CENTER FOR CAPITAL MARKETS COMPETITIVENESS

TOM QUAADMAN
EXECUTIVE VICE PRESIDENT

1615 H STREET, NW
WASHINGTON, DC 20062-2000
(202) 463-5540
tquaadman@uschamber.com

April 26, 2018

Ms. Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
Attention of PRA Office
1700 G Street NW
Washington, DC 20552

Re: Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes, CFPB-2018-0001, 83 Fed. Reg. 3686 (Jan. 26, 2018).

Dear Ms. Jackson:

The U.S. Chamber of Commerce (the Chamber) is the world's largest business federation, representing the interests of more than three million companies of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness (CCMC) to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy. Strong and appropriate consumer protections are an important and necessary component of efficient capital markets.

We appreciate the opportunity to respond to the Consumer Financial Protection Bureau's (the Bureau) Request for Information (RFI) regarding Civil Investigative Demands (CIDs) and associated processes. It is important that the Bureau investigate potential wrongdoing and enforce the law. However, investigations must be done within appropriate parameters that are established through due process and uphold important rights such as free speech. Accordingly, CCMC believes that CIDs must follow four guiding principles:

1. Protect institutions' free speech rights;

2. Petitions to set aside CIDs should be kept private so institutions are not deterred from asserting their rights;

3. Provide target institutions with fair notice if the Bureau believes a legal standard has been violated; and

4. Narrowly tailor requests to relevant documents that could yield information about an articulated alleged violation.

Explanation of General Principles

As referenced above, we urge the Bureau to adopt the four principles below when conducting enforcement investigations and issuing CIDs.

1. **Protect institutions' free speech rights**: The Bureau should not hinder free speech, and recipients should continue to be allowed to disclose CIDs if they wish to do so. The confidentiality of investigations exists to support the rights of investigated parties to not be unjustly tarnished by the mere existence of a government investigation. However, those parties should remain free to disclose the existence of CIDs as they deem appropriate, and the Bureau should formally abandon its 2016 proposal to deny them this right.

2. **Petitions to set aside CIDs should be kept private so institutions are not deterred from asserting their rights:** At the same time, the Bureau should foster the ability for institutions to file petitions to set aside or modify CIDs, instead of creating disincentives to do so. Currently, the existence of a CID is only revealed to the public by the Bureau if an institution files a petition. Publication of such petitions serves to discourage their filing and forces CID recipients to choose between exercising their right to file a petition and maintaining the confidentiality of an investigation. Parties should not be put in this position. Thus, petitions to set aside should not make the identity of the investigated entity public.

3. **Provide institutions with fair notice if CFPB believes a legal standard has been violated:** Enforcement investigations should only be opened and

CIDs should only be issued when the Bureau has reason to believe conduct has violated a clear legal standard. For years, we have opposed the Bureau's practice of "regulation by enforcement," whereby the Bureau would announce novel legal interpretations for the first time in the context of bringing an enforcement action. To date, the Bureau has too readily pursued investigations based on novel and unprecedented legal theories. Even if such investigations ultimately show the recipient did nothing wrong, they impose substantial burdens on CID recipients and expend valuable resources that could be used elsewhere within the institution. Accordingly, the decision to open an investigation and issue a CID should be vested with the Director and the Bureau should adopt clear policies asserting that investigations will only be opened where the suspected conduct, if it occurred, violated clearly articulated legal rules.

4. **Narrowly tailor requests to relevant documents that could yield information about an articulated alleged violation:** Once investigations are opened, inquiries should be narrowly directed at specific suspect conduct and CIDs should only seek targeted information, not broad categories of communications or documents. To date, the Bureau has pursued broad-based investigations that were not grounded in an articulable suspicion of illegal conduct and that, instead, sought to examine all aspects of a company's operations. Such investigations, and the extremely burdensome CIDs they generate, impose undue burdens on companies wholly disproportionate to the Bureau's investigative needs. Bureau investigations should be targeted at specific conduct and CIDs should be reviewed to ensure that they only seek information relevant to that conduct. Moreover, the Bureau should begin investigations by seeking only the critical information it needs to determine if there truly is an issue that needs to be addressed – similar to the boundaries imposed on discovery by the Federal Rules of Civil Procedure. Only if the Bureau has concrete reason to believe that illegal conduct occurred should it send additional, broader CIDs seeking further data and information pertaining to the conduct to better understand what transpired, and identify possible remedies.

Discussion

Protect Companies' Rights to Free Speech by Rescinding the Supervisory Information Sharing Proposal.

