

Comments of

Americans for Financial Reform

Center for Responsible Lending

The Consumer Federation of America

National Consumer Law Center (on Behalf of Its Low-Income Clients)

U.S. Public Interest Research Group

March 27, 2018

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

Re: Agency/Docket Number: Docket No. CFPB-2 018-0001; Document Number: 2018-05783--
Request for Information Regarding Consumer Financial Protection Bureau Civil Investigative
Demands and Associated Processes

Ms. Jackson:

The comments below are submitted in response to the Consumer Financial Protection Bureau's Request for Information ("RFI") Regarding the Bureau Civil Investigative Demands and Associated Processes (Docket No. CFPB-2018-001) on behalf of the undersigned advocacy groups. All of the signatories are joined together by their long history of protecting and defending the rights of consumers through education, advocacy, policy, research, and litigation. Our organizations address a wide variety of consumer issues and have extensive knowledge of the consumer needs addressed by the Consumer Financial Protection Bureau ("CFPB"), the statutes the CFPB enforces, and the work the agency has accomplished.

The undersigned frequently engage with the CFPB and vigorously support both its mission and its independence. Many of our staff have significant experience in public enforcement of consumer protection laws. We appreciate the opportunity to submit these comments for your consideration

The CFPB was created in response to the 2008 financial crisis. Inattention by other regulatory agencies, along with limitations on their authority, contributed significantly to the crisis that destabilized the American economy and caused grave hardship to American families. Reacting to market and regulatory failures that fueled this "Great Recession," Congress in 2010 enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank Act").

As part of this reform, “Congress saw a need for an agency to help restore public confidence in markets: a regulator attentive to individuals and families. So, it established the Consumer Financial Protection Bureau.”¹ Congress gave the agency both power to improve financial markets for consumers and autonomy to guarantee the agency “the authority and accountability to ensure that existing consumer protection laws and regulations are comprehensive, fair, and vigorously enforced.”²

Since its establishment, the CFPB effectively has used its authority and accountability to serve the public interest. The CFPB’s supervision and enforcement actions alone resulted in nearly \$12 billion in ordered relief for more than 29 million consumers victimized by unlawful activity.³

A. Congress intended the CFPB to be an independent agency with broad and flexible CID authority to support its investigatory and public enforcement duties

Congress created the CFPB in 2010 after more than 100 hearings and extensive debate about the causes of the 2008 financial crisis and the ways in which the government could prevent a similar crisis in the future.⁴ When it did so, Congress “gave the new agency a focused mandate to improve transparency and competitiveness in the market for consumer financial products.”⁵

Congress concluded that with this singular focus on consumers, the CFPB could serve American households more effectively than other regulators. In the past, “[f]ederal bank regulators had given short shrift to consumer protection.”⁶ “Congress concluded that [the] ‘failure by the prudential regulators to give sufficient consideration to consumer protection ... helped bring the financial system down.’”⁷ “All told, nearly \$11 trillion in household wealth ... vanished” in the 2008 financial crisis.⁸ “In Congress’s view, the 2008 crash represented a failure of consumer protection.”⁹

Congress responded to these failures by consolidating in the CFPB “authorities to protect household finance that had previously been scattered among separate agencies in order to ... ensure accountability.”¹⁰ It also gave the CFPB important new authority.

The CFPB is the first federal regulator to supervise credit reporting agencies—companies whose data fuel many of consumers’ most important financial transactions.¹¹ More generally, Congress

¹ PHH Corp. v. CFPB, -- F.3d --, 2018 WL 627055, *1 (D.C. Cir. Jan. 31, 2018).

² H.R. Rep. No. 111-517, at 874 (2010) (Conf. Rep.); *see generally* PHH, 2018 WL 627055, at *3-4.

³ CFPB, *Factsheet, Consumer Financial Protection Bureau: By the Numbers* (July 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707_cfpb_by-the-numbers.pdf; Zixta Q. Martinez, *Six Years Serving You*, CFPB (July 21, 2017), <https://www.consumerfinance.gov/about-us/blog/six-years-serving-you/>.

⁴ *See* Dodd-Frank Act, § 1011, 124 Stat. at 1964 (12 U.S.C. § 5491); S. Rep. No. 111-176, at 44 (2010).

⁵ PHH, 2018 WL 627055, at *3; *see also* 12 U.S.C. § 5511(a).

⁶ PHH, 2018 WL 627055, at *3.

⁷ *Id.* (ellipsis in original) (quoting S. Rep. No. 111-176, at 166).

⁸ *Id.* (internal brackets and quotation marks omitted).

⁹ *Id.*

¹⁰ *Id.* (internal quotation marks and brackets omitted); 12 U.S.C. § 5581(b).

