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Comment Intake
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552

Enclosed please find Ballard Spahr's comments submitted in response to the Bureau of Consumer Financial Protection's January 26, 2016 Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes, Docket No. CFPB-2018-0001.

We appreciate the opportunity to provide comment on the important issues encompassed within the RFI. Our observations and comments result from our firm's extensive experience representing our bank and non-bank lending clients, as well as their service providers, in connection with more than fifty Bureau of Consumer Financial Protection investigations across the consumer financial services industry.

Sincerely,

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I. Executive Summary

This comment is being submitted in response to the CFPB's January 26, 2016 Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes, Docket No. CFPB-2018-0001. Our observations and comments reflected herein result from our firm's extensive experience representing bank and non-bank clients, as well as their service providers, in connection with more than fifty CFPB investigations spanning the entire consumer financial services industry. These investigations involved issues relating to payment processing, mortgage lending and servicing, overdraft fees, debt collection, debt buying, student lending and servicing, automobile finance and servicing, installment lending, reverse mortgages, small dollar lending, tax refund anticipation loans, marketplace lending products, and credit reporting.

Notwithstanding the professional and courteous approach of the CFPB's Enforcement staff during the many investigations in which we defended clients, our view is that the current investigatory process is shrouded in needless secrecy, imposes unfair burdens on recipients of Civil Investigative Demands (CIDs), and leaves too much discretion to the CFPB's Enforcement staff to operate without sufficient controls and constraints should they choose to do so. In short, the deck is stacked against the CID recipient, and every aspect of the procedure is designed to work to the detriment of the entity that is under investigation. The process can – and should – be made much fairer without impairing the CFPB's ability to obtain information needed to enforce consumer protection laws. Doing so will further enhance the CFPB's reputation with the industry, government, and consumers alike, as well as bring the CFPB's enforcement process more in-line with the investigative processes used by other regulators or in private litigation.

II. The Current CID Process is Unfair and Places Unwarranted Burdens on Recipients

Our experience assisting our clients in responding to CIDs has demonstrated on numerous occasions that the current CID process lacks basic procedural safeguards and places unreasonable burdens on recipients. Under Section 1052 of the Dodd-Frank Act, a CID is an investigative tool the CFPB is empowered to use to investigate alleged violations of law. To serve a CID in accordance with Section 1052(c), the CFPB must have a reasonable belief that a violation of law has occurred and must provide the basis for the CID to the recipient. This is in contrast to the CFPB's supervisory authority under Section 1024, which does not require any such belief or statement of purpose. The CFPB, however, has a history of using CIDs for broader purposes that are not authorized by the Dodd-Frank Act or Congress, but rather, are more akin to an extensive, unfocused supervisory examination in order to uncover potential violations. Indeed, in 2017, the D.C. Circuit criticized a CID for merely stating that it was issued to investigate "unlawful acts and practices in connection with accrediting for-profit colleges." In the D.C. Circuit's view, the statement of purpose did not contain sufficient detail to meet CID statutory requirements. *See Consumer Financial Protection Bureau v. Accrediting Council for Independent Colleges & Schools*, 854 F.3d 683 (D.C. Cir. 2017). In our experience, we routinely encountered statements of purpose in other investigations containing the same level of detail (or lack thereof) that the D.C. Circuit criticized.

For example, the CFPB has enforcement authority over entities that are not subject to its supervisory authority, including many non-bank entities. In our experience, until recently, the CFPB impermissibly and improperly utilized CIDs as a substitute for examinations when

investigating an entity over which it did not have supervisory authority. As a result, numerous companies that would not otherwise be subject to the CFPB's supervisory authority received broad, undefined, ambiguous, and ultimately, costly CIDs that sought broad categories of information across the company's entire operations and which did not otherwise appear to relate to any alleged, discrete violation of law set forth in the CID's statement of purpose.

The CFPB also has a history of using the CIDs and consent orders as a means of creating new industry-wide legal standards rather than punishing violations of existing law. In these circumstances, the CFPB utilized the CID and enforcement process as a substitute for notice-and-comment rulemaking. The result is that after incurring thousands and often, hundreds of thousands of dollars in legal fees and expenses responding to multiple CIDs over an extended time period, the company then paid restitution and civil penalties for "violating" a legal requirement that did not even exist when the CID was issued.