One important aspect of the CID process not addressed in the RFI is the confidentiality of Bureau investigations. The Bureau should take this opportunity to abandon the proposed revisions to the Bureau's rules governing the confidentiality of information[1] and clarify that the rules are intended to prohibit Bureau personnel—but not CID recipients—from disclosing the existence of an investigation or a CID.

The Bureau's current rules provide that no person in possession of confidential information can disclose such information.[2] The Bureau and regulated companies have thus far operated under the understanding that there is no comparable restriction on the ability of investigatory targets to disclose information about a CID that they receive. In August of 2016, however, the CFPB proposed to revise its confidentiality rules to expressly prohibit CID recipients from disclosing the existence of an investigation except in limited circumstances. The Bureau has yet to act on this proposal.

As the Chamber explained in its comment on the proposed rule,[3] the proposed rule would silence CID recipients in a manner inconsistent with the practice of other government agencies. Such a gag order, which would allow the government to decide when an investigatory target can speak out, is a prior restraint on speech, raising substantial First Amendment concerns. The American Civil Liberties Union agreed, stating in its comment letter that "the proposed regulation would be 'a prior restraint on speech in the strict sense of that term, for prospective speakers [recipients of CIDs or NORA letters who wish to disclose them more broadly] are . . . compelled by law to seek [permission] from the [Associate Director] before the speech takes place.'"[4]

Public scrutiny is a vital check on the abuse of power, and investigatory targets cannot avail themselves of that check if they are silenced. The Bureau should take this opportunity to withdraw the proposed rule and instead clarify that its extant confidentiality rules are targeted at CFPB personnel and do not prohibit investigatory targets from disclosing the existence of an investigation.

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[1] Amendments Relating to Disclosure of Records and Information, CFPB–2016–0039, 81 Fed. Reg. 58310 (Aug. 24, 2016).
[2] 12 C.F.R. § 1070.41(a).
[3] *See* U.S. Chamber of Commerce Comment Letter on CID and CSI, available at https://www.regulations.gov/document?D=CFPB-2016-0039-0027.
[4] *See* Americans for Civil Liberties Union Comment Letter on CID and CSI, available at https://www.regulations.gov/document?D=CFPB-2016-0039-0024.

Petitions to Set Aside CIDs should be Kept Private so Institutions are not Deterred Asserting their Rights.

Although we feel strongly the Bureau must maintain companies' free speech rights, confidentiality is critical when petitioning to modify or set aside a CID. Currently, there is a strong incentive for companies to adhere to Bureau demands because formally pushing back on the CID makes it public. Simply because the Bureau is requesting information from a company does not mean the company did anything wrong. However, the court of public opinion may determine otherwise.

The Bureau's current process for handling petitions to modify or set aside CIDs discourages CID recipients from exercising their rights to file such petitions and makes it extraordinarily difficult for such petitions to be granted. Further, revealing that an investigation is ongoing may be damaging to the target institution even if there was absolutely no wrong-doing. The process should be modified in its entirety to ensure the target institutions can justly exert their rights.

First and foremost, the Bureau must abandon its practice of publicizing rulings on petitions to quash. Such publication appears intended to—and does—serve as a disincentive for companies to file petitions and exert their rights. Companies should not have to choose between exercising their right to petition the Director and keeping an investigation confidential. The reputational and other costs of publicizing an investigation are real and substantial and should not serve to disincentivize companies from exercising their rights. Even if the claim is baseless, the mere fact that a company is under investigation by their regulator is damaging.

Companies are further discouraged from filing a petition to quash because the former Director almost never granted the petitions. Since companies knew it was very unlikely they would win, there was virtually no incentive to make their investigation public and create reputational harm. By keeping petitions to quash private, companies can finally exercise their rights without being immediately found guilty in the court of public opinion.

We do support retaining the petition process, as opposed to relying solely on direct adjudication in Federal court, particularly if the Bureau adopts the recommendations above and applies more common sense and reasonable standards to petition decisions and changes its practice of publicizing petitions.

As noted above, the time for filing a petition should automatically be stayed upon the filing of a request to modify the CID with Enforcement staff until such time as that request is granted or denied. Moreover, additional requests for extension should be granted liberally to allow companies sufficient time to prepare a petition, particularly where the CID seeks voluminous information and the petition is based, in part, on the undue burden imposed by the CID. These requests for extension are not the result of companies seeking to delay their response; they reflect the realistic time is takes to assess massive amounts of data through multi-faceted and often siloed institutions.

Additionally, the Bureau should abandon the practice of ex parte filings by Bureau personnel in response to the petition and should allow companies to file a reply in response to any opposition to the petition filed by Bureau staff. The Bureau's current practice serves no purpose other than to tilt the playing field and deprive the Director of all relevant information in making an informed decision on a petition. To the extent Bureau personnel are relying on confidential information in response to a petition, should information can be redacted from the response provided to the petitioner, but such redactions should be the exception rather than the rule.