¹¹ *See CFPB to Supervise Credit Reporting*, CFPB (July 16, 2012), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-to-supervise-credit-reporting/>; *see generally* 12 U.S.C. § 5481(15)(A)(ix).

made the CFPB the first federal regulator to supervise both banks and non-bank financial companies, including mortgage companies, private student lenders, and payday lenders.¹² With this “level playing field” approach, Congress aimed to ensure that consumers would receive the same level of protection and companies the same level of regulation, in either sector of the market.¹³

Congress also paid careful attention to the CFPB’s structure. Vital to the new agency’s success, Congress concluded, was its independence.¹⁴ Other financial regulators had been “overly responsive to the industry they purported to police.”¹⁵ With the Dodd-Frank Act, as Senator Cardin put it, Congress aimed to “create a consumer bureau . . . that will be on the side of the consumer, that is independent, so the consumer is represented in the financial structure.”¹⁶

Within this context, Congress assigned the CFPB five key functions. In addition to support activities, the CFPB is charged with the responsibility for: (1) “collecting, investigating, and responding to consumer complaints”; (2) supervising financial companies and taking enforcement action to address violations of the law; (3) “issuing rules, orders, and guidance” to implement consumer protection law; (4) “conducting financial education programs,” and (5) researching and monitoring the markets for consumer financial products and services.¹⁷

To fulfill these functions independently and effectively, the CFPB has the authority to issue pre-complaint investigative demands, often referred to as Civil Investigative Demands (“CID” or “CIDs”) to gather the critical facts and data needed to inform its judgments. The undersigned consumer organizations strongly believe the CFPB needs to retain broad and flexible CID investigatory discretion in order to meet the ever-evolving range of challenges within its mandate. It is from this perspective that we respond to the specific questions raised in the RFI concerning the CFPB’s use of CIDs and in the exercise of its investigatory duties.

B. The CFPB recently received a successful independent review of its CID procedures—further revisions are duplicative and unnecessary.

In 2017, the Board of Governors of the Federal Reserve System and Consumer Financial Protection Bureau Office of the Inspector General conducted an independent audit of the CFPB’s CID rules and policies.¹⁸ This evaluation included a review of the CFPB’s records management policy,

¹² See 12 U.S.C. §§ 5514-15; S. Rep. 111-176, at 167–169; CFPB, *Semi-Annual Report of the Consumer Financial Protection Bureau* 70 (Spring 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201706_cfpb_Semi-Annual-Report.pdf.

¹³ S. Rep. 111-176, at 11, 167-68, 229; *see also* 12 U.S.C. § 5511(b)(4).

¹⁴ See S. Rep. No. 111-176, at 10-11, 161, 163; H.R. Rep. No. 111-517, at 874. Congress also provided exacting direction about other aspects of the new agency’s organization. The Dodd-Frank Act required specific offices and units and an advisory board, 12 U.S.C. §§ 5493(a)(5), (b)-(g), 5494, 5535, specified personnel rules, *id.* § 5493(a)(1)-(4), and described how employees could be transferred from other agencies, *id.* § 5584.

¹⁵ *PHH*, 2018 WL 627055, at *1.

¹⁶ 156 Cong. Rec. S5871 (daily ed. July 15, 2010).

¹⁷ 12 U.S.C. § 5511(c)(1)-(6).

¹⁸ BD. OF GOVERNORS OF THE FED. RES. SYS. AND CONSUMER FIN. PROTECTION BUREAU OFF. OF INSPECTOR GEN., *THE CFPB GENERALLY COMPLIES WITH REQUIREMENTS FOR ISSUING CIVIL INVESTIGATIVE DEMANDS BUT CAN IMPROVE CERTAIN GUIDANCE AND CENTRALIZE RECORDKEEPING*,

the file plans for the Office of Enforcement and Office of the Director's records, and every petition to modify or set aside CIDs filed from June 2012 to June 2017.¹⁹ The evaluation also included a sample of CIDs and CID responses.²⁰ Additionally, the Inspector General conducted over a dozen interviews with CFPB officials as well as contextually appropriate interviews of related officials at the Department of Justice and the Federal Trade Commission.²¹

After this detailed, professional, and thorough review of the CFPB's CID procedures, the Inspector General concluded that the CFPB generally complies with the Dodd-Frank Act and the CFPB's own policies and procedures manual. Moreover, the Inspector General found that "the CFPB often uses modifications and extensions of time to alleviate some of the potential burden associated with CID requests."²² The Inspector General noted that the CFPB enforcement staff were cooperative and responsive to the evaluation and thanked the CFPB's career, professional staff for their help.²³ The Inspector General did make a handful of constructive suggestions on recordkeeping and providing notice to CID recipients. The CFPB's Enforcement Office immediately responded favorably to these recommendations and began adopting them.²⁴

The Inspector General's independent review is strong evidence that further revisions to the CFPB's CID policies and practices are unnecessary. The Inspector General's evaluation shows that the CFPB's CID procedures are working well; are in line with the practices at other federal law enforcement agencies; and, should not be further reformed or altered at this time. Conducting a second review of the CFPB's CID policies within a year is entirely unnecessary and a waste of resources.