The broad nature of CIDs also imposes extreme burdens on their recipients, who routinely incur several hundred thousand dollars in fees and expenses, as well as devote hundreds of hours of employee time, responding to them. This burden is unreasonable for large entities, and it can be crippling for smaller entities. And such burdens result from the mere fact that the CFPB is undertaking an investigation, often without regard to whether the recipient actually violated existing law.

The following sections set forth proposals that would help alleviate the burdens of responding to a CID and prevent future abuses. The proposals would restrict the CID process to its proper role: investigating suspected violations of specific consumer financial protection laws.

III. Proposed Modifications to the CID Process

A. *Require a more definite "statement of purpose" that identifies the precise law at issue and the specific conduct the CFPB believes violated that law.*

The Dodd-Frank Act requires that a CID "state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." *See* 12 USC 5562(c)(1) & (c)(2). The CFPB, however, has routinely ignored this requirement. A CID's statement of purpose typically includes an expansive catch-all that states the CFPB is investigating a violation of "any other Federal consumer finance law." This catch all – which appears in many CIDs – literally empowers the CFPB to investigate a violation of *any* federal consumer finance law. That is not a hollow threat. Undersigned counsel has represented clients in numerous investigations where a CID was unfocused, untargeted, and covered all facets of the company's operations. This practice was also criticized by the D.C. Circuit Court of Appeals in *Consumer Financial Protection Bureau v. Accrediting Council for Independent Colleges and Schools*, 854 F.3d 683, 690-91 (D.C. Cir. 2017).

We propose requiring the CFPB, in practice, to include a statement of purpose that, in compliance with the requirements of Dodd-Frank, states the *specific* conduct that the CFPB believes violated the law and the *specific* law that has been violated. The CFPB should be expressly prohibited from including a broad catch-all statement of purpose like those used in the

past so that a CID's scope is limited to the specific conduct and laws referenced in the statement of purpose.

This proposal would ease the burden on CID recipients by placing a meaningful restriction on the scope of material sought in a CID. It also would allow for a more productive dialogue between the CID recipient and the CFPB's Enforcement staff, since the CID's purpose would be known to both sides, helping to focus the parties' discussions during the meet-and-confer process. The proposal is particularly meaningful for smaller entities because it would help restrict the CFPB from conducting unwarranted "fishing expeditions" when it only has (at best) reason to believe only a very narrow course of conduct violated a law.

Requiring a more definite statement of purpose also would limit a CID to its proper role as a law enforcement tool, rather than serving as a substitute for examinations. It would prevent companies from incurring substantial fees and expenses responding to a CID where the CFPB is unable to allege a specific violation of law. The CFPB would instead be required to articulate a suspected violation, and the information requested would have to be related to the alleged violation. In addition to preventing companies from incurring substantial fees and expenses in responding to a CID where the CFPB is unable to allege a specific violation of law, this requirement would free companies not subject to the CFPB's supervisory authority from the threat of examination through enforcement, which is not authorized by Title X of the Dodd-Frank Act.

B. *Add a relevancy standard for CID information requests.*

Requiring a more definite statement of purpose has teeth only if the CID recipient can challenge information requests in the CID as being outside the scope of the statement of purpose. We therefore propose adding a relevancy standard for CID information requests. This proposal would allow a CID recipient to challenge specific requests on the ground that the information sought is not relevant to the violation of law alleged in the statement of purpose. The proposal would bring CID requests more in line with civil discovery standards under Federal Rule of Civil Procedure 26 and the requirements to obtain a search warrant under Federal Rule of Criminal Procedure 41. It would also be similar to the requirement that an EEOC administrative subpoena be "relevant to the charge under investigation." 42 U.S.C. § 2000e–8(a).

The CFPB's current CID practice does not provide recipients with a meaningful opportunity to object to information requests on grounds of relevance for two primary reasons. First, as discussed above, the CFPB routinely includes a broad catch-all provision that extends the CID's scope to *all* federal consumer financial protection laws. Second, the CFPB has repeatedly rejected petitions to quash or modify a CID based on grounds of relevancy. *See, e.g., In re The Source for Public Data, L.P.*, 2017-MISC-The Source for Public Data, L.P.-0001 (Feb. 14, 2017); *In re Assurant, Inc.*, 2015-MISC-Assurant-0001 (April 25, 2016). Our proposals to require a more definite statement of purpose and add a relevancy standard would help address both defects in the existing CID process.

