



April 26, 2018

*Via Electronic Mail*

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

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

Dear Ms. Jackson:

The Clearing House Association L.L.C.<sup>1</sup> (“TCH”) welcomes the opportunity to comment on the request by the Consumer Financial Protection Bureau for information regarding the Bureau’s Civil Investigative Demand (“CID”) process and related issues.<sup>2</sup> TCH and its members support the CFPB’s mission of protecting consumers, and we appreciate and strongly support the Bureau’s current initiative to review its policies and procedures and to receive public comment about its activities. By engaging all stakeholders in a public conversation about how the CFPB can function fairly and effectively, the Bureau has taken an important step in fulfilling its mission of protecting consumers and ensuring that markets for consumer financial products and services operate transparently, competitively, and efficiently. We believe that this important initiative will assist the Bureau in improving the CID process to “best achieve meaningful burden reduction . . . while continuing to achieve the Bureau’s statutory and regulatory objectives.”<sup>3</sup>

The CID process is one of the Bureau’s primary tools for obtaining information related to potential violations of federal consumer financial law. When used appropriately—that is, through tailored requests that balance the burdens of responding with the need for

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<sup>1</sup> The Clearing House is a banking association and payments company that is owned by the largest commercial banks and dates back to 1853. The Clearing House Association L.L.C. is a nonpartisan organization that engages in research, analysis, advocacy and litigation focused on financial regulation that supports a safe, sound and competitive banking system. Its affiliate, the Clearing House Payments Company L.L.C. owns and operates core payment system infrastructure in the United States and is currently working to modernize that infrastructure by launching a new, ubiquitous, real-time payment system. The Payments Company is the only private-sector ACH and wire operator in the United States, clearing and settling nearly \$2 trillion in U.S. dollar payments each day, representing half of all commercial ACH and wire volume.

<sup>2</sup> CFPB, Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes, 83 Fed. Reg. 3686 (Jan. 26, 2018).

<sup>3</sup> See *id.* at 3686.

information—CIDs can help supplement the CFPB’s supervisory authority, allowing the Bureau to address potential violations of law. Unfortunately, the Bureau historically has too often used its CID authority in a manner that places unnecessary burdens on CID recipients and Enforcement staff, without those requests necessarily furthering or promoting the goals of the investigation. Based on the experiences of the industry, the Bureau has:

- at times used CIDs to launch sweeping investigations, with undisclosed and seemingly undefined objectives;
- often required the production of written reports and made other expensive demands on short timelines, without communicating why the information is critical to the investigation or exploring whether the information is available through other, less burdensome means; and
- generally insisted on rigid adherence to a CID’s terms and procedures even where a more flexible and cooperative approach would appear to be more effective in helping the CFPB to obtain relevant information and would be less burdensome on the CID recipient.

As discussed in this letter, existing CFPB procedural rules and approaches relating to issuing, reviewing, and challenging CIDs have contributed to these issues. For example, Bureau officials with the authority to issue CIDs are generally involved in the direct oversight of investigations, the Bureau does not have any formal mechanisms for centralized review of investigations based on its Unfair, Deceptive, or Abusive Acts or Practices (“UDAAP”) authority, nor does it have an independent and confidential process for petitioning for modification of CIDs.

We share the Bureau’s interest in efficiently identifying and addressing potential legal violations, particularly where there may be consumer harm. To that end, this letter contains a range of specific recommended reforms to the rules and practices of the CFPB’s CID process that are intended to further important policy aims, such as due process, transparency, and efficiency, without inhibiting the CFPB’s ability to use CIDs to collect information. Due process and transparency demand that the rules and legal standards that govern or restrict entities’ activities be made clear, in advance, and that CID recipients understand the conduct under investigation and have an opportunity to identify information that is likely to be most relevant to the Bureau’s inquiry. The approach to CIDs should also weigh the utility of the information request against the burden to treat CID recipients fairly by minimizing undue burdens.

Where possible, we believe the recommendations outlined below should be implemented by published rules or other formal regulatory processes, rather than merely by informal practice changes, as doing so will institutionalize those reforms, facilitate consistency in application, and will provide greater transparency to the public and regulated entities. Formal policy changes and codifications will ensure more sustainable reform through future changes in Bureau personnel and will serve to inform stakeholders of the CFPB’s CID process.

## **I. Executive Summary**

- The Bureau should amend its procedures for issuing CIDs to enhance coordination with Supervision and to increase oversight of an investigation's scope and objectives, particularly where an investigation is based on the Bureau's UDAAP authority. In particular:
  - The Bureau should formalize a policy requiring Enforcement to coordinate with Supervision and receive authorization from a senior leadership committee prior to issuing a CID to a supervised institution.
  - The Bureau should implement new procedures requiring a senior leadership committee to review any CID that proposes to investigate a potential UDAAP violation, as well as "catch all" CIDs that broadly investigate "any other violations of Federal consumer law."
- The Bureau should institute additional safeguards to help ensure that the burdens imposed by the nature of the scope of requests included in CIDs are appropriately tailored and proportional to the need for the requested information. In particular:
  - The Bureau should implement formal processes to require Enforcement to demonstrate the necessity of demanded information in relationship to the burden imposed on the CID recipient, particularly in the case of higher burden requests, such as written reports, data analyses, or testimony.
  - The Bureau should limit the time periods encompassed by its investigations to minimize undue burdens on companies and focus the Bureau's finite resources on investigating harms that have the most immediate impact on consumers.
  - The Bureau should inform CID recipients how the information a CID requests relates to the overall scope and purpose of the Bureau's investigation.
  - The Bureau should permit multiple individuals to attest to the "completeness" of a CID issued to a legal entity and adopt an approach to concluding investigations in a predictable and transparent manner.
- The Bureau should implement a confidential, fair, and flexible approach to considering requests to set aside or modify a CID—both within and outside the formal petition process—that takes into account both the CFPB's objectives and the burdens imposed on the entity under investigation. In particular:
  - The Bureau should implement a confidential and independent process through which institutions can formally petition to set aside or modify a CID.
  - Outside of the formal petition process, the Bureau should implement a more flexible and transparent approach to proposed modifications to a CID's scope and/or timeline.
- The Bureau should implement formal policies barring requests for privileged materials through a CID and restricting the use of privileged materials in Enforcement matters.