Moreover, this RFI should not be used as a pretext for slowing federal investigations or holding off on sending CIDs in light of the fact that the CFPB *already completed an audit of CID practices* just six months ago. Additionally, our organizations are concerned that this Request for Information may be politically motivated and calibrated simply to allow companies found violating federal law and other special interests to air grievances related to the CID process. We are concerned that the decision to issue an RFI on CID processes following the Inspector General's successful audit is a waste of time and encourage CFPB leadership to instead focus on protecting consumers from unfair, deceptive, and abusive financial practices in the marketplace.

C. Specific questions raised in the RFI concerning the CFPB's discretion in the use of its CID and investigatory authority.

1. The Bureau's processes for initiating investigations, including 12 CFR 1080.4's delegation of authority to initiate investigations to the Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement.

EVALUATION REPORT 2017-SR-C-015 (2017), <https://oig.federalreserve.gov/reports/cfpb-civil-investigative-demands-sep2017.pdf> (hereinafter FED OIG CID EVALUATION REPORT).

¹⁹ *Id.* at 17.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 10.

²³ *Id.*, executive summary memorandum.

²⁴ *Id.* at 20.

The signatories believe the current process for initiating investigations is appropriate. 12 CFR § 1080.4 delegates to the Assistant Director and Deputy Assistant Directors of the Office of Enforcement the discretion to open investigations. Currently, the Enforcement Office’s policies and procedures manual requires that “the Enforcement Director must approve the opening of any new investigation.”²⁵ In addition, existing Enforcement Office policies require that a panel of career professional staff headed by an issue expert from the Enforcement Office’s Policy and Strategy Team (“PST”) weigh in with a recommendation prior to any investigation opening decision.²⁶ This process already guarantees that a panel of issue experts act as a check on ill-advised investigation proposals.

We believe the current CFPB rules and procedures provide an appropriate level of management control over professional enforcement staff. In particular, we believe the CFPB should not require more senior CFPB staff approval to begin investigations, as such a step would place investigation approvals at a level of managerial control too far removed from professional enforcement attorneys and investigators. An added level of bureaucratic managerial control would risk chilling professional enforcement staff, possibly discouraging them from opening investigations and recommending certain types of investigations and legal theories.

Moreover, requiring higher level approvals prior to initiating investigations could prevent enforcement staff from responding to new and unexpected harmful practices that emerge with new forms of commerce. A critical lesson of the financial crisis of 2008 was that federal consumer financial law enforcement was too slow to respond and too deferential to banking industry preferences and legal opinions.²⁷ To protect the public interest, the CFPB’s career enforcement staff must have the latitude to investigate suspected illegal activity whenever it occurs.

Requiring senior management approval also risks slowing down the process for commencing investigations and bottlenecking the Bureau’s law enforcement work. Consumers have a right to expect that the federal law enforcement staff working on their behalf will move expeditiously to resolve suspicion of illegal activity. Large financial institutions can cause tremendous consumer harm in short periods of time. The necessity of opening enforcement investigations must not be stacked in

²⁵ CONSUMER FIN. PROTECTION BUREAU, OFF. OF ENFORCEMENT, POLICIES AND PROCEDURES MANUAL VERSION 3.0 37 (2017),

https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201710_cfpb_enforcement-policies-and-procedures-memo_version-3.0.pdf [hereinafter “POLICIES AND PROCEDURES MANUAL VERSION 3.0”].

²⁶ The current CFPB Enforcement Office Policy and Procedures Manual requires:

The Opening Memo should be shared with the appropriate Issue Team for Issue Team and PST input. The Issue Team and PST should, within a week of receipt of the Opening Memo, provide the case team with feedback about whether they believe the investigation should be opened and how this investigation fits into the Enforcement Strategic Plan and articulated priorities. The Issue Team and PST feedback may be oral and informal, but should also include a short written recommendation to the Enforcement Front Office about whether to proceed with opening the investigation. That written recommendation should be no more than one page long, and should be provided in a document separate from the Opening Memo.

POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26,

²⁷ See, e.g., U.S. FIN. CRISIS INQUIRY COMM’N, FINANCIAL CRISIS INQUIRY REPORT, 15 (2011), http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf (discussing whistleblowers who were “infuriated at the slow pace of enforcement and at prosecutors’ lack of response to a problem that was wreaking economic havoc . . .”).

queue behind competing political duties, public appearances, educational activities, responding to Congressional oversight, and other responsibilities of senior levels of management.

Instead the decision to open enforcement investigations should remain at a managerial level below political staff with career enforcement professionals in order to prevent conflicts of interest, partisanship, and the appearance of impropriety. Political staff simply may be distracted by their public duties and lack the focus needed for making timely and reflective decisions on opening investigations. Furthermore, political staff are more likely to be deterred from opening necessary investigations because these decisions could impede future electoral campaign fundraising, appointment or confirmation to top level political posts, or transition into the lucrative management positions in large financial institutions following public service. The public must have confidence that law enforcement investigations will not be affected by public relations, electoral politics, or campaign finance. Keeping the authority to open investigations at the career enforcement level avoids the appearance of impropriety and promotes public confidence. Moreover, it is in the best interests of senior political management to have investigation opening decisions in the hands of staffers who are relatively immune to potential political repercussions of investigating the largest financial institutions in the world.