C. *Require a minimum response time of thirty days from receipt of the CID.*

Under current rules, all CFPB CIDs demanding production of documents or things must "prescribe a return date or dates which will provide a reasonable period of time" for the receiving party to produce the requested materials. 12 U.S.C. §§ 5562(c)(3)(B), (c)(4)(B); 12 C.F.R. §§ 1080.6(a)(1)(i), (a)(2)(i). CIDs demanding written reports or answers must "prescribe a date or dates at which time written reports or answers to questions shall be submitted." 12 U.S.C. § 5562(c)(5)(B); 12 C.F.R. § 1080.6(a)(3)(i). Notably, the return period requirement for demands for written reports or answers does *not* include a reasonableness requirement. In our experience, the CFPB usually specifies a return date of thirty days, although it occasionally specifies a shorter return date, such as fourteen or twenty-one days after service. Further, while in our experience Enforcement staff generally has been cooperative regarding extensions of time, we have observed some instances in which CID recipients have been required to produce voluminous documentary material and/or complicated data outputs to the CFPB in fewer than thirty days.

The current landscape regarding the setting of return periods for CIDs is unfair. Simply put, the return periods currently specified by the CFPB – even when they are set at thirty days – do not provide CID recipients with enough time to accurately and completely respond to the CFPB's often voluminous and very detailed requests for documents and information. As explained by one of our clients, "the deadlines set forth by the Bureau are unreasonable . . . in that we are not given enough time to gather the material and information requested by the CFPB considering the breadth of the requests."

When a CID recipient attempts to rush a production in response to an unreasonably short deadline, several issues arise. For one, the recipient may produce an incomplete set of documents or information because it did not have enough time to search and identify what could be an extensive amount of potentially responsive material. Producing incomplete information in the first instance requires a recipient to make subsequent supplemental production(s), often incurring additional (and unnecessary) costs. Moreover, after making any production, the recipient is asked to sign and provide a sworn affidavit of completeness under the penalty of perjury. Many recipients express concern and hesitancy to provide such affidavits when forced to produce information in a rushed manner.

Additionally – and particularly relevant where a recipient is producing *data* in response to CFPB requests – the current return period rules often result in a recipient producing inaccurate information in response to a CFPB request. In this situation, because of deadline pressure, CID recipients may produce data to the CFPB without completely vetting the date and/or performing a quality control review. Similar to producing incomplete information, producing inaccurate information requires a recipient to make supplemental production(s) of data or information to the CFPB, again incurring unnecessary costs. Moreover, a recipient must also explain any differences between the original and updated data – often resulting in confusion between the recipient and the CFPB.

For these reasons, we suggest the following changes to the current rules regarding return periods. First, the CFPB should establish that thirty days[1] is the presumptive *minimum* response time for CID recipients to respond to CFPB requests for documents, things, written reports, and answers to questions. Second, the CFPB should add a reasonableness requirement to the return period requirements for demands for written reports or answers. *Compare* 12 U.S.C. §§ 5562(c)(3)(B), (c)(4)(B), *and* 12 C.F.R. §§ 1080.6(a)(1)(i), (a)(2)(i) (imposing reasonableness standard for demands for documents or things), *with* 12 U.S.C. § 5562(c)(5)(B), *and* 12 C.F.R. § 1080.6(a)(3)(i) (no reasonableness requirement for demands for written reports or answers). Third, and most importantly, the CFPB should encourage (and empower) Enforcement staff to continue to exercise flexibility in setting original return dates beyond thirty days and in granting reasonable extensions of time beyond thirty days.

Making these changes would alleviate the unfair time pressure imposed on CID recipients and provide them with certainty that they will have a minimum, reasonable period of time to respond to a CID. These changes would also decrease the number of future instances in which CID recipients produces incomplete or inaccurate information in order to meet a too-short deadline, improve the completeness and the accuracy of responses produced to the CFPB, and allow Enforcement staff to quickly and efficiently address reasonable extension requests without having to escalate them to senior leadership in all instances.