Finally, the standards applied in resolving petitions should be modified in several ways. To date, the Bureau has adopted court standards for enforcing administrative subpoenas when deciding whether a petition should be granted. However, the petition process affords the agency an opportunity to exercise discretion. We believe the Bureau should use this discretion to create standards that reflect good government and a responsible exercise of investigative authority, and not merely seek to press that authority to its fullest extent. To the extent petitions are based on a claim of undue burden, the Director should balance the investigatory needs of the Bureau and the burden imposed on the recipient. The Bureau should abandon the unreasonable standard used to date whereby a petition based on burden will not be granted absent a showing that complying will "seriously hinder normal operations of a business."[5] CIDs can be enormously burdensome and expensive even if they do not hinder normal business operations, which is why the burden of the requests should be weighed against the expected utility of the information sought.

To the extent petitions are based on claims that go to the scope of the Bureau's authority or the merits of possible defenses, the Director should consider whether there is a reasonable probability that the facts will establish both that the Bureau has enforcement authority and that an actionable violation of law occurred. Rather than

[5] *See, e.g.,* In Re Nexus Services, Inc. and Libre By Nexus, Inc., 2017-MISC-Nexus Services, Inc. and Libre by Nexus, Inc.-0001 (Oct. 11, 2017) at 5 (relying on standard for court enforcement of investigative subpoenas).

deny any petition where a court might uphold the Bureau's authority, the Director should recognize that the investigatory process itself imposes substantial burdens on CID respondents. We also urge the Director to operate in the bounds of his authority and limit investigations based on weak hypotheses or legal theories that push the envelope.

Provide Institutions with Fair Notice if Bureau Believes a Legal Standard has been Violated.

We urge the Bureau to prioritize fair notice and "not pushing the envelope" at the first step in an investigation when deciding to authorize it, instead of waiting to determine merit when bringing a claim. Today, investigations can be opened on suspicion of a legal violation or "to seek assurance that a violation has not occurred,"[6] and are opened by the Assistant Director for Enforcement ("Enforcement Director"). This exceptionally broad standard for opening investigations, coupled with the delegated authority to do so, has allowed the Bureau to pursue burdensome investigations even where the Bureau had no particular reason to believe that a company has violated the law or where the investigation is predicated, at the outset, on a novel and never-before-articulated legal theory (leading to "regulation by enforcement"). Instead, investigations should be tied to a concrete legal standard that already exists, such as "reasonable articulated suspicion" or "good faith factual basis" that the alleged violation has occurred.

I. Investigations Must Only Result if there is a Colorable Reason to Believe a Violation Occurred.

Bureau investigations should only be opened when there is a colorable reason to suspect an entity may have engaged in conduct that violates a clear, previously articulated legal prohibition. This knowledge could be obtained through informal information gathering or the supervision process. Investigations impose substantial burdens on their targets, regardless of whether claims are ultimately brought. Thus, it is critical that investigations should not be opened simply to examine a company's overall compliance with the law, or to investigate a certain practice an enforcement attorney has a bias against, absent such a suspicion. Adopting such a guideline would help to ensure that investigations are not based on novel legal theories, fishing expeditions, or pet projects that would ultimately be unfair to pursue.

II. Consider Other Tools Before Initiating An Investigation.

[6] Office of Enforcement, Policies and Procedures Manual, Version 3.0 ("P&P Manual") at 37.

Prior to opening an investigation, the Bureau should expressly consider whether the Bureau has tools that are more appropriate to address the alleged conduct. We recommend the Bureau establish public guidance that considers whether rulemaking, guidance, or supervision is better suited for the alleged conduct before initiating an investigation. Each enforcement attorney proposing an investigation should articulate why the other means are not sufficient in the internal memo in which an investigation is proposed. This would help ensure that investigations are not needlessly being pursued in cases where less burdensome ways of assessing and ensuring compliance are available (*e.g.*, examination) and that investigations are not being pursued for the purpose of establishing new legal principles, where rulemaking or informal guidance would be more appropriate as a means of communicating regulatory expectations to industry.

III. Only the Highest Levels of the Bureau Should Be Able to Open an Investigation.

We recommend that the decision to open investigations not be delegated to the Enforcement Director and that only the Director or Deputy Director of the Bureau should have the authority to open an investigation, which subsequently allows the issuance of CIDs. The authority to open investigations should not be delegated to the Enforcement Director. Since CIDs can only be issued once an investigation has been opened, the decision to open an investigation should not be taken lightly because it effectively constitutes authority to issue CIDs in furtherance of the investigation. Given the impact that an investigation can have on an institution, including substantial costs of responding to CIDs, investigations should only be opened after careful consideration at the highest levels of the agency.