**II. The Bureau should amend its procedures for issuing CIDs to enhance coordination with Supervision and to increase oversight of the investigation’s scope and objectives.**

The CFPB’s regulations provide the Director, the Assistant Director of Enforcement, and the Deputy Assistant Directors of Enforcement with the authority to issue CIDs.<sup>4</sup> Although this arrangement is designed to balance “the efficiency of the Bureau’s investigative process with appropriate supervision and oversight,”<sup>5</sup> in practice it has not been sufficient to prevent seemingly unfocused and unnecessarily burdensome inquiries. This has been particularly problematic in cases where an entity already is subject to supervision by the Bureau, or where the action is based on the Bureau’s broad UDAAP authority. To promote efficient use of the CFPB’s resources and to limit the burdens imposed on institutions by duplicative investigations, the Bureau should implement additional procedures through which its senior leadership can review the decision to investigate an institution, as well as the scope and objectives of the investigation.

**A. The Bureau should formalize a policy requiring Enforcement to coordinate with Supervision and receive authorization from a senior leadership committee prior to issuing a CID to a supervised institution.**

The Consumer Financial Protection Act (Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act) grants the CFPB both supervisory and enforcement functions over several important categories of financial institutions. While this approach is intended to enhance the Bureau’s ability to protect consumers, better coordination between the Bureau’s supervision and enforcement teams is required to utilize the Bureau’s resources efficiently and to reduce unnecessary burdens to CID recipients and supervised entities. In many instances, the Bureau has issued CIDs to entities that are already subject to supervision by the CFPB. Although there may be circumstances where it is appropriate for Enforcement to open a parallel investigation of a supervised institution, excessive reliance on enforcement tools can lead to overly burdensome or unnecessarily duplicative regulatory inquiries.

There have been multiple instances, for example, where Enforcement has used a CID to investigate matters that were also being reviewed by supervisory regulators—either the CFPB or a prudential bank regulator—at the same time. Enforcement attorneys conducting these investigations generally lack the familiarity with the institution and its business developed over time by their counterparts in Supervision, especially because Enforcement attorneys are typically not organized by area of law or industry or product type and thus may lack prior knowledge of specific products or services. As a result, Enforcement sometimes appears to use CID requests merely to “understand” a particular product or service that may be already well-understood by Supervision, before deciding whether to investigate further and issue additional CIDs. In this context, the CID process appears in many instances to be largely superfluous: examiners have

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<sup>4</sup> 12 C.F.R. § 1080.6(a).

<sup>5</sup> CFPB, Rules Relating to Investigations, 77 Fed. Reg. 39,101 (June 29, 2012).

broad authority to obtain needed information. Yet the Bureau has implemented an approach of pursuing parallel and essentially separate investigations of institutions through Supervision (*e.g.*, through exam and related supervisory processes) *and* Enforcement (*e.g.*, through civil investigations unrelated to examination authority). This practice places unnecessary burdens on regulated institutions and occupies valuable Bureau resources that otherwise could be allocated to other efforts.

Recognizing the need to avoid these duplicative efforts, the Bureau's most recent strategic plan calls for "enhance[d] internal policies that facilitate the integration of the Bureau's supervision and enforcement functions."<sup>6</sup> These enhancements should include more robust procedures for reviewing and approving proposals to conduct investigations of institutions that are already supervised by the CFPB. At the heart of such a process would be the formation of a committee with senior representatives from Enforcement, Supervision, Regulations, and the Office of the General Counsel that would be charged with determining whether, given Supervision's resources, examination authority, and expertise, a separate investigation by Enforcement is necessary.<sup>7</sup> Supervision should play a meaningful, and often dispositive, role in determining whether the CFPB pursues enforcement against a supervised institution. To ensure transparency, the Bureau should publish a set of formal governance arrangements and protocols to be applied by the committee. These standards could include consideration of a variety of relevant factors, including the severity of potential violations, whether the investigation is part of a horizontal investigation including non-supervised entities, the scope of consumer harm, and whether Enforcement is the most efficient mechanism for obtaining the information. Where this committee approves Enforcement's proposal to investigate a supervised institution, Enforcement and Supervision should communicate regarding the status and scope of the inquiry as it proceeds. And as part of this coordination, the CFPB should institute a process and set of standards for returning an action to Supervision after a defined time period to the extent certain criteria are met.<sup>8</sup>

The Bureau should also seek to coordinate overlapping investigations (*i.e.*, where the same or related conduct is at issue) with the U.S. prudential banking regulators, including the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Federal Reserve Board. Although each agency has the ability to pursue investigations under its respective statutory mandate, the agencies should coordinate efforts more effectively to avoid redundant, duplicative, or unduly burdensome actions.

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<sup>6</sup> See Bureau of Consumer Financial Protection Strategic Plan, FY 2018-2022, [https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb\\_strategic-plan\\_fy2018-fy2022.pdf](https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_strategic-plan_fy2018-fy2022.pdf).

<sup>7</sup> Among the members of such a committee, the Bureau should consider including the Associate Director for Supervision, Enforcement, and Fair Lending, the Assistant Directors for Supervision Examinations, Supervision Policy, and Enforcement, the Associate Director for Research, Markets, and Regulations, and the Assistant Director for Regulations.