D. *Make the petition to modify or set aside deadline longer to give more time for negotiation and compromise on scope of the CID before the petition is due.*

Under current rules, a CID recipient must file a petition to modify or set aside a CID within twenty days of service of the CID, and sometimes even less. *See* 12 U.S.C. § 5562(f)(1) (petitions to modify or set aside must be filed no "later than 20 days after the service of any [CID] . . . or at any time before the return date specified in the demand, *whichever period is shorter*") (emphasis added). The CFPB may grant extensions of time within which to file such petitions (*id.)*, but such extensions may only be granted by either the Assistant Director or one of the Deputy Assistant Directors of the Office of Enforcement. 12 C.F.R. § 1080.6(e)(2). Moreover, CFPB regulations do not provide for extensions of time while a CID recipient negotiates the CID's scope with Enforcement staff. On the contrary, CFPB regulations specifically state that "[r]equests for extensions of time [to petition to modify or set aside a CID] are disfavored." *Id.* The CFPB has never exercised its statutory right to grant a party an extension of time to file a petition to modify or set aside a CID in any of the investigations in which we have represented clients, and Enforcement staff has told us on numerous occasions that such extensions would never be granted.

The current twenty-day time period for a CID recipient to petition the CFPB to modify or set aside a CID is unfair. Twenty days (or less in some instances) is insufficient for a CID recipient to meaningfully assess whether it needs to petition the CFPB to modify or set aside a

[1] A thirty-day minimum response period also is consistent with the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 33(b)(2) (presumption of thirty-day response period for interrogatories); Fed. R. Civ. P. 34(b)(2)(A) (same for production of documents or things).

CID and then attempt to negotiate with the CFPB to potentially avoid the need for any such motion. Additionally, during this same period, the recipient is also working to collect potentially responsive information, interview potential custodians and information sources to prepare CID responses, collect data for requested reports, and so forth, thus causing additional challenges to both negotiating the scope of the CID and preparing to make a comprehensive production.

For example, twenty days generally is not enough time for a CID recipient to determine what information, in what format, and within what period of time, it can produce in response to a CID. And even if a recipient is able to make such determinations within twenty days (which, in our experience, it rarely can), twenty days is not enough time for a recipient to communicate those determinations to Enforcement staff during negotiations regarding the CID's scope and to reach an agreed-upon resolution regarding the scope and timing of the CID's information requests. Further, even assuming twenty days were sufficient for a recipient to reach an informal compromise with Enforcement staff regarding the CID's parameters (which, in our experience, rarely occurs), such a compromise does not become official until it is confirmed in writing by a Deputy within the Office of Enforcement. In our experience, the written, official resolution of a request for modification is almost always received *after* the twenty-day petition deadline has passed, sometimes by several weeks. Until that time, it is unknown if the proposed modifications will be accepted and if they are not, the time to file a formal motion to modify or set aside has long since passed in many instances.

Thus, under the current rules, CID recipients are forced to decide whether to file a petition to set aside or modify a CID before they have the information necessary to inform that choice. As discussed above, at twenty days after service of a CID, the recipient almost certainly does not have access to the Enforcement staff's official position regarding any requested modification of the CID. The recipient is therefore left with a false choice. While the recipient can, in theory, request an extension of time to petition to modify or set aside the CID, such a request is an almost certain dead end, particularly given the CFPB's stated policy that such requests for extension are "disfavored," 12 C.F.R. § 1080.6(e)(2), and its history of not granting such requests. Left without a viable path to obtain an extension, the recipient must either: (1) forfeit its right to petition for an order to modify or set aside the CID in order to continue its negotiations with Enforcement staff; or (2) halt those same negotiations, even if they have been productive until that point, in order to file a petition within the twenty-day deadline. Neither of these options is fair to CID recipients. Moreover, forcing petitions to be needlessly pursued actually slows down the CFPB's enforcement process, because CID compliance is placed on hold during the lengthy delay needed for the petition to be adjudicated.

We therefore recommend that the CFPB eliminate this unfair twenty-day requirement. First, the CFPB should eliminate 12 U.S.C. § 1080.6(e)(2)'s statement that requests for an extension of the twenty-day petition deadline are disfavored. Not only is it unnecessary, it is inconsistent with other federal agencies' approaches to such requests. *See generally, e.g.*, 31 U.S.C. § 3733(j)(2) (Department of Justice); 15 U.S.C. § 57b-1(f) (Federal Trade Commission); 16 C.F.R. § 2.10 (same). Second, the CFPB should make the petition deadline longer—specifically, by extending it to forty-five days, instead of twenty days. In our experience, forty-five days is sufficient for a recipient to gain the information necessary for it to determine whether it must petition to modify or set aside a CID.