By way of comparison, the Federal Trade Commission (FTC) requires a resolution passed by the Commission as a whole before CIDs can be issued,[7] ensuring that the heads of the agency have carefully considered whether the compulsory process is warranted. Clearly, Congress would have to adopt a commission structure for the Bureau to fully achieve this critical balancing factor. The Bureau, however, can adopt internal checks in the meantime, and we urge it to do so. .

IV. Before Issuing CIDs Must there must be a Proper Information Gathering Assessment.

Before escalating an inquiry to a CID, we urge the Bureau to instruct its Enforcement Division to pursue an informal information gathering period to assess

[7] 16 C.F.R. § 2.7(a).

whether a CID is necessary. Currently, Enforcement rarely agrees to informal processes for gathering information or to allow a company to conduct an internal investigation and report back to the agency. In fact, the Bureau's Enforcement Manual strictly prohibits attorneys from engaging in an information fact finding period.[8] Prohibiting attorneys from engaging with the potential target institution is incredibly counter-productive because there may have been a misperception that could be cleared up with further information. Instead, the attorney's only recourse under the current manual is to file a CID to get more information.

Not only might the CID be unnecessary, but the lack of informal discussion also creates an onerous fact-finding period that takes up time once the CID is issued that could have been completed informally. Our members have indicated that the education process generally starts with a CID, where target institutions educate the Bureau about the focus of the CID, the company's operations, and the available data. This process should be reversed. The Bureau should *first* educate itself through dialogue with the company, *then* make a determination if there is a potential violation of consumer law. Naturally, they must understand the product or service before they can suspect a violation of law. Only if that process proves insufficient, should the Bureau issue a CID.

Additionally, the Bureau should require that CIDs be issued by the Director or Deputy Director of the Bureau. Currently, CIDs can be and are typically issued by one of four Deputy Enforcement Directors, with no substantive oversight and no processes in place to ensure consistency. This delegation of authority means that even the Enforcement Director does not review CIDs to ensure that they are not unduly burdensome and that they seek information relevant to the investigation.

By way of comparison, the FTC requires that CIDs be issued by the Commission or a Commissioner, the equivalent of requiring that the Director or Deputy Director issue CIDs at the Bureau. Escalating the level at which CIDs are issued would achieve several laudable goals. It would help ensure that CIDs are treated with the importance that they deserve—as an extremely powerful tool that should be used judiciously and with due consideration for the burdens being imposed. It will help ensure that someone slightly removed from the investigation can

[8] Office of Enforcement, Policies and Procedures Manual, Version 3.0 ("P&P Manual") at 37. ("During research matters, Staff should avoid any direct interaction with potential investigation subjects, their known agents, or third party witnesses (other than consumers or potential victims). Evidence gathering should generally be limited to non-identifiable internet searching, review of consumer complaints, media sources, legal research, and contact with other law enforcement agencies and consumers. Staff should ask consumers that they contact during research matters to keep their conversations confidential, although it is understood that consumers may choose to ignore such requests.").

scrutinize the requests in the CID from an objective perspective to ascertain whether they are warranted given the purposes of the investigation.[9] And, it will result in greater reliance on voluntary, more informal requests for information, which will help reduce the burden on companies while providing the Bureau the information it needs for its investigations.

V. Improving Recipients' Understanding of Investigations

a. Narrow the "Notice of Purpose" to clearly articulate what is under investigation.

The Bureau should take additional steps to ensure that investigation targets understand the conduct being investigated and the purpose of the investigation. It can do so through both formal and informal processes. Not only will more specificity help investigation targets, it will also yield more relevant information for the Bureau and decrease the amount of time and resources sifting through superfluous information.

By statute and rule, all CIDs must contain a "Notification of Purpose" setting forth the "nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation."[10] As a practical matter, the Bureau has traditionally relied upon Notifications of Purpose that are extremely broad and do not provide an investigation target with appropriate notice of the conduct being investigated or the legal theory at issue. Indeed, the Bureau's policies provide that "The general approach of the model [Notification of Purpose] 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."[11]

The Bureau should change its process to require that Notifications of Purpose be more narrowly-tailored and precisely drafted to actually identify the specific conduct being investigated and the specific provisions of law that the conduct is believed to violate. This would achieve several critical objectives that would alleviate burden at both the institution and the Bureau, and make investigations more efficient.