<sup>8</sup> These requirements should be separate from and in addition to the role of the Action Review Committee (ARC), which governs the process for transferring matters for Supervision to Enforcement but does not limit Enforcement's ability to pursue actions on its own.

**B. The Bureau should implement new procedures requiring a senior leadership committee to review any CID that proposes to investigate a potential UDAAP violation, as well as “catch all” CIDs that broadly investigate “any other violations of Federal consumer law.”**

In addition to requiring greater coordination between Enforcement and Supervision when the prospective CID recipient is a supervised entity, Bureau leadership should introduce additional measures to ensure alignment between Enforcement investigations and the CFPB’s overall policy objectives and legal positions. Enhanced oversight is particularly important for investigations that are based on UDAAP authority. The Bureau has historically used UDAAP to set industry standards, often where existing rules, guidance, and judicial decisions may not give institutions fair notice that the specific conduct in question is unlawful.<sup>9</sup> The Bureau’s “excessive reliance on case-by-case adjudication over clear rules” has been widely criticized, including by the Department of Treasury<sup>10</sup> and members of Congress,<sup>11</sup> and this approach to regulation raises significant due process concerns.<sup>12</sup> In the case of CIDs and resulting investigations, the Bureau’s apparent reluctance to issue clear *ex ante* standards under its UDAAP authority has at times produced seemingly unfocused inquiries.

To address this issue, the Bureau should implement procedures requiring a senior leadership committee (including the CFPB’s General Counsel’s Office and Office of Regulations) to meaningfully review and approve any CID that proposes to investigate a potential UDAAP that was not already the subject of formal rulemaking.<sup>13</sup> The committee should also review and approve the issuance of CIDs investigating other possible violations of Federal consumer financial laws or regulations to the extent the CID includes a “catch all” statement that “any other violations of Federal Consumer Law” fall within the scope of the

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<sup>9</sup> See, e.g., Former CFPB Director Richard Cordray, Prepared Remarks at the Consumer Bankers Association (Mar. 9, 2016) (explaining that the orders resulting from CFPB enforcement actions “provide detailed guidance for compliance officers across the marketplace about how they should regard similar practices at their own institutions,” and that “it would be ‘compliance malpractice’ for executives not to take careful bearings from the contents of these orders about how to comply with the law and treat consumers fairly”).

<sup>10</sup> U.S. Department of the Treasury, A Financial System That Creates Economic Opportunities, 82–83 (June 2017).

<sup>11</sup> See, e.g., House Financial Services Committee Chairman Jeb Hensarling, Opening Statement at a Hearing with CFPB Director Richard Cordray (Apr. 5, 2017), <https://financialservices.house.gov/news/documentsingle.aspx?documentid=401752> (criticizing former Director Cordray’s decision to proceed against PHH through “an ad hoc enforcement action” rather than “formal rulemaking”).

<sup>12</sup> See, e.g., *PHH Corp. v. CFPB*, 839 F.3d 1, 44–46 (D.C. Cir. 2016) (recognizing that the CFPB’s retroactive application of a new interpretation of a statute “violated due process” by failing to provide “fair notice of what conduct is prohibited”), *reh’g en banc granted, order vacated* (Feb. 16, 2017), *reinstated in relevant part on reh’g en banc*, 881 F.3d 75 (D.C. Cir. 2018).

<sup>13</sup> The committee charged with ensuring the consistency of a proposed investigation with the Bureau’s overall UDAAP approach would likely have the same or similar membership to a committee charged with ensuring coordination between Supervision and Enforcement, as described in Part II.A above.

inquiry.<sup>14</sup> Because these reviews would be conducted by individuals not directly involved in the investigation, such a process would be intended to provide an independent assessment of the CID’s legal consistency (including whether entities have appropriate notice of the potential unlawfulness of the conduct), as well as its consistency with the Bureau’s policy objectives. The Federal Trade Commission (“FTC”) in effect accomplishes an independent review by limiting the ability to issue CIDs to the Commissioners rather than delegating the authority to enforcement attorneys, for example.<sup>15</sup> A primary objective of the review process should be to ensure that the Bureau can articulate, before a CID is issued, a clear scope for the investigation and an appropriate theory as to what may constitute unlawful conduct in the area to be investigated. This additional oversight should help focus the Bureau’s investigations and prevent broad inquiries into areas not previously addressed by published rules and guidance.

**III. The Bureau should institute additional safeguards to help ensure that the burdens imposed by the nature of the scope of requests included in CIDs are appropriately tailored and proportional to the need for the requested information.**

Diligent compliance with a CID’s requests is often expensive and burdensome. Both the Dodd-Frank Act and the CFPB’s regulations afford the Bureau authority to make demands for documents, tangible materials, testimony, written reports, and interrogatory responses when it has reason to believe such information may be relevant to a legal violation.<sup>16</sup> In our experience, the CFPB has frequently deployed this authority to demand vast amounts of information on unreasonably short time frames, requiring institutions to use large teams of employees and external resources to collect, review, and produce information responsive to the Bureau’s requests. While investigations inherently impose burdens on subject institutions, the Bureau has historically issued requests for materials with what has appeared to be insufficient consideration for how to best balance the need to obtain information in civil investigations with the potential burden on companies asked to provide it, and with insufficient consideration of whether there are more efficient means of obtaining the information it seeks. This practice is not without cost to the Bureau—overly broad demands make it more difficult for institutions to produce relevant information to the Bureau, slowing investigations. Additional safeguards and greater transparency are needed to help ensure the burdens of a CID are appropriately balanced with the Bureau’s need to obtain information on a timely basis.

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<sup>14</sup> In the past, it has been common practice for the Bureau to include this language in a CID’s notification of purpose.