Alternatively, if the CFPB does not extend the twenty-day deadline to forty-five days, the CFPB should establish a rule that the twenty-day deadline shall be tolled if Enforcement staff and the recipient are engaged in ongoing discussions about the CID's scope. This approach would encourage recipients to resolve disputes regarding the scope of CIDs through negotiations with Enforcement staff. Increasing the number of modification requests resolved through negotiation would also reduce the number of petitions submitted to the CFPB solely because the recipient and Enforcement staff could not reach a formal resolution prior to the twenty-day deadline. Absent implementation of some combination of these proposed changes, the petition process will remain what it is today – a toothless option with no real viability for CID recipients.

E. ***Making petitions to modify or set aside, and rulings on them, non-public.***

Under current rules, all petitions to modify or set aside a CID, and the Director's decisions on those petitions "are part of the public records of the Bureau unless the Bureau determines otherwise for good cause shown." 12 C.F.R. § 1080.6(g). A party seeking to prevent the CFPB from publicly disclosing its petition must make its showing of good cause to the CFPB "no later than the time the petition is filed." *Id.* CFPB regulations do not define what, if anything, constitutes "good cause."

The requirement of public disclosure of petitions to modify or set aside CIDs is fundamentally unfair to CID recipients. The rule requiring public disclosure of these petitions stands in stark contrast to CFPB regulations that treat other aspects of the CID as confidential. *See, e.g.*, 12 C.F.R. § 5562(d); 12 C.F.R. §§ 1070.2(e), (f), (h), 1070.41–47. The CFPB's requirement that the investigative process remain confidential is appropriate (absent a contrary decision by the entity being investigated to disclose), particularly since the receipt of a CID does not mean that the entity has actually violated any law. Therefore, an entity's receipt of a CID should not be part of the CFPB's public records. By that same logic, a petition to modify or set aside a CID also should remain confidential and outside of the public record. The CFPB's failure to afford petitions to modify or set aside CIDs confidential treatment forces a CID recipient to self-disclose to the public its receipt of a CID, which the entity may not wish to do. It also requires the recipient to consent to public disclosure of its reasons for seeking modification or termination of the CID, and the CFPB's response to its request. The existence and extent of these self-disclosure obligations serve as a powerful disincentive for CID recipients to file petitions to modify or set aside a CID. Tellingly, no other action taken by a CID recipient compels a similar self-disclosure.

Moreover, the CFPB provides recipients with little to no guidance prescribing under what circumstances a recipient may successfully petition the CFPB to exempt from public disclosure its request to modify a CID. *See* 12 C.F.R. § 1080.6(g) (providing only that requests for modification are part of the public record "unless the Bureau determines otherwise for good cause shown"). By contrast, other federal agencies provide more concrete frameworks for obtaining confidential treatment of petitions to modify CIDs. *See, e.g.*, 16 C.F.R. § 2.10(d) (petitions to limit or quash Federal Trade Commission compulsory process may be granted confidential treatment pursuant to regulatory framework set forth in 16 C.F.R. § 4.9(c)). Without any framework to determine what constitutes "good cause," a recipient is left with little, if any, chance of successfully obtaining confidential treatment of its petition.

The dichotomy between the mandatory public disclosure of a petition to modify or set aside a CID and CFPB regulations providing comprehensive confidentiality protection to other investigative materials is unsupportable.[2] The CFPB should be required to afford petitions to modify or set aside CIDs, and the CFPB's corresponding rulings on them, the same confidentiality protections the CFPB applies to its enforcement investigations generally.[3]

This change is necessary for several reasons. First, it eliminates the current framework's "public shaming" of CID recipients who exercise their right to have the CFPB Director review a CID for reasonableness. Removing this powerful disincentive will increase the number of CID recipients who seek Director review, providing the Director with essential insight into the CID drafting process, and the day-to-day operations of Enforcement staff. Moreover, treating petitions to modify or set aside CIDs as confidential ensures consistency within the CFPB's own regulatory framework, which, as described above, provides comprehensive confidentiality protection to all other aspects of the investigative process. If the CFPB does not change current procedures to make petitions to modify or set aside CIDs confidential, it should, at a minimum, provide CID recipients with more specific guidance regarding how a recipient may successfully obtain confidential treatment for a specific petition. *E.g.*, 16 C.F.R. § 2.10(d).