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[9] *See, e.g.,* Comments of the Staff of the Federal Trade Commission Bureau of Consumer Protection in Response to the RFI ("FTC Comment") at 7.

[10] 12 U.S.C. § 5562(c)(2); 12 C.F.R. § 1080.5.

[11] P&P Manual at 68 (emphasis added). *See also id.* at 69-70 (sample Notifications of Purpose drawn extremely broadly); *Accrediting Council for Independent Colleges and Schools v. CFPB*, 854 F.3d 683 (D.C. Cir. 2017) (finding Notification of Purpose improper).

First, this practice would be consistent with the plain words of the statute. The Bureau should abandon its practice of broadly describing categories of conduct (e.g., "servicing of mortgage loans"[12]) in Notifications of Purpose and instead require that the specific conduct at issue that led to the opening of the investigation be described in the Notification of Purpose (e.g., "failing to honor modification agreements"). Similarly, the Bureau should abandon its practice of broadly referencing entire statutes and regulations and the provision of the Dodd-Frank Act that proscribes unfair, deceptive and abusive acts and practices ("UDAAP"). Instead, it should identify the specific legal provision that the staff believes may have been violated and, if UDAAP is involved, whether the specific conduct is suspected to be unfair, deceptive or abusive.

Second, more narrowly tailored Notifications of Purpose would also help ensure that enforcement investigations are based on articulable suspicion that specific conduct is occurring that would violate a specific provision of law and that the information sought is directly relevant to that conduct. By simply adhering to the statute, the Bureau would be less inclined to conduct fishing expeditions because attorneys would be investigating certain conduct, not a broad category of activities. Just as the current policy encourages "very broad" Notifications of Purpose to enable the Bureau to collect "a broad spectrum of information," more narrowly tailored Notifications of Purpose should result in more narrowly drawn and targeted requests for information.

Third, because the validity of specific CID requests is measured in part by their relevance to the purpose of the investigation as set forth in the Notification of Purpose, more precise Notifications of Purpose would also help ensure that the requests set forth in the CID are relevant and necessary to understand the conduct at issue.

Fourth, the Notification of Purpose establishes the scope of the document retention obligation set forth in the CID's instructions.[13] Extremely broad Notifications of Purpose impose substantial document and data preservation obligations on recipients not commensurate with any benefit, as much of the information subject to the Notification of Purpose is unrelated to the actual purpose or focus of the investigation.

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[12] P&P Manual at 70.

[13] The Bureau's standard CID instructions require the retention of "documents, information, or tangible things that are in any way relevant to the investigation, as described in the CID's Notification of Purpose." CID, Document Retention Instruction.

b. **Promote a healthier dialogue between investigators and target institutions**.

In addition to a narrower Notification of Purpose, Enforcement staff should be encouraged to more openly share what is driving an investigation with investigation targets. Better understanding the conduct under investigation would enable investigation targets to engage in a more informed dialogue with Bureau enforcement attorneys regarding the available information that may be relevant to the Bureau's investigation and ways to provide the information in a less burdensome manner. It would also allow investigation targets to more quickly correct misunderstandings and misperceptions that might underlie an investigation.

Our members, as compliance-minded institutions, want to comply with requests and resolve an investigative matter in the most expeditious way possible. It is only logical that an honest, candid dialogue about what is the subject of the investigation will yield the right information in a more efficient fashion. An open line of communication will benefit both the Bureau and the institution by more quickly getting to the root of the issue and identifying the proper remedy.

VI. The Nature and Scope of Requests Should be Narrowly Tailored and Seek only Information Directly Pertinent to the Investigation

We urge the Bureau to require enforcement staff to engage informally with investigation targets to understand basic facts regarding the underlying conduct, the scope of information available, and how it is stored prior to issuing CIDs so that CID requests can be more narrowly tailored. Specifically, we urge the Bureau to look towards the Federal Rules of Civil Procedure for guidance. Currently, Bureau CID requests are often extremely broad, seek information at the outset of an investigation that may not be needed if staff collected and understood basic information, and cover time periods further than the statute of limitations.

a. **Breadth:** Bureau CIDs typically request extremely broad categories of information. CIDs often request "all" documents addressing a particular topic or issue. Given the broad definition of "document"—which includes all iterations and versions of a document—these requests impose substantial burdens on companies that are required to scour document repositories for historic versions of policies, procedures, and other documents. Instead, we urge the Bureau to instruct staff to seek basic information regarding applicable policies and procedures before demanding "all" iterations of any documents.