<sup>15</sup> See 16 CFR § 2.7 (2017) (“When the public interest warrants, the Commission may issue a resolution authorizing the use of compulsory process . . . [to] . . . issue a subpoena, or a civil investigative demand . . .”); FTC Operating Manual § 3.3.6.7.5.1 (“The authority to issue a subpoena or CID cannot be redelegated.”); see also Comments to the CFPB by the Staff of the Federal Trade Commission’s Bureau of Consumer Protection at 7, *In the Matter of Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes* (Mar. 26, 2018) (explaining that requiring Commissioner approval “ensures that there will be an independent assessment of the costs and benefits of the CID by someone who is not conducting the investigation”) [hereinafter “FTC Comment Letter”].

<sup>16</sup> 12 U.S.C. § 1052(c); see also 12 C.F.R. § 1080.6 (implementing regulation).

**A. The Bureau should implement formal processes to require Enforcement to demonstrate the necessity of demanded information in relationship to the anticipated burden imposed on the CID recipient, particularly in the case of higher burden requests, such as written reports, data analyses, or testimony.**

As the FTC has noted, “good government” requires that an agency “use the power that Congress has vested in it and the resources that it has been allocated to exercise restraint when deciding to issue compulsory process and in drafting the specific demands.”<sup>17</sup> In exercising this restraint, the FTC frequently employs informal requests for information as a precursor to (or in lieu of) formal CIDs. The FTC’s policies direct investigators to first request materials through voluntary procedures before resorting to compulsory processes such as subpoenas and CIDs.<sup>18</sup> Further, to obtain approval to issue a CID, FTC staff must explain to the Commission both the relevance of the information sought and “the cost and burden production will impose on target companies.”<sup>19</sup> The Bureau should formally require a similar balancing of interests prior to seeking information through CIDs, and where feasible it should use informal requests to facilitate constructive engagement and more efficient production of information.

The balancing of costs and benefits is particularly important for higher-burden requests, including requests for written reports or employee testimony. If unduly broad, complex or burdensome, these requests can delay the production of more responsive materials, be an inefficient use of the Bureau’s finite resources, and ultimately impede the Bureau’s ability to successfully conclude its investigation. For example, in the case of written reports, in our experience:

- The reports have often called for complex data analysis projects that require an institution to pull and analyze data housed on multiple systems in different formats. Providing this type of custom analysis may entail hiring outside experts or consultants, as employee teams lack resources and knowledge spanning the various systems involved.
- The Bureau has often been unwilling to accept comparable substitute data already maintained by the institution (*i.e.*, the Bureau has not been flexible where the substitute data does not align perfectly with the original CID request).
- The Bureau has consistently set aggressive deadlines by which a CID recipient must provide responses—regardless of the uncertainty and complexity of the project—and will modify the scope or timeframe of its requests only where an institution

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<sup>17</sup> FTC Comment Letter, 2.

<sup>18</sup> See FTC Operating Manual § 3.2.3.2; see also *id.* § 3.6.7.8.3 (providing that requests to use compulsory procedures should “contain justification for the use of compulsory procedures in contrast to voluntary procedures for obtaining the desired information”).

<sup>19</sup> *Id.* § 3.3.6.7.5.1.



establishes the technological and practical *infeasibility* of satisfying the Bureau's demands.

As a result, written report requests often impose exorbitant costs, take months for CID recipients to prepare, and often provide the Bureau with data that is less useful than information maintained by the institution in the ordinary course.<sup>20</sup>

Similarly, CFPB requests for sworn testimony often impose enormous and unnecessary burdens on CID recipients and have resulted in an inefficient use of resources. For example:

- Preparation entails considerable time away from the employee's usual duties—a burden exacerbated when the Bureau declines to provide clear explanations of its objectives for these hearings or explain why informal discussions with subject-matter experts would be insufficient.
- The Bureau has tended to seek sworn testimony early in an investigation when requests for documents or other materials should provide the same information.<sup>21</sup>

To better manage high burden requests, the CFPB should implement rules requiring special approvals by a senior leadership committee prior to issuing requests for written reports, employee testimony, or the production of large volumes of materials (such as large audio file or email productions).<sup>22</sup> To justify such requests, the Bureau should be required to demonstrate the connection between the information sought and the goals of the investigation and to verify that the information is not available through other, less burdensome means, such as data maintained by the entity in the normal course of business or through a request for documents.<sup>23</sup> Moreover, after such requests are approved and issued, institutions should be permitted to petition the Bureau to modify or rescind requests that impose undue burdens or otherwise fail to comply with the principles outlined above. And because an entity often cannot know the full burden of

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<sup>20</sup> The vast amounts of data compiled and transferred pursuant to these requests can also raise concerns regarding the security of personally identifiable information they may contain. *See, e.g.*, Consumer Financial Protection Bureau Office of Inspector General, Evaluation Report (May 15, 2017) (describing need for the Bureau to “improve the Office of Enforcement’s practices for safeguarding” such information).

<sup>21</sup> Recognizing these unique burdens, courts have adopted a standard in which parties seeking this type of testimony must demonstrate both that the individual has “unique first-hand, non-repetitive knowledge of facts at issue” and that it has “exhausted other less intrusive discovery methods.” *Apple Inc. v. Samsung Electronics Co., Ltd.*, 282 F.R.D. 259, 263 (N.D. Cal. 2012).

<sup>22</sup> The membership of such a committee likely would be the same or similar to the committees outlined in Parts II.A and II.B above.

<sup>23</sup> To anchor its balancing of the benefit of a request against its costs, the Bureau should consider adopting the proportionality standard included in the revised Rule 26 of the Federal Rules of Civil Procedure, which requires that requests for materials be “proportional to the needs of the case” and includes consideration of “the importance of the issues at stake,” as well as “the importance of discovery in resolving the issues” and “whether the burden or expense of the proposed discovery outweighs its likely benefit.”

responding until after it begins preparing the written report or other response, the Bureau should permit such a petition at any point during its investigation, rather than only during the compressed meet and confer process.

