated entity. Instead, the Bureau frequently initiates investigations based on issues that were self-reported, and often are already self-corrected by the institution. In addition, even where investigations arise only after the CID recipient has undergone an examination, the reason for escalation from Supervision to Enforcement is often unclear to the institution. As a result, improvements are needed, as discussed further below.

Focus on Examinations. Despite the Bureau's authority to examine the institutions it regulates and to escalate issues to Enforcement only if deemed serious by examiners after exploring all methods of alternative resolution, investigations too often are initiated based on information that was self-identified, and possibly self-reported, by the CID recipient.[8] This is in contrast to the ways in which prudential banking regulators often handle initiation of investigations, and it creates a significant disincentive for an institution to self-report issues to the Bureau and to work with its regulator when attempting to craft a resolution. While the Associations understand that the Bureau needs flexibility to initiate investigations on issues that arise outside of the supervisory context, the Associations recommend that the Bureau focus its enforcement activities on issues discovered through the course of its supervisory examinations after the Bureau has had time to closely examine those issues, allowed the institution to respond during the normal course of the examination, and determined that no alternative confidential, supervisory resolution is possible.

Increased Transparency. Even where the CID recipient has undergone an examination, received and responded to a Potential Action and Request for Response (PARR) letter, and been referred to Enforcement, there is often a lack of transparency regarding the basis for the escalation to Enforcement. Specifically, the institution may never be told why an issue was not resolved in Supervision. In addition, from time to time, the PARR process identifies certain issues, but additional, broader issues—including ones that were not mentioned in the Bureau's PARR letter—are ultimately investigated by Enforcement. Among other things, this lack of transparency prevents institutions from having productive and meaningful internal dialogue within senior management and at the Board level regarding the full scope of issues faced by institutions. Moreover, in our members' experience, prudential regulators typically have been more forthcoming in discussing potential issues with institutions than the Bureau has historically, so this increased transparency by the Bureau would align practices with that of prudential regulators.

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[8] *See* CFPB Bulletin 2013-06, *Responsible Business Conduct: Self-Policing, Self-Reporting, Remediation, and Cooperation* (June 25, 2013) (Bulletin). While the impetus of the Bulletin was to drive dialogue between the Bureau and institutions and foster good corporate citizenship, because of the CFPB's routine use of self-reported actions as the basis for investigations, this has led to the opposite effect in which institutions are uncertain on how to conform to the Bulletin while also staying clear of enforcement actions.

In addition, after transfer to Enforcement, the trajectory of the matter can vary greatly. In some instances, the institution may be met with an initial demand for consensual resolution (without the benefit of the Notice and Opportunity to Respond and Advise process) while in other cases, extensive investigation may ensue through the use of CIDs. The Associations recommend increasing transparency regarding the basis for escalation to Enforcement through use of standardized, publicly available protocols for nature and content of communication to the institution. The Associations further recommend that more extensive information be provided to the institution about why a CID has been issued after transfer to Enforcement and to more closely align CID requests, to the extent they are made, with the issues that resulted in referral from Supervision to Enforcement. Transparent communication with institutions by the Bureau may lead to more informative and efficient exchange of information between the parties.

- **Improvements When Investigations Do Not Arise Out of the Bureau's Supervision of the Recipient**

When the Bureau initiates an investigation of an institution that it does not otherwise supervise, the investigation often comes without advance warning that the Bureau had concerns, and in a number of cases, with seemingly limited vetting of information that may have triggered the investigation. Because the CID recipients do not know about the investigation before service of the CID, they also are unable to engage the Bureau in any meaningful discussion of resolution prior to being thrust into the long, expensive, and burdensome CID process. While not every investigation may be ripe for early resolution, where early engagement may result in resolution (which will save Bureau resources), the Bureau should engage in this process instead of issuing CIDs where possible. The Bureau also should use all of the tools at its disposal to thoroughly vet its information before initiating an investigation, enhance transparency as to what triggered the investigation, and meaningfully engage the subject of the investigation to seek a means of alternative resolution prior to commencement of the investigation, as laid out below.

Vetting of Information Prior to Investigation. It has not been uncommon for the Bureau to initiate investigations based on information that, seemingly, is very limited and/or insufficiently vetted. Such information might include isolated complaints, allegations in a lawsuit, or statements made by the media. On the basis of this imperfect information, the institution may then be faced with one or more CIDs that require costly and burdensome compliance, over an extended period of time, and detract from the institution's ability to carry out normal business functions. While the Associations understand that Bureau investigators have at their disposal certain tools such as opening research matters for further formal due diligence prior to initiating an investigation, our members' experiences raise questions about how often fulsome research is performed. Investigations initiated based on limited information seem to be common, and broad CIDs are a frequently used tactic. For allegations that have not arisen through the Bureau's supervisory activity, the Associations recommend that investigators uniformly employ fulsome vetting of information before initiating an investigation and then, if an investigation must progress, use that information to more narrowly tailor CIDs.

Pre-Investigation Resolution. In the experience of our members, there has been limited effort, or even receptiveness, by the Bureau to engage with the subject of an investigation to explore alternative resolution of concerns prior to commencing a formal investigation, particularly where the issue did not arise during the course of the Bureau's supervisory activities.

The Associations recommend that the Bureau consider ways in which it can better explore pre-investigation resolution with potential subjects, which could reduce burdens on the institutions and conserve Bureau resources and the ability to protect, and if appropriate, compensate consumers in a more expedited and efficient manner. For example, one possibility would be for the Bureau to issue a very limited CID that serves to suspend the destruction of documents while pre-investigation resolution is explored. If resolution does not occur, then the Bureau can issue a broader CID for production of relevant documents, data, or interrogatory responses as appropriate. This type of process benefits both the Bureau and the subject to be investigated as a pre-investigation conversation and may, at a minimum, lead to a more narrowly-tailored and less burdensome CID.

- **Enhanced Coordination**

Regardless of whether the Bureau has supervision authority over the CID recipient, it is apparent to the Associations' members that coordination—both enhanced transparency regarding internal coordination between the Bureau's various divisions and external coordination with non-Bureau government agencies—can be enhanced. As a result, the Associations recommend improving coordination as set forth below.

Internal Coordination. While we understand that there is coordination among the various divisions at the Bureau prior to the initiation of an investigation, there does not appear to be much transparency regarding that coordination. The Associations believe that institutions and the Bureau would benefit from greater transparency about this coordination as it would serve to foster a better understanding of the Bureau's processes, which could eliminate confusion, frustration, and inconsistent communications with Bureau personnel. Examples include the following:

- ***Coordination between Enforcement and Supervision where investigation does not result from an examination***. While Enforcement may coordinate with Supervision prior to commencing an investigation of a supervised institution, Enforcement may nonetheless open an investigation notwithstanding the timing of supervisory activity. Because Supervision's examination schedule is determined one to two years in advance, the institution subsequently can be placed in the untenable position of undergoing an examination encompassing issues for which it is currently under investigation and having to work with the Bureau to navigate this overlap.

- ***Coordination between Enforcement and Supervision where investigation results from an examination***. When an enforcement matter arises out of the Bureau's examination of a supervised institution, it is not uncommon for examiners and other lower-level Supervision staff to be unaware of the commencement of an investigation by Enforcement. This results in disjointed communications between Supervision, Enforcement, and the CID recipient about the basis for the action.

- ***Coordination between Enforcement and Legal***. While Enforcement *can* consult Legal prior to opening an investigation, there is no requirement that it does so. Rather, a proposal to open an investigation—known as an Enforcement Action

> Process (EAP) memo—is submitted to the Enforcement Director, the Enforcement Director approves the investigation, and *then* the EAP memo is circulated more broadly throughout the Bureau, including to Legal. While Legal may opine on the legal basis of the investigation at that time, Legal does not appear to have authority to pause, close, or otherwise limit the investigation should it disagree with Enforcement regarding its authority or jurisdiction to conduct the investigation. This has the potential to allow Enforcement to regulate by enforcement, potentially targeting businesses and conduct that arguably do not fall under its jurisdiction without sufficient legal support.

The Associations recommend implementing a policy that if an examination is presently scheduled of a supervised entity on similar issues, then Enforcement may not initiate an investigation until after such examination is complete and Supervision has had a chance to determine if an alternative to a formal investigation is possible, absent good cause as determined by the Director of Enforcement. The Associations also recommend greater transparency both internally at the Bureau and with institutions on the process for coordination within the Bureau, for example, through public procedure documents outlining required coordination before a CID may be issued. Additionally, the Associations recommend requiring Legal's approval before the EAP memo is submitted to the Enforcement Director for approval to open an investigation.

External Coordination. In the experience of the Associations' members, the Bureau does not sufficiently coordinate with other government agencies—including state entities—that may be investigating similar issues before initiating its own overlapping investigation. Lack of coordination with other agencies during overlapping investigations can result in duplication of efforts to address similar alleged conduct that is tremendously burdensome to the institution, and arguably wasteful of federal resources.