b. Initial Requests: Too often, the initial CID in an investigation will demand information about a broad range of issues, including burdensome data requests from legacy systems and Written Reports that appear targeted at identifying potentially injured consumers. These initial requests are often made before Enforcement staff has collected basic underlying information regarding either the conduct at issue or how the company maintains the relevant information sought. We advocate that the Bureau mandate CID requests are staggered to ensure the Bureau requests and reviews core information pertaining to the conduct at issue before making broad, burdensome requests. Initial CIDs should be limited to seeking such broad information and should never include requests for emails or Written Reports. If the Bureau does not obtain the information desired, staff can of course ask the target institution for more information at a later time. However, we believe an initial narrow request will both ease the burden on the institution and help enforcement staff better understand what they should be asking for.

c. **Email**: We believe the Bureau should refrain from seeking emails in an initial CID and should only request such documents where staff can articulate a clear rationale for doing so. We think a good model for this is Rule 34 of the Federal Rules of Civil Procedure, which governs document production and e-discovery. When emails are requested, the Bureau should be willing to work with investigation targets to identify an appropriately limited number of custodians and develop search terms that will be considered sufficient to meet the Bureau's requests. It has been common practice for the Bureau CIDs to often seek email communications, sometimes in the first CID issued to a company. Currently, enforcement staff is often unwilling to tailor requests, taking the unreasonable position that it is the CID recipient's obligation to produce all responsive emails. In this digital age, individuals may send hundreds of emails a day, so a broad request can easily escalate to millions of emails—many of which have no bearing on the investigation.

d. **Written Reports:** We urge the Bureau to instruct enforcement staff to consult with investigation targets regarding how data is maintained and what data is available before issuing broad Written Reports. Under past leadership, the Bureau has often used its authority to request Written Reports to demand complex and extensive data, sometimes consisting of millions of records and countless data fields. This massive undertaking is incredibly time-consuming and takes countless full-time employees to produce. Instead, we think the Bureau's and institution's time would be better spent searching first through available documents to find relevant information. Only then, should

enforcement staff request Written Reports. Going forward, we also hope the enforcement staff displays a greater sensitivity to the enormous burden that such data requests entail and the time it takes to pull, compile, and quality control data from multiple systems, which are often legacy systems that do not easily interact.

e. **Time Period:** The Bureau should adopt a presumption of only seeking information less than three years prior to the date of the CID, absent an articulable basis for needing further information and express consideration of the applicable statute of limitations. Previously, CIDs have requested documents and information going as far back as the 1990s (long before the Bureau's existence) and for time periods far outside the applicable statute of limitations. Identifying and retrieving such dated information is much more difficult than retrieving more recent documents because documents may not be available, employees may have left the organization, and systems may have changed. Additionally, such data is of limited value, particularly when the information relates to conduct outside the applicable statute of limitations.

f. **Clarity:** We ask the Bureau and its enforcement staff to give greater attention to the precision with which requests are drafted. Frequently, requests use unclear and vague language that leaves recipients guessing as to the precise nature of the information sought. This lack of clarity further underscores the necessity to have a constant dialogue between the Bureau and the CID recipient, both before a CID is issued and throughout the fact-finding process. Having an open line of communication can clear up any confusion for both parties involved, and create a more efficient process.

g. **Internal Coordination:** We encourage enforcement staff to coordinate with their colleagues in Supervision and the Division of Research, Markets and Regulations prior to issuing CIDs to ensure that they are not requesting information similar to that which is already in the Bureau's possession. This would cut down on duplication of efforts for both the Bureau and institutions. At the same time, Supervision should be prohibited from sharing privileged information that has been provided to it in the course of the supervisory process with Enforcement. Sharing such privileged information undermines the protections that are expressly afforded privileged information in the statute and will serve as a disincentive for supervised institutions to voluntarily provide privileged information to Supervision in the course of examinations.

VII. Timeframes Should be Reasonable and Flexible.

Due to the complexity and sheer volume of requests, we ask the Bureau to extend the timeframes for meeting and conferring and return dates, and to liberally grant extensions of the timeframe for petitions to set aside or modify.