**B. The Bureau should limit the time periods encompassed by its investigations to minimize undue burdens on companies and focus the Bureau’s finite resources on investigating harms that have the most immediate impact on consumers.**

It has also been common for the Bureau to issue CIDs that cover very long periods of time, and/or that request materials for time periods well outside either the relevant limitations period or the July 21, 2011 effective date of the CFPB’s UDAAP authority.<sup>24</sup> These untailored requests are often expensive and burdensome. It is common for older materials to be stored on legacy or archived systems, or to be stored offsite, for example. As a matter of efficiency for both the Bureau and CID recipients, initial requests should focus on more recent time periods (for example, the past three years). Materials relating to recent conduct are not only easier for institutions to locate and produce, but also most likely to contain evidence of any ongoing violations affecting consumers. Only upon completion of this initial inquiry and a showing of need should Enforcement staff be permitted to seek senior approval to request information regarding an entity’s conduct in prior years.

**C. The Bureau should inform CID recipients how the information a CID requests relates to the overall scope and purpose of the Bureau’s investigation.**

As the FTC recently noted, “[a]n agency’s articulation of the purpose of an investigation is an important bulwark against misuse of compulsory process.”<sup>25</sup> In keeping with this principle, the Bureau should provide institutions with more detailed explanations of the scope and purpose of its investigations and how the requests it includes in CIDs serve those objectives. Despite the statutory requirement that the Bureau “advise[]” parties compelled to produce information “of the nature of the conduct constituting the alleged violation which is under investigation and the provisions of law applicable,”<sup>26</sup> it has been common practice for the Bureau to issue a CID containing numerous requests without providing any meaningful information about the goals of

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<sup>24</sup> See, e.g., *CFPB v. TCF Nat’l Bank*, No. 17-166 (D. Minn. Sept. 8, 2017) (dismissing claims prior to July 21, 2011, the effective date of the statute establishing the CFPB). Although the CFPB previously argued that actions it pursues through administrative proceedings are not subject to any limitations period, that position has been rejected by the D.C. Circuit. See *PHH Corp.*, 839 F.3d at 54 (“A much more logical, predictable interpretation of the agency’s authority is that the three-year limitations period in [the relevant statute] applies equally to CFPB court actions and CFPB administrative actions.”), *reh’g en banc granted, order vacated* (Feb. 16, 2017), *reinstated in relevant part on reh’g en banc*, 881 F.3d 75 (D.C. Cir. 2018).

<sup>25</sup> FTC Comment Letter, 8.

<sup>26</sup> 12 C.F.R. § 1080.5 (“Any person compelled to furnish documentary material, tangible things, written reports or answers to questions, oral testimony, or any combination of such material, answers, or testimony to the Bureau shall be advised of the nature of the conduct constituting the alleged violation that is under investigation and the provisions of law applicable to such violation.”); see also 12 U.S.C. § 5562(c)(2) (“Each civil investigative demand shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.”).

the investigation, the legal violations being investigated, or what led the CFPB to initiate an inquiry. The Bureau's current procedures, for example, require it to describe only "*in very broad terms*" the nature of the conduct under investigation and the potentially applicable provisions of law.<sup>27</sup> As a result, CIDs typically include only *pro forma* recitations of legal provisions, and often include "catch all" language stating that the investigation also encompasses "any other violation of Federal consumer laws." Moreover, in our experience, the Bureau staff has generally been reluctant to elaborate on the reasons for, or objectives of, its investigations. This lack of transparency is inconsistent with the Bureau's own regulations, and has been criticized widely, including by the Department of Treasury and the CFPB's Office of Inspector General.<sup>28</sup> It also led the D.C. Circuit to rule that the CFPB's notification of purpose practices did not comply with Dodd-Frank's requirements.<sup>29</sup>

In addition to presenting risks that its CIDs are legally insufficient, the Bureau's reluctance to articulate an investigation's objectives decreases a CID's effectiveness while simultaneously increasing the burdens. Where a CID recipient has not been adequately advised of the purpose of an investigation or how particular requests relate to that purpose, the recipient is often less well positioned to efficiently assist Bureau personnel by providing information relevant to those aims. In such circumstances, institutions often expend substantial resources gathering materials that are ultimately of limited use to Enforcement staff, who then must issue new or revised requests for additional information.

A specific description of the investigation that links the information the CID demands to the conduct being investigated should increase the effectiveness of the Bureau's investigations while simultaneously reducing the burdens imposed on CID recipients. CFPB rules should be amended to require that CIDs include a clear explanation of not only the legal basis for the investigation, but also its purpose and scope, and the nature of the acts or practices under investigation. And as an investigation progresses, Enforcement staff should be encouraged to engage in substantive discussions about how particular information requests relate to the objectives articulated in the CID, and staff should remain open to proposals for how alternative materials might serve the same purpose. An open dialogue during investigations can help to bridge the gap between the Bureau's understanding of what it is searching for and the entity's familiarity with the materials and data that may ultimately be responsive to the Bureau's requests or needs.

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<sup>27</sup> See CFPB, Office of Enforcement Policies and Procedures Manual, 68 (May 2017) (emphasis added).

<sup>28</sup> U.S. Department of the Treasury, A Financial System That Creates Economic Opportunities, 86 (June 2017); Consumer Financial Protection Bureau Office of Inspector General Evaluation Report, 8 (Sept. 20, 2017).

<sup>29</sup> See *CFPB v. Accrediting Council for Indep. Colleges & Sch.*, 854 F.3d 683 (D.C. Cir. 2017) (holding that a CID was invalid because it did not "meet the statutory requirement that the CID state the nature of the conduct under investigation and the applicable provisions of law").