In instances in which there are ongoing parallel investigations, the Associations recommend improving pre-investigation coordination with non-Bureau regulators so that one agency takes the lead in the investigation, and the other agencies address their concerns through limited non-duplicative requests. This has occurred in connection with some Bureau investigations, particularly where the DOJ has been involved, but effective coordination has been the exception rather than the norm in general experience.

2. The Bureau's processes for the issuance of CIDs, including the nondelegable authority of the Director, Assistant Director of the Office of Enforcement, and the Deputy Assistant Directors of the Office of Enforcement to issue CIDs

Notwithstanding the technical requirement that the Director, Assistant Director of Enforcement, or the Deputy Assistant Directors for Enforcement issue CIDs, as a practical matter, there appears to be a lack of oversight in connection with the issuance of CIDs. As will be explained in greater detail in response to other topics discussed below, the frequent over breadth of the CIDs, coupled with the unrealistic timeframes in which to respond, suggest that more senior personnel may not be giving CIDs the attention they deserve prior to issuance. For example, the CID might request "all documents" related to a particular broad subject in the possession, custody, or control of the "Company," while defining "Company" to include the

recipient as well as every parent, subsidiary, or affiliate of the recipient, and the same CID might provide a timeline for completion of production of only 30 calendar days.

- **Issuance of CIDs**

Successive CIDs. In the experience of the Associations' members, successive CIDs for production of information often are issued before personnel have completed a fulsome review of the materials produced in response to earlier CIDs and without sufficient appreciation of their burden. Successive CIDs are often no less burdensome than the initial CID in scope, and often can be even more challenging. It is unclear whether senior personnel take into account the fact that a prior CID already has been issued and the associated burdens thereto when reviewing additional CIDs related to the same investigation.

Use of CIDs to "Understand" a Product or Service. At times, the Bureau seems to use the CID process to "understand" a product or service that might be under investigation. This process is legally dubious and a poor use of the Bureau's investigative time and resources. It also causes CID recipients to incur enormous expenses that appear to be disconnected from any alleged wrongdoing. Many times, the information provided to the Bureau leads it to conclude that there is nothing to investigate. There should be a less burdensome manner in which Bureau investigators can learn about a product or service, through a targeted request for information or other informal mechanisms.

Use of Privileged Information. The Associations' members have experienced the use of attorney-client privileged and work product information—which was obtained during the supervisory process—to form the basis of a CID issued by Enforcement. Although regulated parties understand that there will be coordination between Supervision and Enforcement, Enforcement should not be able to make an end-run around privilege assertions that would arise in the context of investigations by simply obtaining documents from Supervision. Institutions may be inclined to comply with requests for privileged documents during the Supervision process, however, there will be a chilling effect on that process if the privileged documents are shared with Enforcement. The Associations believe that Supervision should not be permitted to transmit privileged information to Enforcement as that provides Enforcement with information it otherwise is not entitled to receive.

Issuance Dates and Times. Additionally, in our members' experience, it is not uncommon for CIDs to be issued on days and at times that deprive recipients the full amount of time provided to meet ensuing deadlines. For instance, many broad requests for documents and oral testimony have been issued on Friday after the close of business or on the eve of holidays when the institution's personnel, who would otherwise be tasked with responding to the CIDs, are unavailable. This is important because service begins the clock for the 10-day deadline to "meet and confer," the 20-day deadline to file a petition to modify or set aside the CID, and ultimately, the date the materials must be submitted to the Bureau absent an enlargement of time. By way of example, if a CID was served on Friday, December 21 at 6pm, the "meet and confer" must occur no later than Monday, December 31, allowing the CID recipient only four business days to prepare during a holiday week.

Insufficient Coordination. There also appears to be insufficient coordination with other government agencies who are investigating similar issues on a parallel track when drafting the information requests in the CID. Given the burdens and inefficiencies to both the Bureau and the CID recipient in issuing duplicative CIDs, the Associations believe that the agencies should coordinate insofar as they are making similar information requests.

- **Recommendations**

The Associations recommend increasing safeguards to ensure the meaningful review of CIDs by senior Bureau personnel prior to issuance. Among other things, senior personnel should be required to consider: (i) the proportionality of the requests to the potential consumer harm; (ii) whether the requests as written are described with sufficient particularity and narrowly targeted (as will be discussed in further detail below in response to Question #4); (iii) whether prior CIDs have been issued and the burden associated with responding to the prior CIDs and the pending CID; and (iv) whether other government agencies conducting parallel investigations already have issued CIDs and the potential overlap between those agencies' CIDs and the Bureau's CID. The Associations also recommend implementing rules that prohibit the exchange of privileged information from Supervision to Enforcement.

With respect to timing, the Bureau also should adopt procedures that ensure that the subject has a full and fair opportunity to respond. To the extent that CIDs must be issued on a Friday, or the eve of a holiday, this should be done sparingly after meaningful consideration of whether the need to issue the CID justifies the practical reality of depriving the recipient of much needed time to respond. Insofar as circumstances do not warrant such a result, the Bureau should issue the CID the next business day, or alternatively, issue the CID but tie deadlines to a clock which begins to run on the next business day. In addition, if a CID is served after 5pm ET, it should be considered to have been served on the next business day. Finally, to ensure more flexibility with timing and investigation deadlines, the Associations recommend that all deadlines be in "business days," as opposed to calendar days.

3. Specific steps that the Bureau could take to improve CID recipients' understanding of investigations, whether through the notification of purpose included in each CID or through other avenues, including facilitating a better understanding of the specific types of information sought by the CID

Communication about the nature, scope, and progression of the investigation typically is deficient throughout the lifecycle of an investigation. This presents myriad issues, including concerns regarding due process and fundamental fairness to the recipient. The lack of communication also increases burden and inefficiency as it limits the recipient's ability to propose alternatives that are more narrowly-tailored to the Bureau's concerns. Although recipient institutions are in the best position to know the types of data and documents they maintain, they need sufficient information from the Bureau in order to propose alternatives that provide the Bureau with the information it needs while minimizing burden on the institution and the Bureau. As a result, and as discussed further below, we urge the Bureau to enhance communication with CID recipients by: (i) improving the information set forth in the NOP; (ii) discussing the basis and nature of the investigation with the CID recipient at the outset and having periodic touchpoints as the investigation progresses; (iii) requiring Bureau investigators

to revisit the scope of an investigation if the nature of the investigation evolves, and to update the NOP accordingly; and (iv) sharing consumer complaint information, where appropriate, with institutions where such information is the catalyst behind the investigation. The Associations also recommend training for Bureau staff on these enhanced communications to ensure both improvement of and more consistent communication.

- **Notification of Purpose**

All CIDs are required by 12 C.F.R. § 1080.5 to contain a NOP. These statements should provide meaningful insight into the nature of the investigation in its preliminary stages, yet in practice, NOPs are wholly insufficient to provide an understanding of the potential legal violations being investigated. They lack both factual and legal specificity, depriving the subject of an understanding of the potential legal violations at issue and seemingly facilitating broad fishing expeditions in some instances.[9] Some are so vague as to be nearly meaningless; they may recite a list of various statutes without any information about the specific concerns that prompted the CID. The notification of purpose should be more specific and tailored to the facts of the particular investigation and institution.

By way of example, the NOP might cite to a broad statute such as the prohibition on UDAAP. However, the NOP is typically devoid of any information regarding the prong allegedly being violated, much less the theory underlying the alleged violation.

The D.C. Circuit recently upheld the denial of a petition to enforce a CID because the NOP in that CID was deficient. The NOP in that case was not materially different than the types of notifications in typical CIDs. It stated:

> The purpose of this investigation is to determine whether any entity or person has engaged or is engaging in unlawful acts and practices in connection with accrediting for-profit colleges, in violation of sections 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536, or any other Federal consumer protection law. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.[10]

[9] Understanding the need to allow the Bureau's legal theory to evolve during the course of the investigation, the Associations point out that the Bureau's guidelines established in the Office of Enforcement's Policies and Procedures Manual already provide a vehicle whereby staff can alter the notification where appropriate by simply consulting the Deputy Enforcement Director supervising the investigation or the Assistant Litigation Deputy. *See Policies and Procedures Manual*, Office of Enforcement, Version 3.0 (May 2017) (Enforcement Manual), at 58, https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201710_cfpb_enforcement-policies-and-procedures-memo_version-3.0.pdf.

[10] *See ACICS*, 854 F.3d at 686.

The D.C. Circuit held that the CID's NOP was impermissibly vague and provided insufficient notice because it provided "no description whatsoever of the conduct" under investigation and failed to explain the meaning of "the broad and non-specific term 'unlawful acts and practices'" in the context of the particular investigation.[11] As noted above, in the experience of the Associations' members, these types of vague, non-descriptive NOPs are the norm and not the exception.