a. **Petitions to Set Aside**: The 20-day timeframe for petitions to set aside, which is based in the statute, is unrealistic, considering the breadth of CID requests and the frequent delay in receiving a response to a request to modify a CID from Enforcement staff, which is a prerequisite to filing a petition. Moreover, this problem is exacerbated by the Bureau's rule providing that extensions of this deadline are disfavored.14 Instead, extensions should be liberally granted unless there is clear reason not to. Frequently, a CID recipient will not have received a response to a request to modify the CID before the expiration of the 20-day petition deadline. This places CID recipients in the position of having to expend resources to prepare a petition that may be unnecessary, and forces companies to choose between filing such a petition or hoping that their requested modifications will be granted. Rather than disfavoring extension of the 20-day deadline, the Bureau should adopt a rule providing that upon submission of a written request to modify a CID, the 20-day deadline will be stayed pending a final resolution of the request to modify. The Bureau should also more freely grant additional extensions of this timeframe to allow companies to avail themselves of the right to file such petitions. Enforcement should also be prevented from effectively denying CID recipients the right to petition by holding requests in abeyance. Frequently, rather than granting a request to strike a particular request in a CID, Enforcement will hold the request in abeyance—essentially suspending the response date indefinitely. This tactic—which preserves Enforcement's ability to bring the request back to life—effectively deprives CID recipients of the opportunity to petition to have the request stricken. Enforcement should withdraw requests in such instances. If Enforcement later determines that the information at issue is necessary to the investigation, it can issue a new CID for the information, which would afford the recipient the right to petition to quash. Holding requests in abeyance serves no purpose other than limiting the rights of CID recipients and exacerbating the unchecked authority in the hands of Enforcement.

b. **Meet and Confer:** The ten-day deadline to meet and confer, which is established by regulation,[15] is unreasonable, particularly when coupled with extraordinarily broad requests in CIDs. Especially in the case of large organizations, ten days is an extremely aggressive timeframe in which

[14] 12 C.F.R. § 1080.6(e)(2).
[15] 12 C.F.R § 1080.6(c).

institutions are expected to identify personnel with relevant knowledge, understand what documents and data are available, ascertain what modifications are needed, and identify potential alternatives. The ten-day timeframe is especially challenging when the CID calls for comprehensive data pulls, sometimes comprising dozens of different data fields, historical documents from legacy systems, or massive amounts of emails. Understanding the specific data that is available on different systems and how to retrieve the documents takes much longer than ten days. The FTC allows CID recipients 14 days to meet and confer[16] and the Bureau should at least adopt a similar 14-day timeframe, with flexibility about being able to meet and confer additional times.

c. **Return Dates:** Return dates for CIDs vary widely, and are seemingly driven by subjective preferences of individual Enforcement Deputies. Return dates do not appear to bear any connection to the breadth of information sought or the burden in obtaining it. On numerous occasions, CIDs have been issued with return dates of 21 dates or less, even though the CIDs call for voluminous data productions that will inevitably take months to compile. Not only is the return date entirely unreasonable in such cases, it does not even afford sufficient time to submit a comprehensive written request for an extension prior to the return date. In some instances, the Bureau has used extremely unreasonable return dates, of a week or less for substantial productions, as a means of seemingly punishing or coercing companies that Enforcement staff believes are not complying in good faith. We respectfully ask that this abuse of power be stopped. Return dates should be based on a reasonable assessment of the amount of time that will be required to compile responsive information and no other factor. We urge the Bureau to adopt a presumption against any return date that provides less than 30 days to respond. The FTC recently adopted a presumptive 30-day return date, consistent with Federal Rule of Civil Procedure 34(b)(2).[17] Enforcement staff should have to provide an explanation for why a shorter return date is necessary and reasonable in light of the information requested if they seek approval for a shorter return date.

VIII. The Right Afforded Witnesses

We ask the Bureau to revise its rules to clarify that counsel are allowed to object for all valid reasons. The Bureau's rules[18] unnecessarily inhibit the free flow of

[16] 16 C.F.R. § 2.7(k).
[17] FTC Comment at 10.
[18] 12 C.F.R. § 1080.9(b)(2).

information at investigational hearings. Enforcement staff have used the rule limiting objections at investigational hearings as a means to intimidate counsel and witnesses. They also have prevented interjections intended to clarify confusing or misleading questions or otherwise intended to clarify the record. The rule is more restrictive than the equivalent FTC rule, which is derived from almost identical statutory language[19] and allows for objections.[20] Numerous court rules[21] permit and even encourage objections to foster debate and ensure that both sides are heard. We encourage the Bureau to take a similar approach, and believe this will yield a more thoughtful, productive discussion.

We also think the Bureau should adopt a rule limiting investigational hearings to factual questions. We have heard of instances where Enforcement staff use investigational hearings to elicit opinion testimony from fact witnesses in an attempt to obtain "sound bites" they can later use against a company. We hope the Bureau can move past this practice and, instead, focus only on the facts of the case.