If the Bureau makes any changes to its investigation opening procedures, the signatories recommend revising the Enforcement Office Policies and Procedures Manual to allow the Deputy Assistant Directors of the Office of Enforcement to open investigations without requiring approval from the Assistant Director of the Office of Enforcement.²⁸ Such a change would be consistent with the existing regulations which explicitly provide for this delegation of authority.²⁹

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

The signatories believe that the current process for issuing CIDs is appropriate. 12 CFR § 1080.6 provides discretion to the Assistant Director and Deputy Assistant Directors of the Office of Enforcement to issue CIDs.³⁰ Current office policies require CID forms be “signed by the Enforcement Director or a Deputy Enforcement Director.”³¹ This procedure strikes the appropriate balance between managerial control and the potential for slowing enforcement investigations.

Furthermore, the CFPB should not require a higher level of senior management approval prior to issuing CIDs. As with the decision to open investigations, professional enforcement staff need flexibility, discretion, and speed to provide a nimble, 21st century response to illegal activity. Slowing down investigations by requiring career staff to obtain buy-in from more senior leaders would lead to slower investigations, fewer investigations, less deterrence of illegal activity and more harm to the American public.

²⁸ Cf POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 37,

²⁹ 12 CFR § 1080.4 (“The Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement have the nondelegable authority to initiate investigations.”).

³⁰ 12 CFR § 1080.6.

³¹ POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 57,

Moreover, requiring sign-off from more senior managers for sending CIDs could harm the subjects of investigations themselves. For example, some publicly traded consumer finance businesses disclose the existence of CFPB investigations in their securities disclosures. Slowing down the investigation process by requiring more red-tape and hurdles in issuing CIDs could force investigation subjects to disclose investigations more frequently and for longer periods of time.

The signatories believe that the current rules and process on issuing CIDs is working well and should not be changed.

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

Current Bureau practices strike the right balance between CID recipients' need for understanding investigations and the Bureau's need to uncover evidence of illegal activity. Existing regulations and CFPB Enforcement Office Policies *already* require enforcement staff to provide notice to CID recipients of the purpose of CIDs in the "Notification of Purpose" section of the standard office CID form.³² Under existing policy, enforcement staff "are required to describe the nature of the conduct constituting the alleged violation under investigation and the applicable provisions of law."³³ The undersigned believe this existing policy is more than sufficient to provide notice to CID recipients. Further levels of red tape, bureaucratic detail, or instructions to CFPB enforcement staff could interfere with their ability to effectively investigate suspicious activity.

CFPB leadership should bear in mind that many investigation subjects are hostile to CFPB investigations because the subjects are engaged in violations of the law. While some investigation subjects are forthcoming and cooperative in investigations, other subjects may engage in spoliation of evidence, concealment, and obfuscation in order to frustrate the federal government's legitimate law enforcement goals. In order to hold businesses and individuals accountable for their illegal activity, CFPB enforcement staff need the flexibility to craft CIDs for both cooperative and uncooperative recipients alike. Making Bureau investigators provide even more information than existing policies already require might inadvertently divulge information that bad actors could use to obstruct the investigation.

Furthermore, some investigation subjects may prefer that the Bureau not provide more detailed disclosures regarding the purpose of the CID. For example, the Bureau must often serve CIDs on third parties that are not currently under investigation in order to gather information about whether an investigation subject may be violating the law. Revealing to the third party the nature and purpose of the CID could expose the investigation subject to inadvertent reputational harm prior to an adjudication of liability. If CFPB leadership requires further disclosure of the purpose of CIDs, this information should be very general in nature and limited to the importance of law enforcement and the rule of law generally, as CID recipients have a civic duty to cooperate with law enforcement.

Finally, in 2017, pursuant to the recommendation of the Office of the Inspector General of the Federal Reserve Board of Governors and a D.C. Circuit Court of Appeals decision, the Bureau

³² 12 CFR § 1080.5; POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 58,

³³ POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 58,

both revised its Policy and Procedures Manual and officially reminded enforcement staff of the importance of providing notice regarding the subject matter of CIDs. Further adjustment of the Bureau's CID policies in this area is unnecessary.³⁴

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

The CFPB's existing procedures adequately achieve the Bureau's objectives while minimizing burdens on CID recipients. For example, the CFPB Office of Enforcement's Policies and Procedures Manual already provides that:

[A] CID for the production of documentary material or tangible things should describe each class of material requested with definiteness and certainty. A reasonable return date for the material should be provided. CID recipients should comply with the detailed instructions relating to the productions of documents, including the Document Submission Standards.³⁵

Moreover, the CFPB's existing meet and confer procedures are sensible and effective. Under the current policies and procedures, the recipient of a CID normally is required to attend a meeting with CFPB staff to discuss any of the recipient's questions and concerns regarding the CID. This meeting, which can occur face-to-face or over the phone, is a proactive step the CFPB has integrated into its enforcement policies that helps promote communication, identify problems, and avoid unnecessary disputes. While federal law enforcement investigations by their nature lead to contention and stress, the CFPB's meet and confer process strikes a reasonable balance in helping recipients respond to CIDs without burdening CFPB enforcement staff with procedures, disclosures, meetings, or delays that might slow down prosecution of the public interest.