Indeed, the Office of Inspector General's recent evaluation (OIG Report) of the Bureau's CID processes also highlights this deficiency. The OIG Report found that agency guidance pertaining to the NOPs should be improved because of the danger in describing "the nature of the conduct and the potentially applicable law in very broad terms."[12] The OIG Report noted that noncompliant notifications of purpose "limit the recipient's ability to understand the basis for requests" and delay the information the Bureau needs to enforce consumer financial protection laws, while also posing a reputational risk.[13]

In our experience, Bureau investigators also generally are reluctant to make appropriate changes to the NOP in subsequent CIDs if the scope or the circumstances of the investigation have changed since its opening. This runs counter to the Bureau's guidelines established in Enforcement's Policies and Procedures Manual (Enforcement Manual) where Bureau investigators are expected to consult the Deputy Enforcement Director supervising the investigation or the Assistant Litigation Deputy to alter the notification where appropriate.[14] Appropriately modifying a NOP during an investigation would illuminate the focus of the investigation, particularly insofar as that focus changes. These modifications should be discussed in a formal "meet and confer" process before the investigation proceeds to a new CID in which the Bureau presents its revised NOP.

In addition, we note that Bureau investigators often are unwilling to provide any further information, either at the outset or during the course of the investigation, regarding the drivers of the investigation or legal concerns.[15] Indeed, the recipient is often left to try to glean investigational purpose from the nature of the questions that have been asked. For example, given that the Bureau often uses consumer complaints as the basis of the investigation, it would be helpful for the Bureau to share the specific complaints—when public or already available to

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[11] *Id*. at 690-91.

[12] *See* Office of Inspector General, 2017-SR-C-015, *The CFPB Generally Complies With Requirements for Issuing Civil Investigative Demands but Can Improve Certain Guidance and Centralize Recordkeeping*, at 3 (Sept. 20, 2017) (OIG Report), https://oig.federalreserve.gov/reports/cfpb-civil-investigative-demands-sep2017.pdf.

[13] *Id*. at 7.

[14] *See* Enforcement Manual, at 58.

[15] *See, e.g., CFPB v. Universal Debt Solutions, LLC*, No. 1:15-CV-859-RWS, 2017 WL 3887187, at *8 (N.D. Ga. Aug. 25, 2017) (holding, after the CFPB failed to answer deposition questions, used a prewritten script to answer deposition questions, and claimed privilege in the CFPB's refusal to answer questions probing underlying, non-privileged facts, that "the CFPB willfully violated the Court's repeated instructions to identify for Defendants the factual bases for its claims").

the regulated parties—or the nature of the complaints with enough specificity that the investigation and response to the CID can be more focused.

Upon completion of the CID responses, the recipient is often left for months and, in some cases, more than a year wondering about the status of the investigation. This often comes with significant business impacts and burdens including, but not limited to, potential disclosure and reporting obligations, ongoing inability to predict financial impact, impediments to business transactions with third-parties, and alterations to normal document destruction policies.

In addition, and of ultimate importance, to the extent that there is a legitimate concern about consumer harm, the entity is unable to timely address issues that may be impacting consumers. Subjects have frequently asked the Bureau to "just tell [them] what they are doing wrong so that it can be fixed"; historically, however, such requests have been met with vague, non-responsive statements that the agency hopes to be able to do that "soon." This approach seems antithetical to the Bureau's core mission of consumer protection.

- **Tolling Agreements**

Certain members of the Associations regularly have experienced pressure from the Bureau to enter into tolling agreements at the very inception of the investigation and issuance of a CID—before the facts have been developed and before any decision has, or even could, been made regarding the likelihood of an enforcement action. While a proposed tolling agreement is preferable to a lawsuit, in other enforcement contexts such agreements usually *only* are sought after sufficient fact-finding and when an enforcement action appears inevitable, and the parties need more time to reach a consensual resolution. Requesting tolling agreements so closely after service of a large CID encourages inefficient enforcement investigations and further discourages the Bureau staff from being candid about what they are investigating.

- **Recommendations**

The Associations urge the Bureau to adopt several improvements to its CID processes in order to improve understanding of investigations. First, the Bureau should modify the information required to be included in the NOP to make clear: (i) the specific conduct being investigated; (ii) the specific laws and regulations at issue and, where the law is broad, the relevant legal theory; (iii) how the specific conduct may violate the specific laws; and (iv) whether the recipient is the subject of the investigation or a third-party recipient in possession of relevant information. The NOP also should not include a catch-all encompassing "any other Federal consumer financial protection law" because that phrase renders any specificity in the NOP meaningless. In order to illustrate these guidelines, model language might be adopted.

Second, with recognition that the integrity of the investigation must be preserved, the Bureau should require Bureau investigators to discuss the basis and nature of the investigation with the CID recipient at the outset and to have periodic touchpoints, not less than once a quarter, as the investigation progresses to discuss the status of the Bureau's investigation, the focus of its concerns, and the legal theory underlying its potential case. Such touchpoints should include a discussion of the status of the Bureau's investigation, the current legal theory, and the facts upon which the Bureau is basing its preliminary conclusions (to the extent possible without

eroding the integrity of the investigation). Third, Bureau investigators should be required to revisit the scope of an investigation if the nature of the investigation evolves and adhere to the provision in its Enforcement Manual requiring the NOP to be revised accordingly.[16] Fourth, Bureau investigators should seek tolling agreements after sufficient fact-finding and when an enforcement action appears inevitable or a statute of limitations is going to expire imminently and the parties need additional time to reach a consensual resolution. Finally, to effectuate these improvements, the Associations recommend to the Bureau that it retrain Bureau staff so that there is consistent application of these improvements across all investigations.

4. The nature and scope of requests included in Bureau CIDs, including whether topics, questions, or requests for written reports effectively achieve the Bureau's statutory and regulatory objectives, while minimizing burdens, consistent with applicable law, and the extent to which the "meet and confer" process helps achieve these objectives

The Associations believe that CIDs and the requests contained therein should be proportional to the potential harm being investigated. However, in the experience of the Associations' members, requests for information in CIDs do not appropriately balance the Bureau's desire for information with the burdens that these requests place on recipients. The information requested by CIDs fails to reflect the legal and jurisdictional limitations placed on the Bureau's ability to enforce specific federal laws and regulations.[17] As a result, the scope of written requests typically are overbroad with respect to both the relevant timeframe covered and the types of information requested. The resulting burdens placed on institutions include cost, strain on resources, impacts to the recipient's data management systems, and interference with ongoing business operations.

The Bureau then engages in undue reliance on the "meet and confer" process to narrow the requests. The "meet and confer process" is a time-sensitive and highly discretionary process. Among other things, the recipient's success in achieving a meaningful modification of the CID request is dependent on the willingness of the Bureau investigators to work with the recipient and the Bureau investigators' own understanding of the issues. An understanding of the issues often is influenced by the individual Bureau investigator's seasoning with respect to both discovery, generally, and his or her knowledge of industry and/or business practices at issue, specifically.

Further complicating matters, the "meet and confer" process is time-constrained insofar as the initial meeting must occur within ten days. While the process typically is ongoing for a number of weeks, institutions that choose to pursue this route do so with prejudice to their petition (e.g. appeal) rights as any formal petition to set aside the CID must be filed within 20 days of service. Accordingly, any institution receiving a broad CID is placed in an untenable

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[16] *See* Enforcement Manual, at 58 ("If the scope or circumstances of the investigation have changed since opening, Staff should consult the Deputy Enforcement Director supervising the investigation or the ALD with regard to making appropriate changes to the description.").

[17] *See* Enforcement Manual, at 68 ("The general approach of the model language is to describe the nature of the conduct and the potentially applicable law in very broad terms to preserve the Bureau's ability to request a broad spectrum of information in any CIDs issued in the investigation, particularly since the direction and scope of the investigation might change.").

position, with near certainty of having to end the "meet and confer" process prematurely if it seeks to exercise petition rights.

Below we identify recommendations concerning the nature and scope of CID requests and the "meet and confer" process.

- **Timeframe of Requested Information**

The relevant timeframe for information requested by a CID is at times inconsistent with the Bureau's jurisdiction. It is not uncommon for the Bureau to allege unfair, deceptive and abusive practices that predate the CFPA.[18] In addition, CIDs often fail to take into meaningful consideration the relevant statutes of limitations where statutory jurisdiction was transferred from another agency under the Dodd Frank Act. The Associations suggest updating the Bureau's procedures to ensure that the relevant time-period for responsive materials are tailored to the relevant statute of limitations, with the understanding that the Bureau may make specific requests for certain targeted documents outside that timeframe, which may be relevant to the investigation.

- **Breadth and Burden of Requested Information**

The breadth of requests in CIDs is often overbroad. As noted above, this can be significantly burdensome on institutions, placing strain that may be disproportionate to the needs of the Bureau. Breadth is often attributable to a number of common issues.