F. *Make the process for resolving petitions to set aside or modify more transparent.*

Under current rules, a CID recipient must "specify each ground upon which the petitioner relies in seeking" a petition to modify or set aside a CID. 12 U.S.C. § 5562(f)(3). The petition must "set forth all factual and legal objections to the [CID], including all appropriate arguments, affidavits, and other supporting documentation." 12 C.F.R. § 1080.6(e)(1). The Enforcement staff responsible for issuing the CID may "provide the Director with a statement setting forth any factual and legal response to a petition." *Id.* § 1080.6(e)(3). But Enforcement staff is not required to provide a copy of their response to the CID recipient. *See id.* (permitting Enforcement staff to submit response to Director "without serving the petitioner"). All petitions to modify or set aside a CID are ruled upon by the Director. *Id.* § 1080.6(e)(4).

Depriving a CID recipient the right to view the Enforcement staff's arguments supporting a CID is unfair. As an initial matter, there is simply no rational reason for not permitting a CID recipient to have access to Enforcement staff's arguments in support of the CID issued to the

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[2] One possible CFPB rationale for making petitions and rulings thereon part of the public record is that rulings provide guidance to CID recipients. But the CFPB can achieve that goal through other measures – for example, by publishing a Bulletin and/or publishing rulings on petitions with the CID recipient's name and identifying information redacted.

[3] Other federal agencies permit parties to maintain the confidentiality of at least *the contents of* their petitions to modify or set aside CIDs. *See, e.g., LASR Clinics, LLC v. United States DOJ*, No. 2:17-cv-02118, 2017 U.S. Dist. LEXIS 173097, at *2 (D. Nev. Oct. 19, 2017) (referencing petitioner's motion to set aside CIDs, which was *filed under seal*); *see also* 31 U.S.C. § 3733(j)(2) (motions to modify Department of Justice False Claims Act CIDs must be submitted to federal district court for adjudication).

recipient. The baselessness of this requirement becomes particularly apparent when contrasted with Enforcement staff's unlimited access to the recipient's arguments *against* the issuance of the CID.

Moreover, denying a recipient access to arguments supporting a CID deprives the recipient of the opportunity to address those arguments, resulting in a lopsided review process. This unbalanced process serves only to deprive the Director, the individual responsible for granting or denying petitions, the opportunity to consider all available arguments related to the CID's reasonableness, thereby forcing the Director to make determinations on the reasonableness of a CID based upon imperfect, incomplete and one-sided information.

The CFPB can easily remedy this unfair process by simply making the Enforcement staff's responses to petitions to modify or set aside a CID available to the petitioner. Making these responses available to the petitioner would provide an opportunity for the petitioner to consider, and potentially respond to, Enforcement staff's arguments in support of the CID. Under this approach, the petition resolution process would more closely resemble a more impartial judicial process. A process more closely resembling a judicial one would result in better, more balanced decisions regarding petitions to modify.

Moreover, there is no corresponding downside to this approach. If, for example, some extraordinary circumstance required Enforcement staff to disclose information related to a CID to the Director, but to withhold it from the recipient, the CFPB could develop a process whereby Enforcement staff could provide that information – and only that information – separately to the Director. But that situation should be the exception, and not the rule. Fundamental principles of fairness and due process mandate that CID recipients have access to the reasons articulated by a federal agency in support of the agency's decision to serve compulsory process upon them.

G. *Permitting objections at investigational hearings.*

The CFPB's rules of investigation permit CFPB investigators to take live testimony from witnesses pursuant to CIDs. 12 C.F.R. § 1080.7. Under current practice, a witness being interrogated by the CFPB's enforcement staff has a right to be represented by counsel. *Id.* at § 1080.9(b). However, counsel's ability to represent the witness is almost completely negated by the CFPB's rule that no objections are permitted during testimony except those related to privileged or constitutional matters. *Id.* at § 1080.9(b)(1)-(2).

Under § 1080.9(b)(3) "[c]ounsel for a witness may not, [except as noted above], interrupt the examination of the witness by making any objections or statements on the record." If an attorney violates that rule, the CFPB can bar the attorney from practicing before the CFPB or from continuing to represent his or her client. *Id.* at § 1080.9(b)(5). Indeed, witnesses do not even have the right to later clarify responses to unclear questions. While § 1080.9(b)(4) permits a witness's counsel to "request that the Bureau investigator conducting the investigation permit the witness to clarify any of his or her answers, [] [t]he grant or denial of such request [is] within the *sole* discretion of the Bureau investigator conducting the hearing." *Id.* (emphasis added).