**D. The Bureau should permit multiple individuals to attest to the “completeness” of a CID issued to a legal entity and adopt an approach to concluding investigations in a predictable and transparent manner.**

*First*, the Bureau should make changes to the manner in which it implements the requirement that materials produced pursuant to a CID be made “under a sworn certificate” as to the completeness of the production.<sup>30</sup> Although CFPB regulations state that responses provided by legal entities may be certified by “any person responsible for answering each reporting requirement or question,”<sup>31</sup> the Bureau generally has required that a single individual certify an institution’s entire CID response. This practice does not reflect the reality that it is unusual for a single individual to be able to attest—based on personal knowledge—to the completeness of all of an entity’s responses to a CID’s various requests. Given that responsive information often comes from a range of personnel and systems, the Bureau should permit joint certifications by multiple employees. In addition, rather than mandating that a single individual certify that an institution’s response to the entire investigation is “complete,” the CFPB could permit the employee primarily responsible for responding to a particular individual request to describe and certify the steps taken to compile and produce the response to that request.

*Second*, Enforcement should be required to adhere to well-defined processes for formally concluding the Bureau’s investigations. The CFPB’s regulations state that an investigational file “will be closed” upon a finding that an enforcement action is unnecessary or not in the public interest, but the rules provide no information or procedures regarding closure of an investigation.<sup>32</sup> In the absence of specific requirements, in our experience, the Bureau historically has often declined or delayed providing notice of an investigation’s conclusion. The resulting ambiguity regarding the status of pending investigations has been particularly concerning in instances where the entity under investigation must include the status of the inquiry in public filings, which can have a continued negative effect on share price and overall company value.<sup>33</sup> To address this issue, the Bureau should implement rules or procedures specifying a reasonable timeframe following an institution’s response in which it must either issue requests for additional information, initiate an enforcement action, or provide a formal close-out letter ending its investigation.

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<sup>30</sup> See 12 C.F.R. § 1080.6(a).

<sup>31</sup> See, e.g., 12 C.F.R. § 1080.6(a)(1) (requests for documents); *Id.* § 1080.6(a)(3) (requests for written reports or answers to questions).

<sup>32</sup> 12 C.F.R. § 1080.11(b).

<sup>33</sup> See, e.g., 17 C.F.R. § 229.103 (requiring companies to disclose “any material pending legal proceedings . . . known to be contemplated by governmental authorities”).

**IV. The Bureau should implement a confidential, fair, and flexible approach to considering requests to set aside or modify a CID—both within and outside the formal petition process—that takes into account both the CFPB’s objectives and the burdens imposed on the entity under investigation.**

Good faith requests by CID recipients to modify the nature, scope and/or timeframe of a Bureau CID (*e.g.*, so that the CID can be tailored to the responsive information a recipient has and/or how the recipient maintains the information) can greatly increase the efficiency of the Bureau’s investigations. Ultimately, both parties are best served when they can arrive at a mutually agreeable scope and timeline for an inquiry. In order to avoid unnecessary delays during investigations and promote cooperation, the Bureau should implement confidential, fair, and flexible approaches for considering and efficiently responding to requests to set aside or modify a CID, both within and outside the formal petition process.

Unfortunately, the CFPB’s historical practices and procedures for considering changes to CIDs have not adequately fostered opportunities for the Bureau and CID recipients to work together to achieve the efficient resolution of modification requests. The Bureau’s rules and process for submitting formal petitions to modify or set aside a CID entail making the CID public and therefore expose entities to potential reputational harm. Moreover, the petition process under Director Cordray was largely futile, as he denied every petition formally adjudicated. This has led entities to largely conclude that petitions are not worth the cost and risk involved, despite having reasonable arguments for the modification of a CID.

In addition, the Bureau lacks mechanisms outside of the formal petition process for fair and efficient consideration of modification requests to the scope and/or timeframe of an investigation. Line Enforcement attorneys are not typically given discretion to authorize reasonable modifications to scope or timing, and as a result, are constrained to focus on rigid adherence to timelines and modification procedures rather than on pragmatically negotiating a realistic production timeline and scope. The result has been additional costs and delays, as well as effort that would have been far better expended addressing the needs and purpose of the investigation and expeditiously providing responsive materials to the Bureau.

**A. The CFPB should implement a confidential and independent process through which institutions can formally petition to set aside or modify a CID.**

The CFPB’s rules permit the recipient of a CID to petition the Director for an order modifying or setting aside the CID.<sup>34</sup> However, several aspects of the Bureau’s treatment of petitions have discouraged challenges to CIDs, notwithstanding an entity’s good faith belief that an investigation is unduly burdensome or oversteps the CFPB’s authority.

Under the Bureau’s current rules, both the petition to modify or set aside the CID and the Director’s order in response to that petition are by default made part of the Bureau’s public

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<sup>34</sup> 12 C.F.R. § 1080.6(e).

records.<sup>35</sup> The Bureau currently posts petitions and the Director's decisions on the Bureau's public website. While a petitioner can request that a petition remain confidential, the Director is under no obligation to grant that request, and the institution lacks an opportunity to withdraw a petition that the Director declines to keep confidential.<sup>36</sup> Thus, to file a petition, the institution must be willing to make public the fact that it is under a government investigation, risking significant reputational costs before *any* findings or even allegations of wrongdoing have been made. As both the Department of Treasury and the Bureau itself have recognized, the public nature of the process tends to discourage the filing of petitions, particularly for institutions that take compliance with the law seriously.<sup>37</sup> To avoid chilling good-faith challenges to potentially unlawful or unduly burdensome CIDs, the Bureau should amend its rules to provide that the petitioner's identity is to remain confidential during and after the petition process, either through the redaction of identifying information or (where redaction is infeasible) by publishing a summary bulletin explaining the Bureau's rationale in accepting or rejecting a petition.