Definitions in CIDs. The definitions used in CIDs can significantly impact the burdens imposed in responding to CID requests. As a preliminary matter, the definitions themselves are often untenable in their breadth. For example, the Bureau often defines "Company" to be the recipient as well as every parent, subsidiary, or affiliate of the recipient as opposed to limiting the definition to the recipient only, thereby potentially expanding a CIDs scope and the burden associated therewith exponentially. In other instances, definitions within the CID are inconsistent with how those terms are used in the industry, generally, and within the recipient's business, specifically. Also, in other circumstances, it is unclear how the Bureau is using a given term as it is wholly undefined or the definition is ambiguous. Before issuing a CID, the Bureau should ensure that all relevant terms are defined and that such definitions are consistent with their use by the industry and not overbroad in their scope. Moreover, the definition of "Company" should be limited to the institution that is the recipient of the CID absent compelling reasons to expand the definition to include parents, subsidiaries, or affiliates.

Requests for Documents. It is common for CIDs to include requests seeking "all documents" related to a particular broad subject as opposed to narrowly tailoring the request to what is needed for an investigation. By way of example, it would not be uncommon for a mortgage servicer that specializes in the servicing of distressed assets to receive a request for all documents related to the servicing of delinquent loans, rather than requesting the servicing files

[18] *See* Memorandum Opinion and Order, *CFPB v. TCF Nat'l Bank*, No. 17-166-RHK-DTS, at 9 (D. Minn. Sept. 8, 2017) ("The Bureau attempts to salvage earlier claims under a type of continuing-violation theory, arguing it has 'alleged conduct violating the CFPA that post-dates its effective date' . . . That is clearly not the law.").

for a random sample of delinquent loans along with the policies and procedures related to collections, loss mitigation, and foreclosure.

Before crafting its requests, the Bureau should more carefully consider conduct under investigation and tailor the requests to seek only those documents likely to provide information about that conduct. While the Enforcement Manual states that "[a] CID should be narrowly tailored to solicit the information necessary for the investigation,"[19] the members have found that the Bureau's practices do not mirror such guidelines. In addition, requesting a voluminous amount of information not only burdens the CID recipient but also the Bureau investigators who must spend time, energy, and resources reviewing vast amounts of information, some of which may not be relevant to the investigation. This results in the Bureau devoting too many resources to a single investigation, which prevents them from investigating other potentially harmful conduct.

Furthermore, CIDs often include requests for emails, which often can be the costliest and most time-consuming type of request with which to comply. The Associations suggest that the Bureau institute procedures by which emails are requested in a judicious and narrowly-tailored fashion so as to not overburden the producing institution. For instance, Bureau investigators should narrowly tailor any requests for emails by both timeframe and subject matter, particularly where the recipient is not the subject of the CID.

As a means to minimize the burden of reviewing emails, among other document types, the Bureau should adopt a standard protocol in connection with the recipient's use of alternative document review protocols, such as technology assisted review (TAR). The absence of uniform protocols on this issue drive the need to take the issue up afresh in connection with each investigation, with the potential for inconsistent outcomes. The Associations suggest implementing a protocol governing alternative review methodologies, which might be used by recipients in order to improve email review accuracy and speed, while reducing cost.

Requests for Data. Data requests often are not crafted in a manner that allows the CID recipient to provide the information in a reasonable, efficient, and cost-effective manner. Many requests simply ask for mass exports of data from the CID recipient's systems, without meaningful justification for why such information needs to be provided. Even when the information is available, such data exports are taxing on the institution's resources, impeding institution personnel's ability to perform their day-to-day responsibilities, and ultimately come at a significant cost to the institution. Moreover, the Bureau regularly asks for large amounts of data at the earliest stages of investigations. This data, however, rarely sheds light on any alleged misconduct and often is not related to the substantive issue of whether there was a violation of law. Thus, under the Bureau's current approach, CID recipients spend significant amounts of time and money compiling data that, in most cases, are not used for any investigative purpose.

[19] Enforcement Manual, at 58. The Enforcement Manual also states that "[w]henever possible, Staff should undertake steps to reduce the likelihood of a petition to modify or set aside a CID. [ ]One strategy is to ensure at the outset that the CID is tailored to the needs of the investigation and is not overbroad. [ ]Staff should also be amenable to working with the CID recipient to narrow the CID, as described above, consistent with the needs of the investigation." at 64.

Instead, the Bureau should consider issuing targeted data requests once the scope of the investigation and any potential harm is more readily understood.

The Bureau's data requests present many additional types of challenges, with some of the more common being the following:

- In some instances, the information sought may not be maintained in the manner the Bureau has requested, creating challenges in both extraction and conversion to make it useful for the Bureau's purposes;

- Where data is housed on a number of systems, some of which are inactive legacy systems, Bureau investigators often expect the recipient to not only export the data, but also manually match up similar, but not entirely identical, fields before production; and

- In other instances, data simply does not exist, and the Bureau requests creation (or re-creation) of such data.

Moreover, the Bureau typically seeks "meet and confer" participation of employees who can speak to the CID recipient's information management systems. While both the Bureau and company counsel need to understand systems and data storage, a CID recipient's staff should not be required to attend "meet and confer" sessions. Not only are the limitations of particular computer systems only one part of assessing burden, but by requiring these employees to attend the "meet and confer," this allows the Bureau to effectively "take a deposition" without any protection for the employee.

The Associations urge the Bureau to limit its data requests to data reasonably maintained in the normal course of business and readily extractable. In addition, the Bureau should require only reasonable manipulation of such data prior to production and should discontinue mandated participation of the employees of CID recipients.

Interrogatories. In the experience of the Associations' members, interrogatories often are drafted in a manner that assumes "facts" that have not been established or indicate a misunderstanding of the CID recipient's business. These type of interrogatories are burdensome and inefficient both to the institution, which now must try to correct those inaccurate or incomplete interrogatories and which may increase the likelihood of more interrogatories being propounded, and the Bureau, which now has used its limited resources in a manner that has not resulted in any relevant information. The Associations recommend that the Bureau draft interrogatories in order to learn facts as opposed to in a manner that assumes information that has not yet been established. Moreover, as discussed above, implementing the Associations' recommendations regarding pre-investigation communications between the Bureau and the CID recipients not only will narrow an investigation, but will serve to educate Bureau investigators on an institution's business line which should avoid requests based on incorrect facts.

In addition, interrogatories may require the CID recipient to create documents or compile information in a manner that is burdensome, inefficient, or may be obtained readily from other sources, such as documents or public sources. For example, an interrogatory might seek a

graphical organizational chart depiction of staff that does not already exist, so the institution must create that specific organization chart. The Associations suggest incorporating a rule similar to Federal Rule of Civil Procedure 33(d) to allow a CID recipient to produce business records in place of providing a written response to an interrogatory. Moreover, if the requested information is available from public sources, and the Bureau has sufficient detail to locate and identify the information, we recommend that the Bureau adopt new protocols to independently gather such information, thereby easing an additional burden on responding institutions or at a minimum adopt a presumption that institutions need not recreate data that already is compiled or published in similar fashion.

Production of Privilege Logs. The Associations have found there to be an insufficient appreciation of the burdens of reviewing, redacting, and producing privileged materials within the CID's return date. There is significant hardship in the requirement that privilege logs be produced at the time of each and every production. Notwithstanding the additional time and effort that it takes to review privilege documents, rolling privilege logs fail to take into consideration that the parameters of what may or may not be privileged is an ever-changing concept that can fluctuate based on new facts previously unknown to the parties that may be uncovered during the document review period.

The timing of privilege log production is a matter of negotiation in connection with every investigation, with the potential for differential outcomes. Specifically, some Bureau investigators will permit the receipt of the privilege log at the end of production, while others may not.

The Associations recommend the production of a single privilege log at the end of the investigation's document production phase, unless there are extenuating investigative reasons to demand logs with greater frequency. This will aid in (i) alleviating the burden on the CID recipient to conduct a constant "review within a review" for these specialized documents; (ii) limiting the possibility of inadvertently producing privileged information; (iii) decreasing potential inconsistencies in privilege determinations; and (iv) increasing efficiency.

The Associations also recommend that the Bureau consider changing its process of requiring document-by-document privilege logs. Currently, privilege logs requested under CIDs require that recipients provide, for each document withheld, not only the date of the document and the authors and recipients, but also a description of the subject matter, and an explanation why the document is privileged or immune from discovery. As an alternative, we recommend that where traditional document-by-document privilege logs are not appropriate, the Bureau consider allowing categorical privilege logs, while reserving the right to ask for greater detail in connection with certain categories, as necessary. Categorical privilege logs have been accepted by various state Attorney General Offices and the DOJ. Categorical logs are a viable alternative to a tedious and expensive process that often yields little tangible benefit.