CFPB leadership should bear in mind that some financial institutions and their attorneys may attempt to misuse their contacts with CFPB Enforcement Office managers and professional staff in order to lobby for a favorable investigation outcome, changes to current regulations or policies, or other forms of special treatment. Unlike investigation subjects and their attorneys, ordinary American consumers do not have the benefit of extended face-time with CFPB enforcement staff. Enforcement policies and procedures should not be amended in a way that allows investigation subjects to waste time, create needless correspondence, demand useless concessions, extensions, or other special favors.

Furthermore, for every investigation subject that may be violating the law, there are likely dozens of law-abiding companies that are suffering from a competitive disadvantage. Businesses that are complying with the law have a right to expect that CFPB political leadership will not allow the investigation process to be manipulated for purposes unconnected to law enforcement investigations. The purpose of meet and confer meetings is to allow the CFPB's investigation to move forward in an expeditious and fair manner. The CFPB must not amend its procedures to allow contact or discussions that run the risk of interfering with the law enforcement purpose and mission.

³⁴ CFPB v. Accrediting Council for Indep. Colleges and Schools, 854 F.3d 683, 685 (D.C. Cir., 2017)

³⁵ POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 58.

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

Existing CID timeframes strike a reasonable balance between the interests of the CFPB and CID recipients. Several observations are in order: First, many CIDs are relatively simple, specific, and do not require significant costs or time for a response. For example, some CIDs merely request business records from a third party that easily are retrieved and readily available. It is critical that the Bureau's rules and procedures not be amended to create needless delay in law enforcement where there are no legitimate compliance concerns from CID recipients. The existing rules and procedures sensibly set an expectation of brisk compliance and grant professional staff the discretion to extend times for responding as necessary.

Some CID recipients, and their attorneys, may prefer additional time irrespective of whether it is truly necessary. In some circumstances, CID recipients may try to abuse requests for additional time in order to engage in spoliation of evidence, obscure computer records, or conceal assets that could be used to provide restitution to victims of illegal activity. Enforcement staff need the flexibility and discretion to exercise their professional judgment on how to balance the best interests of both the public as well as CID recipients. Although the CFPB likely will receive many comments from well-funded financial institutions and their counsel on this point, the primary focus of the Bureau should remain on ensuring that the public is protected from illegal activity by covered persons, related persons, and their service providers.

Second, investigations often require cumulative, as opposed to simultaneous, CIDs. This is to say that CFPB staff must often send a CID to a recipient in order to gather information necessary to ask the right questions of and request the needed documents from a subsequent recipient. Delaying one CID may lead to delays in a whole sequence of dependent CIDs. Any one given CID recipient may not understand that their delays can cause the Bureau to fail to ask critical questions of another recipient possibly leading to the need for a duplicative second CID that increases costs for both the Bureau and the recipient overall. While the first recipient may believe that Bureau staff are being unreasonably strident, it is more likely that staff are in fact protecting the needs and interests of CID recipients as well as the public. These questions of timing, order, and logistics are best left to the CFPB professional staff's discretion and judgment and are not likely to be assisted with amendments to existing rules or policies.

Third, it is crucial that CFPB investigations move quickly. When financial institutions are violating the law, there are often thousands of vulnerable families that may be suffering from unwarranted fees, excessive interest, privacy violations, inaccurate credit reports, inappropriate payments, or other financial problems. Each day of delay in pursuing an investigation can impose real harm on consumers as well as their children and other dependents. Moreover, delayed investigations erode the public trust and faith in our government. Indeed, investigation subjects themselves often complain when investigations remain pending too long, even though they themselves may have asked for additional time to meet and confer or respond to a CID.

Fourth, we are concerned that the CFPB should not follow unhelpful developments currently underway at the Federal Trade Commission. The FTC recently changed its investigation procedures to extend the default return date for CIDs in consumer protection matters from 14 to 21 days for third parties and from 21 to 30 days for targets of investigations. We believe that this change to FTC

policy was unnecessary and will lead to delays in investigating violations of federal law. Instead, we support the traditional approach of imposing a default rule that requires prompt CID compliance with discretion given to professional staff to modify CID deadlines where appropriate.

CFPB leadership must not forget that delays in law enforcement investigations contributed to the 2008 financial crisis. The federal Financial Crisis Inquiry Commission (“FCIC”) found that in the run-up to the 2008 crash, “enforcement actions came late in the day—often just as firms were on the verge of failure. In cases that the FCIC investigated, regulators either did not identify the problems early enough or did not act forcefully enough to compel the necessary changes.”³⁶ Congress created the CFPB to prevent making this same mistake again. For these reasons, the signatories believe that existing enforcement office rules and procedures on the timeframe for meeting and conferring and petitioning to modify or set aside a CID should remain unchanged. If the CFPB leadership does make a change, the signatories believe the current Policy and Procedures Manual could be amended to provide greater emphasis on the need for quick investigations that respond forcefully to the most pressing consumer financial services problems.