In our experience, most CFPB investigators conducting investigational hearings have conducted those hearings in a reasonable manner. Many permit counsel to, with permission,

assist with the investigational hearing by offering helpful suggestions when the witness appears not to understand the question. Most also routinely offer witnesses the opportunity to clarify prior testimony.

However, in some cases, aggressive investigators have led witnesses to give inaccurate testimony by asking unclear or unfair questions. For example, some investigators require witnesses to testify about matters as to which they have no personal knowledge or to guess or speculate about hypothetical situations. Others have asked witnesses to volunteer information in response to questions like "is there any other information that you know of that would be of interest to us in this investigation?" or "when you prepared for your testimony, were there any topics you were worried I would ask you about?" Such questions are entirely improper.

Of course, aggressive questioning is nothing new to the world of litigation. In litigation, however, the opposing party can object and defend itself from unclear or unfair questions. In investigational hearings, however, the investigators are in complete control, with the witnesses and their counsel powerless to object to improper questions. Nor do the witnesses and their counsel receive any further insight into how answers provided in response to such unfair questions are received and processed within the investigation or give rise to later actions, such as NORA notices and consent order terms. This imbalance is neither fair nor conducive to the CFPB's gathering of accurate information on which to base enforcement decisions.

H. *Provide that investigational hearing witnesses have the right to automatically receive copies of transcripts and all exhibits.*

Although Dodd-Frank states that the witness in an investigational hearing is presumptively entitled to receive a copy of the transcript of his or her testimony, unless there is "good cause" to refuse to provide a copy of the transcript (*see* 12 USC 5562(c)(13)(G)), the CFPB's actual practice is to require witnesses to request permission from the CFPB's Enforcement staff to purchase a copy of their hearing transcripts from the court reporter. This practice is unfair and inconsistent with the statute itself. Indeed, we have experienced instances within the same investigation, involving the same Enforcement attorneys, where some requests for witness transcripts were granted and others were not, for unknown reasons.

Moreover, it is the CFPB's standard practice to disallow witnesses from keeping or receiving copies of the exhibits they are questioned about during investigational hearings – even if the witness or the witness's company produced those documents. The effect of these practices is to make the enforcement process more secretive, less transparent, and to make it more difficult for the subjects of investigations to defend against allegations by the CFPB's Enforcement staff that they have engaged in violations of law. There is no legitimate reason for these practices, and the CFPB should change them to allow witnesses to obtain copies of their hearing testimony and the exhibits they were shown while testifying. To deal with situations in which there is some unusual need to restrict access to a transcript or individual exhibits, the rule can provide that these may be withheld for good cause, if the withholding is authorized by an appropriate supervisor within the CFPB's enforcement division, and if the good cause explanation is provided to the witness.

I. *Create a rule prohibiting examination staff from sharing attorney-client privileged documents with enforcement staff.*

One of the most unfair aspects of the CFPB's supervisory practice has been its assertion that it is entitled to obtain attorney-client privileged documents during examinations. The CFPB has argued that 12 U.S.C. § 5581, which transfers to the CFPB "all powers and duties" of prudential regulators, also transferred those prudential regulators' alleged "power" to demand the production of privileged documents during examinations. CFPB Bulletin 12-01, p. 1. We believe the statutory basis for the CFPB's assertion that it may demand privileged documents in an examination is very weak, but we leave that issue aside for the purpose of this discussion.

It is fairly well established that regulators like the CFPB *cannot* obtain privileged documents pursuant to CIDs when acting in their enforcement capacity. 12 C.F.R. § 1080.8(a) (allowing CID recipients to withhold privileged information); *see also Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 979 F. Supp. 2d 104, 108 (D.C. Dist. 2013) (noting that "a [CID] recipient may withhold responsive material based on a 'claim of privilege'").

What is not spelled out in the applicable regulations is whether CFPB supervisory staff can share privileged documents obtained during examinations with CFPB Enforcement staff during the course of their investigations. Indeed, page 15 of the CFPB SEFL Staff Memorandum 2016-01 indicates that Enforcement staff are permitted to review any documents obtained by supervision staff during the course of an examination. That memorandum is generally seen as part of the CFPB's "supervision playbook," giving detailed instructions on how examinations are conducted.