Requests for Privilege Waivers. In the experience of the Associations' members, Bureau investigators routinely request that institutions waive attorney-client privilege and work product protections with regard to advice and work performed during the conduct at issue and after the conduct at issue (i.e. an internal investigation report). The Bureau even has asked institutions to proactively engage in certain reviews for the Bureau (e.g., hire a third party vendor

to review data and draw conclusions). Requesting an institution to waive a bedrock legal principle has the potential to chill privileged discussion by the gatekeepers—the lawyers/compliance in the institution. Indeed, the DOJ, for example, has considered the policy issues arising out of a demand for a waiver of privilege and generally has prohibited its lawyers and investigators from making such demands. The Associations recommend that the Bureau adopt a policy that is similar to that of the DOJ.

Staggered Productions. In the general experience of the Associations' members, the production of documents, data, and interrogatory responses to the Bureau have occurred on a rolling basis, as opposed to all at once on a particular return date. This staggered production process benefits both the Bureau and the CID recipient because it allows the institution to focus on less burdensome production items first, which could assist in answering threshold questions, while also allowing the Bureau to gain a greater understanding of these threshold issues earlier in the investigation. The Associations recommend that the Bureau formally recognize that rolling productions are permissible in its regulations, and where appropriate (especially with large or complex CIDs), consider modifying its CID language before issuance to recognize that rolling or staggered productions are the presumption.

- **"Meet and Confer" Process**

As noted above, because CIDs are often overbroad, the "meet and confer" process becomes a vital mechanism for negotiating reasonable parameters with respect to the requests. However, a recipient's ability to effectively utilize the "meet and confer" process is limited by the 10-day timeframe imposed on recipients, and as discussed further below, depends on the willingness and ability of the frontline Bureau investigators to work with the subject of the investigation to negotiate parameters. Often negotiations result in disparate outcomes driven by individual desires. In some instances, Bureau investigators have demonstrated an inability or unwillingness to understand the burdens imposed by sweeping requests. When the CID recipient has sought the engagement of more senior staff in this process, senior staff often are unwilling to engage in the "meet and confer" process and thus the CID recipient is limited in avenues for relief. The Associations suggest providing increased training to Bureau investigators to mitigate this issue and establishing a mechanism whereby the CID recipient can more easily interface with more senior staff, when necessary.

5. ***The timeframes associated with each step of the Bureau's CID process, including return dates, and the specific timeframes for meeting and conferring, and petitioning to modify or set aside a CID***

The Associations recommend that the Bureau give significant consideration to changing the extremely short deadlines associated with the CID process, including timeframes for "meet and confer" sessions, filing of petitions to modify or to set aside a CID, and the return date of the CID. Section 1080.6(c) requires the parties to meet and confer within 10 calendar days after receipt of the CID, while section 1080.6(e) requires that any petition to modify or set aside the

CID must be filed within 20 days after service of the CID.[20] Information sought in the CID is typically requested within 30 or fewer days following service.

Against the backdrop of extraordinarily broad CIDs, certain timeframes are so compressed that they are often impossible to meet and place the CID recipient in the position of being unable to exercise its rights. As discussed in further detail below, changes to certain timelines would increase efficiency, reduce burdens, and better ensure due process for CID recipients.

- **"Meet and Confer"**

Many key deadlines associated with CIDs are too short. Requiring an institution to participate in a fulsome and substantive "meet and confer" within 10 days of receipt of a CID is typically untenable in light of the depth and breadth of the CID. As an initial matter, recipients typically need to retain counsel and may need a preliminary conversation with the Bureau investigators to understand what the Bureau is seeking. A CID recipient's first notice of a CID usually includes requests for production of a broad and exhaustive list of documents, data, and may even include topics for oral testimony.

The Bureau expects the first "meet and confer" to be substantive, including discussion of data requests. Accordingly, before a "meet and confer," the CID recipient often must undertake an extensive, labor-intensive, and time-consuming assessment to ascertain the location of information, assess burden, craft proposed modifications, identify points of clarification, and consider a realistic production timetable. Where timely "meet and confers" take place, they rarely are highly productive because there has not been sufficient time to analyze the CID and attendant production matters.

Bureau investigators are inconsistent in their willingness to work with the CID recipients on setting more reasonable initial "meet and confers." Extensions with respect to the initial "meet and confer" deadline are infrequent, and if granted, often are very short (e.g. a few days).

Expanding a "meet and confer" timing will benefit both CID recipients and the Bureau, as it will permit the recipient to more sufficiently investigate any burdens associated with the CIDs and allow both parties to find reasonable approaches for compliance in a more organized and efficient process. The Associations believe that it is reasonable to require recipients to contact the Bureau within 10 days to confirm receipt of the CID and set a time for an initial "meet and confer" to occur within a reasonable, specified window thereafter of at least 21 days absent good cause. There also should be flexibility to continue the "meet and confer" process, as necessary, based on the nature and scope of the information being sought—perhaps with milestones that are tied to the breadth or complexity of the information being requested.

The Associations understand that the Bureau's Rules were patterned after the Federal Trade Commission's (FTC) rules of investigation. However, as written, the FTC's rules are

[20] *See* 12 C.F.R. § 1080.6(c) and (e).

more lenient, in material ways, as written and as applied. By way of example, under the FTC's investigative rules, the "meet and confer" must take place no more than 14 days after a recipient receives the CID, with extensions granted of no more than 30 days.[21] In our members' experience, however, the FTC generally has taken a reasonable approach when it is necessary to meet outside this "meet and confer" deadline. The additional time provided under the FTC's rule helps to make the initial process less of a discovery "fire drill" and gives recipients the ability to more readily assemble records management and legal staff capable of identifying systems of records responsive to the CID. This would make production discussions much more fruitful and efficient.

- **Petitions to Modify or Set Aside**

Under the Bureau's Rules, a petition to modify a CID is due within 20 days of service of the CID, and requests for extensions of this deadline are disfavored.[22] The Rules are unnecessarily constrictive when compared with the language in Dodd-Frank, 12 U.S.C. § 5562(f)(1), which provides for 20 days to file such a petition or "within such period exceeding 20 days after service or in excess of such return date as many be prescribed in writing, subsequent to service, by any Bureau investigator named in the demand." At a minimum, the Associations recommend that the Bureau revise its Rules to align with the language in the Dodd-Frank Act and delete any language stating or suggesting that extensions are disfavored. With respect to timing, the Bureau is not constrained to the current Rules because of the wider latitude provided by statute. Moreover, given the negative practical implications of proceeding in a 20-day timeframe, which is discussed more fully below, the Bureau should consider expanding its timelines.

The Bureau's Rules for petitioning, like its "meet and confer" requirements, are modelled after the FTC's rules of investigation. As written and in practice, however, the Bureau Rules are more stringent. For instance, both agencies require that a petition to limit or quash a CID be filed within 20 days of service;[23] however, the FTC's rules permit a CID recipient to request an extension to file a petition.[24] Also, FTC staff have delegated authority to grant extensions on a case-by-case basis. In our members' experience, the FTC offers a more reasonable and balanced approach when filing extensions under such tight time constraints.

In the experience of our members, the 20-day timeframe is virtually impossible to meet, and extensions are rarely (if ever) granted. As noted above, at the 20-day marker, CID recipients are typically in discussions with Bureau investigators regarding modifications to the CID itself and these discussions may not have concluded. Issues must be discussed with the Bureau or they cannot be included in a petition.[25] However, even if the initial discussions have concluded,

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[21] *See* 16 C.F.R. § 2.7(k).

[22] *See* 12 C.F.R. § 1080.6(e)(2).

[23] *See* 16 C.F.R. § 2.10(a).

[24] *See* 16 C.F.R. § 2.10(a)(5).

[25] *See* 12 C.F.R. § 1080.6(c)(3) ("The Bureau will not consider petitions to set aside or modify a civil investigative demand unless the recipient has meaningfully engaged in the 'meet and confer' process described in this subsection and will consider only issues raised during the 'meet and confer' process.").

subjects may not have sufficient time to draft the petition. This is a function of needing to complete the discussions in order to know what needs to be included and the time needed to craft arguments.

We believe a better approach for handling the timing issue related to petitions is to tie the timing for the petition filing to the conclusion of "meet and confer" discussions. This would allow CID recipients and the Bureau to have the time needed to work in a cooperative manner to address issues of concern to the recipient, and possibly avoid the petition process altogether. If the process cannot be avoided, the recipient of the CID would be provided with sufficient time to prepare a proper submission that very likely may be narrower.

- **Return Dates**

Return dates for CIDs typically are aggressive, especially where the CID seeks large amounts of information or data. Though § 1080.6(a)(i) states that CIDs must have a return date that "will provide a reasonable period of time within which" the recipient can respond, in practice, the return date of the CIDs almost always provide insufficient time.[26]

As a preliminary matter, return dates usually are 30 days or less than the date of service. There are significant inconsistencies, from investigation to investigation, in flexibility on enlarging timeframes—even where there are similar fact patterns and CID requests. Moreover, where Bureau investigators allow for additional time to respond, it is not uncommon for them to require production deadlines that are much shorter than those proposed by the CID recipient, notwithstanding reasonable justification being provided. The Bureau's reluctance to grant extensions does not appear to be connected to any urgency to resolve the investigation or threat of imminent harm in most cases. Often after refusing to grant meaningful extension, Bureau staff will go weeks or months without engaging with a CID recipient after receiving the produced materials. The Associations believe that return dates should be tied to the depth and breadth of the CID with the Bureau accepting rolling productions. Given our members' experience with CIDs to date, return dates should be no sooner than 60 to 90 days after CID receipt, with longer timeframes needed based on the depth and breadth of the CID.