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

Federal Rule of Civil Procedure 30(b)(6) (“Rule 30(b)(6)”) ³⁷ and 12 CFR 1080.6(a)(4)(ii) ³⁸ are very similar and include comparable provisions to protect the interests of a deposed party.

³⁶ U.S. FIN. CRISIS INQUIRY COMM’N, *supra* note 28, at 302.

³⁷ Rule 30(b)(6) states:

(6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

FED. R. CIV. P. 30(b)(6).

³⁸ Sub-section 1080.6(a)(4) states:

(4) Oral testimony.

(i) Civil investigative demands for the giving of oral testimony shall prescribe a date, time, and place at which oral testimony shall be commenced, and identify a Bureau investigator who shall conduct the investigation and the custodian to whom the transcript of such investigation shall be submitted. Oral testimony in response to a civil investigative demand shall be taken in accordance with the procedures for investigational hearings prescribed by §§ 1080.7 and 1080.9 of this part.

(ii) Where a civil investigative demand requires oral testimony from an entity, the civil investigative demand shall describe with reasonable particularity the matters for examination and the entity must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf. Unless a single individual is designated by the entity, the entity must designate the matters on which each designee will testify. The individuals designated must testify about information known or reasonably available to the entity and their testimony shall be binding on the entity.

Nonetheless, while both concern the taking of oral testimony, they serve separate and distinct purposes and are subject to completely different sets of governing procedures. To conflate the two in order to bind the CID investigatory process by the same rules that apply in a civil litigation discovery process would be totally inappropriate and would hinder unnecessarily the CFPB's exercise of its discretion in fulfilling its statutory obligations.

Both Rule 30(b)(6) and CID's are intended to provide for the use of oral testimony to deal with the problems caused by information asymmetry (i.e. where one party has virtually exclusive access to and control of relevant information and data). However, there are at least three key differences that distinguish the circumstances in which 12 CFR 1080.6(4) applies as compared to the circumstances where Rule 30(b)(6) applies.

First, 12 CFR 1080.6(4) applies solely to a preliminary investigative process whereas Rule 30(b)(6) only applies once civil litigation has been initiated. Rule 30(b)(6) always is part of an adversarial process. The corporate defendant's Rule 30(b)(6) representative frequently is an extremely important source of proof of liability for a plaintiff, especially where the defendant corporation has sole knowledge of the events that gave rise to the lawsuit and of its own practices. By comparison, CID testimony can be used by the CFPB to fulfill any and all of the five functions delegated to the agency as it deems appropriate once it has an opportunity to review the testimony provided. Its use is not limited to enforcement or the imposition of liability and the scope of its investigatory reach should not be similarly constrained.

Second, Rule 30(b)(6) is applied within the framework of a complete set of discovery rules established to effectively and fairly manage the unique aspects of civil litigation. Taking the strictures of Rule 30(b)(6) and applying them to a CFPB CID investigation without the balancing provisions that appear in other provisions of the Federal Rules of Civil Procedure (i.e. Rule 16, Rule 26 and Rule 37) unnecessarily will limit and hamper the CFPB's legitimate investigatory efforts.

Finally, Rule 30(b)(6) is applied under the supervision of a judicial authority who has the ability to monitor and insure that the discovery process is fair to both parties. However, in a CID investigation there is no authority to enforce the rule in order to ensure that the party controlling the information does not engage in abusive, dilatory or obfuscating practices such as "bandying," coaching the witness, failing to supplement or changing testimony. The CFPB needs strong authority to overcome these obstacles on its own.

Therefore, oral testimony pursuant to a CFPB CID should be treated similarly to, but not exactly the same as depositions governed by Rule 30(b)(6). Although they share many of the same goals, and include some of the same protections, they are not identical. Rather, CID's should retain the broad flexibility they currently enjoy under 12 CFR 1080.6(4) in order to enable the CFPB to efficiently and effectively engage in productive investigations within its jurisdiction. Rule 30(b)(6) need not, and should not, be explicitly incorporated into 12 CFR 1080.6(4).

7. The Bureau's processes for handling the inadvertent production of privileged information, including whether 12 CFR 1080.8(c) and/or whether the Bureau's processes should be modified in order to make expressly clear that the standards

12 C.F.R. 1080.6(4).

applicable to Federal Rule of Evidence 502 also apply to documents inadvertently produced in response to a CID.

The language of 12 CFR 1080.8(c)³⁹ is substantially similar to the comparable provisions of Federal Rule of Evidence 502(b).⁴⁰ Both are intended to provide a predictable, uniform set of standards under which parties can determine the consequences of an inadvertent disclosure of a communication or information covered by an evidentiary privilege or work-product protection. Both accord with the majority judicial view on whether such an inadvertent disclosure is a waiver.

There therefore appears to be no reason why the standards applicable to the Federal Rule of Evidence need to expressly be incorporated into the CFPB's current regulation governing the same topic. At best, it would be redundant and unnecessary. At worst, it could be confusing since such a step would leave open the question of whether the remaining Federal Evidentiary Rules are, or are not, applicable to the CFPB's CID's. Accordingly, 12 CFR 1080.8(c) should remain unaltered.