Additionally, CFPB rules provide that Enforcement can respond to a petition with a statement setting forth the factual and legal basis for the investigation. The rules permit Enforcement to provide this statement to the Director "without serving the petitioner,"<sup>38</sup> and in practice these documents have not been provided to entities challenging a CID. Although there may be circumstances where it is necessary for supporting materials to be provided in a confidential manner, such as where an investigation is based on a whistleblower complaint or on information provided by another law enforcement agency, this approach should be the exception and not the rule. And, even where an investigation is based on sensitive information, that information can be protected through more tailored means, such as through redactions to documents. To maintain transparency and impartiality in the petition process, and to ensure that the decision-maker is fully briefed on the relevant facts and law, the Bureau should modify its rules to provide that Enforcement's statement will be shared with the subject institution and to provide the institution the opportunity to respond to Enforcement's arguments and positions.

The Bureau should also reconsider the timeframe under which an institution must petition to modify or set aside a CID. Current rules mandate that a petition be filed within twenty days of the service of the CFPB's requests,<sup>39</sup> and the requirement that petitions contain "only issues raised during the meet and confer process" further reduces the time institutions have to develop facts showing a CID is unlawful or unduly burdensome.<sup>40</sup> Combined with the inability to respond to Enforcement's findings with respect to the factual and legal basis for the

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<sup>35</sup> 12 C.F.R. § 1080.6(g).

<sup>36</sup> See Consumer Financial Protection Bureau Office of Inspector General Evaluation Report, 5 (Sept. 20, 2017).

<sup>37</sup> See *id.* at 11; U.S. Department of the Treasury, A Financial System That Creates Economic Opportunities, 91 (June 2017).

<sup>38</sup> 12 C.F.R. § 1080.6(g).

<sup>39</sup> 12 C.F.R. § 1080.6(e).

<sup>40</sup> 12 C.F.R. § 1080.6(c)(3).

investigation, this compressed timeline helps explain why thus far all adjudicated petitions challenging Bureau CIDs have been unsuccessful. To afford institutions sufficient time to understand the burdens and issues posed by a CID, the CFPB should amend its rules to permit the filing of a good faith formal petition at any point during an investigation.

Finally, and most importantly, the Bureau should change its rules to create an independent process for the consideration of petitions to modify or set aside a CID. Fairness and due process would be best served by a truly independent adjudicator. The Director of the Bureau oversees the Enforcement functions of the Bureau and thus would not have the requisite independence from the enforcement process that results in the issuance of the CID.<sup>41</sup> The Bureau should establish a petition process that entities have confidence in and perceive as fair, particularly given that CIDs lack legal force until a court orders an institution to respond.<sup>42</sup> We encourage the Bureau to revise its regulations to transfer authority for deciding petitions to a more independent arbiter, such as an administrative law judge, and to specify in the rule that the administrative process is deemed exhausted following a ruling on the petition in that forum, such that an appeal to federal court may immediately follow.

**B. Outside of the formal petition process, the Bureau should implement a more flexible and transparent approach to proposed modifications to a CID's scope and/or timeline.**

While improvements to the Bureau's formal petition process are needed, an institution's opportunity to request changes to the scope or timeline of a CID should not be limited to that formal procedure. Instead, investigations should involve open and ongoing communication about the goals underlying the Bureau's requests for information and how those goals can be achieved efficiently and under a reasonable timeframe. We recommend that the Bureau make several modifications to its rules and practices to encourage such cooperation and dialogue.

The Bureau has generally issued CIDs with the return date predetermined, even before the Bureau has obtained any information about a realistic and reasonable timeline for providing a full response. This practice often sets an adversarial tone from the outset of an investigation; it forces the subject of the CID to justify any extension of this deadline without information from the Bureau regarding the basis for the Bureau's timeline. While deadlines are no doubt necessary, those deadlines should not be set without first understanding the effort involved in responding to the requests. To facilitate more productive conversations about timing and scope, we recommend that the Bureau require that a meet and confer occur within a reasonable timeframe (*e.g.*, fifteen or twenty days after receipt of the CID), but that the CID's return date itself be left open until after the meet and confer occurs (or the recipient declines to attend a meet and confer). This process change will afford entities more opportunity to understand and explain

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<sup>41</sup> See 12 C.F.R. § 1080.6(e)(4).

<sup>42</sup> See, *e.g.*, *John Doe Co. v. CFPB*, 849 F.3d 1129, 1131 (D.C. Cir. 2017) ("CIDs are not self-enforcing, and non-compliance triggers no fine or penalty.").

any obstacles to providing responsive information, which in turn will enable the Bureau to establish a mutually agreeable timeline for response with the recipient.

The Bureau should also make changes to its meet and confer process. Under current practice and in our experience, the Deputy Enforcement Directors responsible for granting modification requests are almost never present at meet and confer discussions. Instead, institutions must express concerns about burden and feasibility to Enforcement line attorneys who have no authority to make any changes and who must present entities' requests to the actual decision-maker in the "backroom."<sup>43</sup> Similarly, any requests by the deputies for clarification or additional information must be relayed back to the institution through the line attorneys. This cumbersome process makes productive dialogue difficult. This issue can be remedied through some combination of two changes: First, rather than rely on line attorneys to communicate an institution's concerns, the CFPB should permit institutions to communicate directly with the deputy charged with granting or denying modifications. Second, for some or all types of modifications, the Bureau should empower line attorneys to make the modification decision themselves. These changes would bring the Bureau more in line with the less formal modification process used by other agencies, such as the DOJ, SEC, and FTC.

In addition to these specific changes, the Bureau should employ a more flexible approach to both the scope of and timeline for CID responses. In many cases, the Bureau seems focused on obtaining complete responses to every request in the CID as quickly as possible, insisting that any deviation from the CID's terms be submitted as a formal modification that itself involves a robust fact-gathering exercise to justify the change. This emphasis on investigational process misdirects the resources of both the Bureau and entities under investigation. Instead, Enforcement staff should be encouraged and empowered to discuss the information most important to its investigation, and to focus the entity's response on that information through the use of rolling production schedules or otherwise. This would not only reduce CID burdens, but would also enable the Bureau to quickly obtain information important to its investigation.