6. ***The Bureau's taking of testimony from an entity, including whether 12 CFR 1080.6(a)(4)(ii), and/or the Bureau's processes should be modified to make expressly clear that the standards applicable to Federal Rule of Civil Procedure 30(b)(6) also apply to the Bureau's taking of testimony from an entity***

The Associations believe that it is an absolute necessity to have a set of rules dealing with core process issues akin to those addressed in the FRCP. While the current Bureau Rule for taking testimony from a corporate entity, § 1080.6(a)(4)(ii), is substantially similar to FRCP 30(b)(6), in practice, CIDs consistently have failed to reasonably identify matters for oral testimony with particularity. This has imposed significant burdens on CID recipients as they attempt to provide information responsive to CID requests. In addition, there are concerns that current Bureau procedures do not present topics for oral testimony with "reasonable particularity." Further, the way in which topics are crafted may call for designation of multiple

[26] *See* 12 C.F.R. § 1080.6(a)(1)(i).

witnesses on a single topic. Investigational hearings are not time limited, and hearings may be conducted in a manner that is inefficient and fundamentally unfair insofar as company counsel are unable to object during proceedings. A closer adherence to the FRCP should streamline testimony, facilitate better preparation of corporate witnesses, and ultimately make testimony more efficient for the Bureau and the CID recipient alike.

- **Reasonable Particularity**

Specifically, even though the Rules require the Bureau to notice with reasonable particularity the matters for examination,[27] requests for corporate testimony often are very broad, with little particularity. This presents significant challenges in preparing witnesses. Further information on hearing topics from the Bureau typically must be obtained orally, and Bureau investigators are inconsistent in their willingness to provide this information in any detail. Moreover, even when the Bureau investigators are willing to provide further information, it may *broaden* the scope of the potential testimony, and does not narrow it.

Moreover, even when all of this effort has been undertaken, it is not uncommon for Bureau investigators to ask questions outside the scope of the noticed topics, with no meaningful ability of counsel to object or seek to limit the testimony. This lack of adherence to the particularity requirements in the Bureau's own Rules leads to great burden and inefficiencies.

- **Multiple Witnesses**

CIDs for oral testimony often are drafted in such a way that multiple corporate witnesses for a single entity must testify on the same topic. Consequently, institutions are forced to designate a disproportionate number of representatives, all of whom must be fully prepared for hearings through discussions with individuals with information on the relevant matters at issue, review of documents, deposition transcripts, exhibits, conversations/interviews with knowledgeable employees, and/or any other preparation.

- **Length of Investigational Hearings**

In addition, there is no time limit on investigational hearings. They can begin at any time and can last more than seven or eight hours. Bureau investigators also have wide latitude to take testimony beyond a single day if the circumstances of the investigation in their view necessitate multiple days of testimony.[28] Investigators are instructed to set forth multiple days of testimony by including such instructions in CIDs should they know in advance that additional days are necessary.[29] In our members' experience, the Bureau is likely to ask for multiple days of testimony even when a single day is sufficient. With no real incentive to get to the heart of the

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[27] *See* 12 C.F.R. § 1080.6(a)(4)(ii) ("Where a civil investigative demand requires oral testimony from an entity, the civil investigative demand shall describe *with reasonable particularity* the matters for examination.") (emphasis added); *see also* Fed. R. Civ. P. 30(b)(6) ("In its notice or subpoena, a party . . . must describe *with reasonable particularity* the matters for examination.") (emphasis added).

[28] *See* Enforcement Manual, at 72.

[29] *Id.*

matter, the investigational hearings can devolve into duplicative questioning, questions that are outside the scope of the noticed topics, and a general inefficiency in the taking of testimony.

Moreover, there is no limit on the number of times an individual or entity can be required to testify. In our members' experience, it is not uncommon for the Bureau to issue multiple CIDs for a single witness, which is burdensome, inconvenient, and time-consuming.

- **Counsel's Ability to Object**

While there are some similarities between investigational hearings and depositions in private civil cases, these hearings do not resemble civil depositions when evaluating key characteristics related to process. Questioning is not required to be consistent with what is permissible under the FRCP or even proportional to the scope of the investigation, causing confusion, unrest, potentially injecting prejudice, among other things. Bureau investigators may ask compound questions, leading questions, failing to lay proper foundation, badgering the witness, and asking questions that have been answered multiple times already.

Even though the Rules permit a witness's counsel to be present during the investigational hearing, they do not permit attorneys to make objections other than those made "for the purpose of protecting a constitutional or other legal right or privilege, including the privilege against self-incrimination."[30] Therefore, the right of counsel to intervene in an investigational hearing is severely restricted.

Further, the investigational hearing Rules provide no opportunities for counsel to object to ensure a clear record of testimony and overall fairness on the record. Counsel can play a useful role in ensuring witnesses are not misunderstanding questions and prevent the Bureau from spending time on an avenue of questioning because of such a misunderstanding. Ensuring a clean and fair record also is vital because Bureau supervisors who are responsible for deciding the direction of an investigation generally are not present at hearings, and thus, can rely only on clear transcript as evidence of a witness's information, impressions, or beliefs.

Overall, the Associations recommend that the Bureau adopt the FRCP absent good cause, or procedures akin thereto. This would allow the CID recipient to adequately prepare its witness, adequately defend the client, and to bring more efficiency and effectiveness to the proceeding. In particular, investigational hearings should: (i) identify matters for oral testimony with reasonable particularity; (ii) limit testimony to topics identified in the CID; (iii) ensure that corporate testimony is narrowly-tailored to appropriate corporate witnesses who can speak to a specific topic; (iv) limit hearings to one seven-hour day; and (v) in order to streamline testimony and allow effective representation, permit counsel to object more fully to questions as to form, scope, misstating facts, mischaracterizing prior testimony, argumentative, relevance, privilege, and calls for a legal conclusion.

[30] *See* 12 C.F.R. § 1080.9(b)(2).

7. The Bureau's processes for handling the inadvertent production of privileged information, including whether 12 CFR 1080.8(c) and/or the Bureau's processes should be modified in order to make expressly clear that the standards applicable to Federal Rule of Evidence 502 also apply to documents inadvertently produced in response to a CID

The Associations believe that it should be made expressly clear that Federal Rule of Evidence (FRE) 502 standards apply to the inadvertent production of privileged information and urge the Bureau to modify its processes for handling such inadvertent disclosures. While the language of section 1080.8(c) parallels that in FRE 502(a) and (b), providing CID recipients with protections against subject matter waiver and inadvertent disclosure, we recommend that the Bureau include the broader protections of Rule 502(e).[31] Rule 502(e) provides CID recipients making productions to federal agencies with the ability to enter into voluntary clawback agreements, which generally are binding only on the parties to the agreement.[32]

The ability to enter into clawback agreements with the Bureau circumvents any inherent ambiguities of 502(b) and balances the Bureau's role as not only the issuing party, but also as the judge, the fact-finder, and the initial appellate forum that decides whether a CID recipient took reasonable steps to prevent disclosure. These agreements benefit both the Bureau and CID recipients because the latter saves on resources that previously were directed at a "belt and suspenders" privilege review and redirects those efforts to other aspects of the document production, which ultimately increases efficiency in production.

8. The rights afforded to witnesses by 12 CFR 1080.9, including limitations on the role of counsel described in 12 CFR 1080.9(b) in light of the statutory delineation of objections set forth in 12 U.S.C. 5562(c)(13)(D)(iii)

The Bureau's Rules provide very few rights to witnesses and should be significantly revised. While the Rules generally permit a witness's counsel to be present during the investigational hearing, counsel are very limited in their ability to make valid objections, impose reasonable parameters on questioning, and engage in cross-examination of the client. As a result, counsel are not able to effectively defend the witness, ensure clarity of the record, and facilitate efficiency within the hearing. In addition, as discussed in further detail below, where a current employee is being represented by separate counsel, counsel for the subject (i.e., CID recipient) is not permitted to participate in the hearing even if the witness would prefer the presence of such counsel.

The Bureau's approach with respect to the rights of witnesses is more constrained than mandated by statute. The Bureau should adopt procedural rules relating to investigational hearings that are similar to other federal agencies in order to better ensure fairness, accuracy, consistency, and efficiency in connection with testimony. In addition, while there may be circumstances where presence of the subject's counsel would be disfavored, there should be

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[31] *See* 12 C.F.R. § 1080.6(c); Fed. R. Evid. 502.