This unfair practice should be prohibited. Either the CFPB should abandon its controversial assertion that it is entitled to obtain privileged documents in examinations, or alternatively, at a minimum, those documents should be used solely for supervision purposes and never shared with enforcement.

J. *Modifying the form of certifications required by CID recipients.*

The CFPB's current practice with regard to a CID recipient's certification at the end of producing information in response to a CID is unfair and disconnected from the real world.

It is typical for CID recipients to be corporate entities, and for CIDs to request voluminous information from different parts of the organization, reaching back many years, and sometimes involving actions taken by persons who are no longer employed by the company. Companies responding to these CIDs typically undertake a diligent search for responsive information, and it is also typical for the method used to search for such information to be shared with the Enforcement staff as the company is responding to the CID.

After producing the information demanded in a CID, the recipient currently is required to certify, under oath, that it has produced all of the requested information after a diligent search. 12 C.F.R. § 1080.6(a)(1)(ii). The rule specifically requires that the recipient provide a "sworn certificate, in such a form as the [CID] designates." *Id.* The form "sworn certificate" attached to most CIDs is unfair and unreasonable, however, especially as applied to large organizations. The certificates that we have seen require the certifying party to swear, without any knowledge or

other qualification, that a diligent search has been conducted, that all documents found during that search have been produced, and that any document not produced has been withheld only under a claim of privilege.

Particularly for large organizations, the person signing the certification is relying, by and large, on representations made by his or her colleagues. Allowing the person making the certification to do so "upon information and belief" is fairer and reflects the reality that people within large organizations are often required to rely on others for information, including whether a diligent search has been conducted and whether responsive documents have been produced.

To be fair, we have not experienced a situation in which Enforcement staff has pursued a perjury charge against a certifying party where documents were later discovered in an unexpected place or where they were accidentally omitted from a production. However, requiring unqualified sworn statements from people who necessarily rely on the representations of others, needlessly puts them in jeopardy, without any corresponding benefit to the CFPB.

K. *Abandon the proposal that would prohibit CID recipients from disclosing the existence of the CID.*

In 2016, the CFPB published a proposed rule that seeks to prohibit the recipient of a CID or letter from the agency providing Notice and Opportunity to Respond and Advise (NORA letters) from disclosing the CID or NORA letter to third-parties without prior written consent of a senior CFPB official. *See* Proposed Rule Relating to Disclosure of Records and Information CFPB-2016-0039, 81 Fed. Reg. 58310 (Aug. 24, 2016). We believe the CFPB should abandon that effort for several reasons.

First, the proposed rule would constitute a "gag" rule that would stifle constitutionally protected speech and operate as an unconstitutional prior restraint on speech. *See Tory v. Cochran*, 544 U.S. 734, 738 (2005) ("Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.").

Second, in addition to being a content-based prior restraint, the proposed rule would vest individual government officials with unfettered, broad discretion to allow or prohibit speech. An investigatory target may have myriad reasons for disclosing a CID or NORA letter. For instance, there may be contractual obligations or other business reasons for a CID or NORA letter recipient to disclose the CID or NORA letter to current or prospective business partners. The recipient may also seek to criticize the CFPB's actions or position, seek trade association, public or congressional support for opposition to the CFPB's investigation, soften the impact of an impending fine or lawsuit, or warn other industry members. Those are all legitimate reasons for an entity to disclose a CID or NORA letter.

Third, the CFPB's proposal is also at odds with how other federal agencies operate. The SEC and FTC do not prohibit recipients of CIDs or subpoenas from disclosing them. Grand-jury witnesses do not generally have a secrecy obligation. *See* Federal Rule of Criminal Procedure 6(e). Even the non-disclosure of an FBI national security letter, which is used primarily in terrorism cases, is conditioned upon certification by a senior FBI official that non-disclosure is

necessary for public safety and that the recipient has been advised of the opportunity for judicial review. 18 U.S.C. § 2709(c)(1).

There is simply no justifiable basis to require the recipient of a CID or NORA letter to keep the existence of the CID or NORA letter secret. The CID process is a civil investigative tool, not a criminal law enforcement tool, and does not have any impact on national security. The reasons that typically justify keeping government action a secret are not present in the CID context. Indeed, the only apparent purpose for requiring secrecy appears to be to shield the process from public view, thereby making it more difficult to identify governmental abuse of power. The proposed rule should therefore be abandoned.