Finally, as a matter of practice, the Bureau should toll an institution's time to respond to a CID while formal modification requests are pending. This would avoid the need for recipients to expend resources responding to requests that will ultimately be removed or modified. This change would also encourage the Bureau to negotiate modifications in a timely manner in order to allow the investigation to move forward.

**V. The Bureau should implement formal policies barring requests for privileged materials through a CID and restricting the use of privileged materials in Enforcement matters.**

As the Supreme Court has repeatedly recognized, the attorney-client privilege represents a vital aspect of our legal system, encouraging full and frank communication between attorneys

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<sup>43</sup> See Consumer Financial Protection Bureau Office of Inspector General Evaluation Report, 4 (Sept. 20, 2017) (outlining the CID modification process).



and clients and “thereby promot[ing] broader public interests in the observance of law and administration of justice.”<sup>44</sup> By encouraging clients to speak candidly with their lawyers, the privilege enables lawyers to give sound legal advice about legal requirements.<sup>45</sup> The privilege serves an especially important purpose where a client is a financial institution. Due to the complex web of governing statutes, regulations, and other rules that apply to financial institutions, there is an acute need for sound legal advice from both internal and external counsel without fear of disclosure of these communications to third parties. Regulated institutions are ultimately much more likely to comply with legal requirements, including consumer protection laws, where they can frankly and freely seek guidance from counsel.<sup>46</sup>

Despite the undisputed importance of the attorney-client privilege, the CFPB’s investigative rules contain no express restrictions on the ability of Enforcement to request the production of privileged materials. Although the Bureau’s regulations permit a party to withhold privileged materials from its response to a CID and to provide a detailed privilege log,<sup>47</sup> the ability of Enforcement to request these materials in the first instance creates the possibility that the Bureau can pressure institutions to produce materials protected by privilege, or that institutions will not assert or will narrowly construe privilege in order to appear cooperative. The protections provided by the privilege are further diminished by the Bureau’s position that it can “compel [production of] privileged information pursuant to its supervisory authority,” and the risk that the Bureau will pressure parties to produce materials listed on privilege logs indirectly via Supervision, or that Enforcement will simply obtain the materials from Supervision and then use them in an enforcement matter.<sup>48</sup>

These risks and the lack of formalized rules about the ability of the Bureau to request privileged materials do not appropriately reflect the importance and vital role of attorney-client privilege in our legal system. The Bureau’s lack of a policy restricting requests for privileged information departs from several other government authorities, such as the SEC and DOJ, which

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<sup>44</sup> *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing 8 J. Wigmore, Evidence § 2290).

<sup>45</sup> See, e.g., *id.*; *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009) (“We readily acknowledge the importance of the attorney-client privilege, which is one of the oldest recognized privileges for confidential communications.”); *Trammel v. United States*, 445 U.S. 40, 51 (1980) (“The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation if the professional mission is to be carried out.”); *Fisher v. United States*, 425 U.S. 391, 403 (1976) (the purpose of the Privilege is “to encourage clients to make full disclosure to their attorneys.”); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (the privilege “is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.”).

<sup>46</sup> The privilege protects communications with both in-house and external counsel. See, e.g., *Hertzog, Calamari & Gleason v. Prudential Ins. Co. of Am.*, 850 F. Supp. 255, 255 (S.D.N.Y. 1994) (“It is well settled that the attorney client-privilege applies to communications between the corporation and its attorneys, whether corporate staff or outside counsel.”).

<sup>47</sup> 12 C.F.R. § 1080.8(a).

<sup>48</sup> CFPB, Confidential Treatment of Privileged Information, 77 Fed. Reg. 39617, 39619 (July 5, 2012).

have both issued standards recognizing the importance of privilege.<sup>49</sup> A similar CFPB policy would not prevent the CFPB from obtaining the facts necessary to its investigations; it would, however, help preserve the ability of institutions to seek legal advice. To ensure financial institutions are able to seek the candid advice of legal counsel both before and after coming under investigation, the CFPB should also adopt a formal rule or policy statement that, during the course of an investigation or enforcement action, it will neither seek production of privileged materials, nor employ privileged documents obtained from Supervision.

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As noted above, TCH strongly supports and appreciates the Bureau's current efforts to review its investigative practices. TCH also firmly supports the Bureau's enforcement of consumer protection laws, particularly where there is risk of consumer harm. However, the existing rules and practices governing use of CIDs do not properly balance the Bureau's need for information with the burdens these requests impose on entities under investigation. Through the reforms described above, the CFPB can institute a more transparent, balanced, and efficient process that encourages cooperation between Enforcement and institutions and that enables more effective investigations.

The Clearing House appreciates the opportunity to comment on the proposal. If you have any questions, please contact the undersigned by phone at 212-612-9220 or by email at [Gregg.Rozansky@theclearinghouse.org](mailto:Gregg.Rozansky@theclearinghouse.org).

Respectfully submitted,



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<sup>49</sup> For example, the SEC's Enforcement Manual requires the Commission's staff to "respect legitimate assertions of the attorney-client privilege and attorney work product protection," because "the SEC wants to encourage individuals, corporate officers and employees to consult counsel about the requirements and potential violations of the securities laws." SEC Division of Enforcement, Office of Chief Counsel, Enforcement Manual (Oct. 28, 2016), <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>. Similarly, the United States Attorneys' Manual makes clear that cooperation credit should be granted for disclosing facts relevant to an investigation, rather than for waiving privilege or work product protections. *See* 9 U.S. Attorneys' Manual §§ 28.710-20.