[32] Fed. R. Evid. 502(e) ("An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.").

greater flexibility for such counsel to participate if such participation would not negatively impact the Bureau's investigation.

- **Counsel's Ability to Object**

The Bureau's Rule restricting objections that may be interposed by counsel is based on a Dodd-Frank statutory provision, but is more restrictive than required by statute. Dodd-Frank allows an attorney to "advise a person . . . in confidence . . . with respect to *any* question asked of such person" and permits objections "on the record to *any* question."[33] As stated above under Question #6, the Bureau Rules permit attorney objections only as to constitutional grounds and in order to protect privilege.[34]

The Bureau's Rule forbidding attorneys from making objections other than those made for constitutional or privilege reasons also is a significant departure from the FTC's rules upon which many of the Bureau's Rules on investigational hearings have been patterned. The FTC rules allow attorneys to make any objections as long as they are stated concisely in a non-argumentative and non-suggestive manner.[35]

Further, because the Bureau's Rules allow counsel to be excluded from an investigational hearing (and potentially suspended or disbarred from further practice before the Bureau) if the Bureau investigator believes counsel is being "disorderly, dilatory, obstructionist, or [engages in] contumacious conduct,"[36] this limitation of objections currently has a chilling effect on counsel's willingness and ability to defend his or her client.[37] When an objectionable question is asked, counsel has to make the strategic choice to either try to clarify the record and risk being thrown out of the hearing or allow the record to be unclear, but remain in the hearing. By revising the Bureau's Rules to align with the language in Dodd-Frank and the FTC's rules, counsel will no longer be forced to make this Hobson's choice.

Moreover, as stated above in response to Question #6, limitations on counsel's ability to object have resulted in inefficient, unduly burdensome, and fundamentally unfair investigational hearings. Because of the limited role of counsel, the witness effectively is placed in the position of being his or her own counsel, defending against questioning that may be unnerving and improper, correcting or clarifying questions where confusing, and attempting to interpose proper parameters based on the topic areas.

As a matter of practice, some Bureau investigators permit limited objections during the investigational hearings, but many others do not. This has resulted in inconsistency, sometimes even within the investigation if different Bureau investigators are conducting hearings. As

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[33] *See* 12 U.S.C. § 5562(c)(13)(D)(ii)-(iii) (emphasis added).

[34] *See* 12 C.F.R. § 1080.9(b)(2).

[35] *See* 16 C.F.R. § 2.9(b)(2).

[36] *See* 12 C.F.R. § 1080.9(b)(5).

[37] While this language also is found in the FTC's rules, in our members' experience, it does not have the same chilling effect because the FTC's rules regarding objections are much broader than the CFPB's Rules. *See* 12 C.F.R. § 1080.9(b)(5).

discussed above in response to Question #6, counsel should be allowed to make limited, appropriate objections or seek clarification where necessary to effectively represent the witness and to allow the investigational hearing to proceed in a just and efficient manner.

- **Multiple Questioners**

In many instances, multiple Bureau investigators are present during the hearing. In addition, staff from other federal or state agencies may also be present. It is not uncommon for multiple investigators to simultaneously question a witness and even interrupt one another, thereby causing an incomprehensible record. This process is unnerving for witnesses where counsel is unable to interject unless privilege or constitutional grounds apply.

- **Clarifying Questions/Cross-examination**

Following completion of the examination of the witness, counsel for the witness may request that the Bureau investigator conducting the hearing permit the witness to clarify his or her answers.[38] While both the Bureau's Rules and the FTC's rules provide that it is within the sole discretion of the investigator to grant or deny such a request, the Bureau's Rules do not contain the added language contained in the FTC's rules that such requests ordinarily would be granted except for good cause stated and explained on the record.[39] In our members' experience, the authority to grant or deny such a request is within the sole discretion of the Bureau investigator. In line with other federal agency standards, witnesses should be allowed to clarify any of their answers, and the Bureau investigator should not be tasked with making that decision. Allowing witnesses to do this as of right only benefits the investigation as it will result in an accurate understanding of the facts.

- **Attending Employee Investigational Hearings**

Finally, in our experience, where a corporate entity's current employee is represented at an investigational hearing by separate counsel (in a non-whistleblower posture), the current Bureau practice is to prevent counsel from attending the hearing, even if the witness and individual counsel consent. If consent is granted, and there is not a legitimate investigatory reason to exclude counsel, such counsel should be permitted to attend the hearing, or alternatively, should be able to obtain a copy of the transcript directly from the Bureau. Effectively "boxing-out" corporate counsel from the hearing, at a minimum, further impedes the CID recipient's understanding of the investigation. It may also lead to the inadvertent disclosure of privileged or confidential supervisory information without the counsel present to clawback such information. Corporate counsel must rely on the recollections of the employee-witness and separate counsel, or await a copy of the hearing transcript that must be requested by the witness under § 1080.9(a) and without any assurance that the request will be granted. Simply allowing counsel to attend the hearing, where there has been consent granted by the employee, would permit the entire investigation to proceed in a more just, efficient, and transparent manner.

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[38] *See* 12 C.F.R. § 1080.9(b)(4).

[39] *See* 16 C.F.R. § 2.9(b)(2).

9. The Bureau's processes concerning meeting and conferring with recipients of CIDs, including, for example, negotiations regarding modifications and the delegation of authority to the Assistant Director of the Office of Enforcement and Deputy Assistant Directors of the Office of Enforcement to negotiate and approve the terms of satisfactory compliance with civil investigative demands and extending the time for compliance

The Bureau Rules currently provide that within 10 days of receipt of a CID, the CID recipients and Bureau investigators must "discuss and attempt to resolve all issues regarding compliance" with the CID during the "meet and confer."[40] As noted above, Bureau CIDs typically are very broad, and only can be narrowed through the "meet and confer" process. Accordingly, the importance of the "meet and confer" cannot be understated.

- **Negotiating CID Modifications**

As discussed in more detail in response to Questions #4 and #5 above, negotiating modifications with Bureau investigators is challenging both because of the timing that is imposed and because the process involves significant discretion. A CID recipient's ability to effectively utilize the "meet and confer" process depends on the willingness, and ability of Bureau investigators to work with the recipient to negotiate parameters of the CID. In some instances, Bureau investigators have demonstrated an inability or unwillingness to understand the burdens imposed by sweeping requests. Specifically, there is often insufficient appreciation for the burdens imposed by CIDs, including the time, expense, and institutional resources that are required to respond. And as discussed above, there is insufficient consideration of the burden imposed on the Bureau in connection with voluminous requests such as investigators missing key information because they have received too many materials and devoting too many resources to a single investigation, which prevents the Bureau from investigating potentially other harmful conduct.

When assessing whether a modification is needed, the Bureau should consider the entire scope of the CID. While one particular request may not seem burdensome in isolation, coupling that request with a number of others likely is burdensome, particularly if there are only one or two institution employees who can gather the requested information. Similarly, while extensions of time are desirable in some circumstances, they are not always a complete solution, as burdensome requests also must be considered, which should drive the tailoring of requests.

- **Delegation Authority to Approve CID Modifications**

The process for approving and denying modifications also warrants consideration. Bureau investigators assigned to the matter have no authority to grant modifications immediately. Rather, approval must be obtained from the Deputy Assistant Director of the Office of Enforcement. This results in the Bureau investigators "listening" to the CID recipients' modification requests and noting that they do not have any authority to approve such requests. The investigators then pass the request to the Litigation Deputy, who is removed from the

[40] *See* 12 C.F.R. § 1080.6(c).

process and is not "negotiating" in any meaningful manner. Often this authorization process takes the Bureau time after receiving, escalating, and discussing the modification request. This timing delay is especially problematic in instances in which there is a pending modification letter that substantively affects a looming document production deadline, but no response from the Bureau on whether it will grant the proposed modifications in the CID recipient's modification letter. While the authority for modifications and extensions of time to respond to a CID resides with the Deputy Assistant Directors, we recommend that Bureau investigators make it a customary practice to inform the CID recipient whether they will recommend that a modification be approved or denied. This will minimize surprises for the CID recipient. In addition, the Bureau may consider empowering enforcement lawyers to ***grant*** certain modifications and time extensions on an *ad hoc* basis, rather than seek approval whenever a recipient requests a modification. More flexibility or discretion for staff attorneys in the modification context would provide greater clarity to both sides and encourage efficient fact gathering at a key stage of the Bureau's investigation.