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

³⁹ Subparagraph 1080.8(c) states:

(c) Disclosure of privileged or protected information or communications produced pursuant to a civil investigative demand shall be handled as follows:

(1) The disclosure of privileged or protected information or communications shall not operate as a waiver with respect to the Bureau if:

- (i) The disclosure was inadvertent;
- (ii) The holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (iii) The holder promptly took reasonable steps to rectify the error, including notifying a Bureau investigator of the claim of privilege or protection and the basis for it.

(2) After being notified, the Bureau investigator must promptly return, sequester, or destroy the specified information and any copies; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if he or she disclosed it before being notified; and, if appropriate, may sequester such material until such time as a hearing officer or court rules on the merits of the claim of privilege or protection. The producing party must preserve the information until the claim is resolved.

(3) The disclosure of privileged or protected information or communications shall waive the privilege or protection with respect to the Bureau as to undisclosed information or communications only if:

- (i) The waiver is intentional;
- (ii) The disclosed and undisclosed information or communications concern the same subject matter; and
- (iii) They ought in fairness to be considered together.

12 CFR 1080.8(c)

⁴⁰ Federal Rule of Evidence 502(b) states:

b. Inadvertent Disclosure- When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

- 1. the disclosure is inadvertent;
- 2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- 3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

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The differences between the rights afforded to witnesses in a CFPB CID deposition incorporated in the provisions of 12 CFR 1080.9(b),⁴¹ as opposed to the statutory delineation of objections set forth in 12 U.S.C. 5562(c)(13)(D),⁴² can be explained by the differences between the investigatory contexts in which the rules apply.

⁴¹ Subparagraph 1080.9(b) states:

(b) Any witness compelled to appear in person at an investigational hearing may be accompanied, represented, and advised by counsel as follows:

(1) Counsel for a witness may advise the witness, in confidence and upon the initiative of either counsel or the witness, with respect to any question asked of the witness where it is claimed that a witness is privileged to refuse to answer the question. Counsel may not otherwise consult with the witness while a question directed to the witness is pending.

(2) Any objections made under the rules in this part shall be made only for the purpose of protecting a constitutional or other legal right or privilege, including the privilege against self-incrimination. Neither the witness nor counsel shall otherwise object or refuse to answer any question. Any objection during an investigational hearing shall be stated concisely on the record in a nonargumentative and nonsuggestive manner. Following an objection, the examination shall proceed and the testimony shall be taken, except for testimony requiring the witness to divulge information protected by the claim of privilege or work product.

(3) Counsel for a witness may not, for any purpose or to any extent not allowed by paragraphs (b)(1) and (2) of this section, interrupt the examination of the witness by making any objections or statements on the record. Petitions challenging the Bureau's authority to conduct the investigation or the sufficiency or legality of the civil investigative demand shall be addressed to the Bureau in advance of the hearing in accordance with § 1080.6(e). Copies of such petitions may be filed as part of the record of the investigation with the Bureau investigator conducting the investigational hearing, but no arguments in support thereof will be allowed at the hearing.

(4) Following completion of the examination of a witness, counsel for the witness may, on the record, request that the Bureau investigator conducting the investigational hearing permit the witness to clarify any of his or her answers. The grant or denial of such request shall be within the sole discretion of the Bureau investigator conducting the hearing.

(5) The Bureau investigator conducting the hearing shall take all necessary action to regulate the course of the hearing to avoid delay and to prevent or restrain disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language. Such Bureau investigator shall, for reasons stated on the record, immediately report to the Bureau any instances where an attorney has allegedly refused to comply with his or her obligations under the rules in this part, or has allegedly engaged in disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language in the course of the hearing. The Bureau will thereupon take such further action, if any, as the circumstances warrant, including actions consistent with those described in 12 CFR 1081.107(c) to suspend or disbar the attorney from further practice before the Bureau or exclude the attorney from further participation in the particular investigation.

12 CFR 1080.9(b).

⁴² Subsection 5562(c)(13)(D) states:

(D) Attorney representation

(i) In general. Any person compelled to appear under a civil investigative demand for oral testimony pursuant to this section may be accompanied, represented, and advised by an attorney.

(ii) Authority. The attorney may advise a person described in clause (i), in confidence, either upon the request of such person or upon the initiative of the attorney, with respect to any question asked of such person.

Specifically, the applicable scopes of the two provisions significantly are different, with the statutory provision applicable in a narrower, more focused, context (i.e. fair housing) than the general regulatory scheme. Therefore, allowing the more unlimited coaching of witnesses authorized by the statute in limited circumstances (“[t]he attorney may advise a person described in clause (i), in confidence, either upon the request of such person or upon the initiative of the attorney, with respect to any question asked of such person” as compared to “[c]ounsel for a witness may advise the witness, in confidence and upon the initiative of either counsel or the witness, with respect to any question asked of the witness where it is claimed that a witness is privileged to refuse to answer the question”) to be applied to the CFPB’s exercise of its broader investigatory responsibilities will unnecessarily and improperly inhibit the agency from fulfilling the full extent of its mandated duties.