The Bureau should also adopt a policy making clear that witnesses will be provided copies of their transcripts in a format that allows them to print and keep a copy except in exceptional circumstances. Current Bureau policy requires witnesses to ask permission to purchase a transcript from Enforcement staff. Although such permission is typically granted, this interposes an unnecessary burden on witnesses. Similarly, the Bureau should change the policy that prohibits witnesses from keeping copies of exhibits used during their testimony. Such exhibits typically consist of material produced by the investigation target, meaning the rule is most often used to prevent a company from obtaining copies of its own documents. Once the exhibit has been shared with the witness and counsel there is no apparent reason to prevent the witness from keeping a copy. As with the rule that requires permission to obtain a printable copy of the transcript, this policy appears to simply emphasize the position of power and authority of Enforcement staff, instead of being rooted in a solid purpose.

Finally, the Bureau should adopt a policy that it will use investigational hearings as a last resort and only once the Bureau has attempted to gather the relevant

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[19] *Compare* 12 U.S.C. § 5562(c)(13)(D)(iii) (Dodd-Frank Act) *with* 15 U.S.C. § 57b-1 (FTC Act). *See* FTC Comment at 11-12 (noting that rights granted witness under FTC rules "are generally consistent with those granted witnesses in depositions under the Federal Rules of Civil Procedure" and referencing need for objections to be stated concisely and in a non-argumentative manner). Perhaps because the FTC's rule is derived from language that is identical to the Dodd-Frank Act, the FTC Comment erroneously states that the Bureau has granted witnesses similar rights. *Id.* at 11. It has not done so, but it should.

[20] 2 C.F.R. § 2.9(b)(2).

[21] LA Superior Court CITE.

information through interrogatories, informal witness interviews, or documents requests. Preparing for investigational hearings is a time-consuming and expensive task. Particularly where the Bureau is seeking corporate testimony, which requires educating a corporate representative about oftentimes broad topics and time periods, investigational hearings are not the most efficient means of obtaining relevant information.

IX. Meet and Confer

From our experience, the Bureau's meet and confer process does not adequately achieve its objective and can be greatly improved by empowering the line attorneys conducting the meet and confer. We urge the Bureau to empower Enforcement line attorneys with the power to grant extensions and modifications during the meet and confer process.

Currently, Enforcement requires that all requests for CID modification be reduced to writing and such requests can only be granted by a Deputy Enforcement Director. This means that Enforcement staff are not empowered to engage in a meaningful dialogue with defense counsel about how requests might be limited or to grant even modest modifications or extensions of time. Moreover, the Deputy Enforcement Director, who is empowered to grant modifications, is farther removed from the case and is less familiar with the nuances of the investigation. As a result, there is not much "conferring" and the meet-and-confer meeting typically consists of CID recipients articulating their concerns about the burden being imposed without getting meaningful feedback from line staff. Enforcement staff conducting the meet-and-confer sessions should be empowered to agree to CID extensions and modifications at the meet and confer meeting without a requirement that every modification request be reduced to writing and elevated to a Deputy Enforcement Director.

X. Requirements for Responding to CIDs

We urge the Bureau to adopt a functional approach to its document submission standards that weighs the usefulness of the documents against the burden for the institution. Other agencies have much simpler document submission standards.[22] The Bureau has been incredibly focused on the technical aspects of production, including the production of "native" files and metadata fields. Producing "native" documents years later when systems and employees have changed can be incredibly difficult. The

[22] *See, e.g.* FTC Comment at 13 (noting that FTC requirements are "significantly shorter and less complex" than the Bureau's Document Submission Standards).

Bureau should adopt a more functional approach to its document submission standards and require native files and metadata fields only in those rare instances where there is a reason to believe that such information will be relevant and useful (*e.g.*, in the rare cases where there is a dispute as to the authenticity or date of a document). Otherwise, the standard files convey the requested information and should be sufficient.

XI. Closing Investigations

The Bureau should take steps to ensure that companies that are the target of an investigation are apprised of its status and notified in a timely manner if an investigation is closed. Companies treat CIDs with great importance and will not close out the investigation until the Bureau makes clear that it has. Although current Bureau procedures provide that an investigation target should be notified at the close of an investigation if no charges are to be brought, companies often go years without hearing from the Bureau. If a matter remains open, companies still devote resources to it, must retain documents and information relevant to the investigation and must report it to executives and auditors, even if there has not been action on it in years. The Bureau should adopt presumptive timeframes at which it will inform investigation targets of the status of an investigation (*e.g.*, every 6 months) and timely close investigations if they are not going to be pursued.

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We believe that due process, which is at the heart of our legal system, and free speech are important to promote successful capital markets. This allows for consumer protection and certainty for market participants. We believe that this RFI is an important step forward towards achieving those goals.

Thank you for your consideration of these comments and would be happy to discuss these issues further.

Sincerely,

Tom Quaadman