10. The Bureau's requirements for responding to CIDs, including certification requirements, and the Bureau's CID document submission standards

- **Certification Requirements**

The Associations recognize that the Bureau has made some changes in connection with its certification process. For example, individuals are no longer required to certify that all of the documents and information *required* by the CID and which are within the *knowledge* of the CID recipient have been submitted to the Bureau. Nonetheless, certain certification requirements remain unrealistically arduous. The Bureau requires the recipient to submit two certifications: one for the document production, and one for the interrogatory responses. In addition, there is also a required business records declaration. Certification requirements compel a single individual to certify under penalty of perjury that he or she: (i) has made a diligent inquiry of ***all*** persons who likely have possession of responsive documents and information and has confirmed that a diligent search has been made of ***all*** of the locations and files that likely contained responsive documents and information in the CID recipient's possession, custody, or control; and (ii) that ***all*** of the documents and information identified through that search have been submitted to the Bureau. For most institutions under the Bureau's supervision, it is difficult, if not impossible, for a single individual to personally inquire of all individuals and locations likely to contain responsive documents and information. Asking individuals to do so places them in an untenable situation in which they are certifying under penalty of perjury something that may be unknowable to a single individual. Therefore, the Associations urge the Bureau to incorporate language allowing certification to the best of the signator's knowledge and after a reasonable investigation, similar to the language recently adopted by the U.S. Department of Housing and Urban Development (HUD) in HUD's annual certifications. That certification requires individuals to assert "to the best of [their] knowledge and after conducting a reasonable investigation."

- **Document Submission Standards**

In our members' experience, the Bureau often insists on the production of responsive documents in native format—even when location and acquisition of native versions is costly,

cumbersome, and time-consuming, and even when the native version of the file yields no additional, useful information. We recommend that the Bureau provide for greater flexibility regarding when the production of native documents are required and allow CID recipients to produce non-native documents when it is too costly and burdensome to otherwise produce the documents in native format.

11. The Bureau's processes concerning CID recipients' petitions to modify or set aside Bureau CIDs, including:

a. Whether it is appropriate for Bureau investigators to provide the Director with a statement setting out a response to the petition without serving that response on the petitioner;

b. Whether petitions and the Director's orders should be made public, consistent with applicable laws; and

c. The costs and benefits of the petition to modify or set aside process, vis-a-vis direct adjudication in Federal court, in light of the statutory requirement for the petition process and the fact that CIDs are not self-enforcing

Rather than providing a viable and efficient mechanism for challenging CIDs, the Bureau's formal process for modifying or setting aside CIDs presents further procedural obstacles. As a preliminary matter, the timing challenges associated with filing a petition, as discussed in response to Question #5 above, often make it practically impossible to utilize the petition process. In addition, when considering the lack of transparency in the process, the fact that the Bureau Director is the ultimate decision-maker, and the low likelihood of success (only one out of 34 CIDs where the Director has issued a petition decision has been modified through the formal petition process in the past five plus years),[41] CID recipients have been disincentivized to use the petition process. The disincentive to petition is further compounded by the fact that there is a presumption that the petition and the ruling thereupon will be made public, thereby resulting in disclosure of an otherwise confidential investigation.

As discussed in further detail below, there should be significant changes to the petition process to increase transparency and fairness. These include: (i) requiring Bureau investigators to serve petitioners with the same statement that is provided to the Director in response to a petition to modify or set aside a CID; (ii) discontinuing the practice of making petitions and resulting orders public; and (iii) allowing institutions to challenge CIDs before a fair, confidential, and independent tribunal. In addition, more generally, it would be useful to CID

[41] Decision and Order on Petition by Synchrony Financial to Modify or Set Aside CID, *In re Synchrony Fin.*, CFPB No. 2017-MISC-Synchrony Financial-0001, (Sept. 7, 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201709_cfpb_synchrony-financial_decision-and-order-on-petition.pdf. Moreover, no other relief was provided for the 33 petitions that resulted in publicly available orders issued by the former Director. *See* CFPB, *Petitions to Modify or Set Aside*, https://www.consumerfinance.gov/policy-compliance/enforcement/petitions/.

recipients and the industry for the Bureau to provide guidance materials that include the important considerations the Bureau weighs when it determines whether a CID should be modified or set aside.

- **Serving Response on Petitioner**

Section 1080.6(e)(3) provides that "Bureau investigators may, *without serving the petitioner*, provide the Director with a statement setting forth any factual and legal response to a petition for an order modifying or setting aside the demand."[42] It is improper to deny the petitioning institution any information about how the Bureau investigators are portraying the petition to the Director, and whether the petition itself offers adequate responses to the Bureau investigator's concerns related to modifying or setting aside the CID. The petitioner should have the benefit of full information in connection with the petition process, including the response and the opportunity to rebut that response. If there is concern about disclosing information to the petitioner from, for example, a whistleblower, the Bureau investigator can redact that information from the response. The Associations recommend modifying the Bureau Rules to require any response to the petition to be served on the petitioner and allow the petitioner to file a short reply to any response within 7 days of receipt of the response.

- **Public Petitions**

CIDs typically bear the instruction that the "CID relates to a nonpublic, law-enforcement investigation," which benefits the Bureau because "premature disclosure of this investigation could interfere with the Bureau's law-enforcement activities," as well as the CID recipients, who likely do not want negative inferences drawn from their receipt of a CID, no matter how vague or specific its NOP. And yet, receipt of the CID results in an immediate 10-day "meet and confer" deadline and a 20-day deadline to file a petition to set aside the CID, which ultimately can result in a public order from the Director. Thus, recipients must choose to either bypass the petition (even when it is in its best interests) or take a disfavored step early in the investigation before more information has been exchanged between the parties that could have avoided the conflict.

The Associations believe that the Bureau's practice of publishing petitions to modify or set aside CIDs and the Director's order on such petitions has had a chilling effect on a CID recipient's willingness to utilize the petition process. Knowing that a confidential investigation will be made public if a petition is filed, results in an unwillingness to challenge overly broad CIDs because the disclosure of the investigation may have more significant attendant consequences than simply complying with the CID. This chilling effect, coupled with the Bureau's resistance to modify or quash CIDs, only adds to the burden of CIDs requests and the demands on legitimate businesses. Moreover, publicizing petitions cuts against the presumed intent of the petition process, which is to act as a safeguard against meritless CIDs, or at a minimum, requests that need to be modified. While a CID recipient may request that the Director's orders and petition remain confidential, the OIG Report noted that as of the date of

[42] *See* 12 C.F.R. § 1080.6(e)(3) (emphasis added).

that report, the Bureau had not granted in full any requests for confidential treatment, and only had granted in part three such requests.[43]

We also note that the Bureau's current Rules only allow for publication of the petitions and the Director's orders, but not responses from the Bureau investigator to the petition. Given this inconsistency with the treatment of the petition and the Bureau's response, and balancing the need for others to understand the Director's orders with the confidentiality concerns of identifying a non-public investigation, the Associations recommend that the Bureau modify its Rules to delete any requirement that the petition be made public.

The Associations do recognize that the Director's orders on petitions may be informative to CID recipients when assessing challenges to CIDs. However, the Associations believe that this need for information can be balanced with the need to maintain the confidentiality of an investigation by redacting identifying information from the Director's orders prior to public disclosure if disclosure is necessary. Redacting identifying information would not impair the public's ability to assess and understand these important rulings, nor impede guiding future petitioners and providing predictability to the determination process, and it would help ensure that the Bureau treat similar petitions similarly. In addition, we continue to encourage Bureau investigators to take steps to reduce the likelihood of a petition to modify or set aside a CID by ensuring that a CID is initially narrowly-tailored to the needs of the investigation and is not overly broad.

- **Costs and Benefits of Petitions**

As a preliminary matter, the arbitrator of the validity of the petition should not be the very entity that issued the CID in the first instance. Under the prior administration, the Bureau denied all petitions made public (and modified only one). This underscores the importance of considering who should be the judge and jury. Under the Rules, the "Director has the authority to rule upon a petition for an order modifying or setting aside a civil investigative demand"[44]

While true that the non-self-executing nature of Bureau CIDs prevents the Bureau from compelling a recipient's response, federal district court is unlikely to be a viable option. Direct adjudication in federal court is likely to be significantly costlier to a CID recipient. In addition, it may serve to publicly disclose the investigation, a circumstance that typically is not desirable, as discussed above.

The Bureau should consider the appointment and use of administrative law judges (ALJ) to decide on the validity of petitions to modify or set aside a CID as a more viable option where there is a mechanism for maintaining confidentiality. The Associations believe that an ALJ process – insulated from agency influence – is a cost-efficient alternative to court proceedings, and is likely to enable more CID recipients to take advantage of the petitioning process in light of the fact that ALJs function as independent, impartial triers of fact in agency hearings.

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[43] *See* OIG Report, at 5.

[44] *See* 12 C.F.R. § 1080.6(e)(4).

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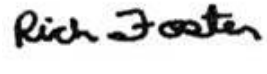
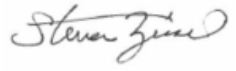
Thank you again for the opportunity to share our views with you on this important matter. The Associations welcome the opportunity to discuss any of the issues raised in this letter. Should you have any questions or if we can provide any additional information, please contact Richard Foster at Richard.Foster@FSRoundtable.org, Steven I. Zeisel at SZeisel@consumerbankers.com, or Anne C. Canfield at accanfield@michaelbeststrategies.com.

Respectfully Submitted,





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