Similarly, the difference in the scopes of the statutory and regulatory investigatory provisions is reflected in the different means in how the access to information is enforced. In the limited statutory context, where there is a broader right to coach and direct the witness not to answer during the course of taking oral testimony – and therefore the greater potential for abuse and obstruction – the statute explicitly provides that the CFPB may file a petition with a federal district court for an order compelling such person to answer questions. In the regulatory context, however, where the ability of counsel to coach a witness or direct them not to answer during the course of the taking of their oral testimony already is circumscribed within the applicable regulation, the need for separate enforcement mechanisms to insure proper access to relevant information is less necessary. Thus, the regulatory remedies are more limited and do not include the express right to seek judicial intervention.

Congress created a separate set of objections under 12 U.S.C. 5562(c)(13)(D) that are permitted in distinct and limited types of investigatory interrogations undertaken by the CFPB. Congress also authorized a separate means for enforcing the agency’s rights in such investigations. To apply that separate set of objections to the CFPB’s general investigatory authority, especially without the associated expanded enforcement rights provided in the statute, would be inappropriate. The rights afforded to witnesses by 12 CFR 1080.9, including limitations on the role of counsel described in 12 CFR 1080.9(b) should not be changed to adopt the statutory delineation of objections set forth in 12 U.S.C. 5562(c)(13)(D)(iii).

9. The Bureau’s processes concerning meeting and conferring with recipients of CIDs, including, for example, negotiations regarding modifications and the delegation of authority to the Assistant Director of the Office of Enforcement and Deputy Assistant

(iii)Objections. A person described in clause (i), or the attorney for that person, may object on the record to any question, in whole or in part, and such person shall briefly state for the record the reason for the objection. An objection may properly be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination, but such person shall not otherwise object to or refuse to answer any question, and such person or attorney shall not otherwise interrupt the oral examination.

(iv)Refusal to answer. If a person described in clause (i) refuses to answer any question—

(I)the Bureau may petition the district court of the United States pursuant to this section for an order compelling such person to answer such question; and

(II)if the refusal is on grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of section 6004 of title 18.

Directors of the Office of Enforcement to negotiate and approve the terms of satisfactory compliance with civil investigative demands and extending the time for compliance.

Under current CFPB Office of Enforcement rules and procedures, investigation subjects already have ample opportunity to request modifications to the substance and process of CIDs for good cause. Specifically, 12 C.F.R. 1080.6 and the Enforcement Office's Policies and Procedures Manual both authorize the Enforcement Director or a Deputy Enforcement Director to limit the scope of a CID, alter the terms of a CID, and approve the terms of satisfactory CID compliance for good cause.⁴³ Moreover, CID recipients are free to request and the Enforcement Director or Deputy Directors are free to grant time extensions for good cause.⁴⁴ Existing policy already provides that enforcement staff "should engage in negotiations with petitioner's counsel to the extent that the requests being made are reasonable."⁴⁵

Current policies do require investigation subjects to ask for CID modifications in a writing that includes the factual and legal information necessary to support their request. This sensible policy helps both CID recipients and enforcement staff understand and focus on what modifications a CID recipient is requesting and why the modification may be necessary. The existing CFPB "good cause" standard for CID modification provides sufficient flexibility for enforcement staff to determine whether modification requests are appropriate. Providing further exceptions, limitations, appeals, or restrictions on the authority of enforcement staff would risk limiting the effectiveness of CFPB investigations. It could also expose investigation subjects to needless delay and uncertainty.

CFPB leadership must not allow investigation subjects to turn each CID into an extended invitation to negotiate, delay, appeal, obfuscate, or otherwise impede lawful federal investigations. Indeed, CFPB leadership should bear in mind that defense counsel responding to CFPB investigations may view CIDs served on their clients as an opportunity to generate billable hours at their clients' expense. Many attorneys that are likely to submit comments on the CFPB's CID policies have a strong financial incentive to slow down and increase the cost of CFPB investigations. Some consumer financial services defense attorneys engage in scare tactics and fear mongering that at times have inaccurately portrayed CFPB staff as unreasonable in order to convince their clients to invest in unnecessary legal fees. Providing additional levels of appeal, further opportunities for negotiation, and other avenues for favors or other special treatment, may in many circumstances actually end up working against CID recipients' interests by generating delay and higher costs. Existing policies provide CFPB staff the right tools to balance the interests of CID recipients with the need to enforce federal law on behalf of the public and other law-abiding businesses.

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

The CFPB's CID document submission standards include routine instructions on how to deliver documents to the Bureau. These instructions include practical and uncontroversial instructions such as "all productions should be produced free of computer viruses" and "a cover letter should be included with each production." Generally, the CFPB's current document submission standards

⁴³ 12 C.F.R. § 1080.6; POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 63.

⁴⁴ POLICIES AND PROCEDURES MANUAL VERSION 3.0, *supra* note 26, at 63.

⁴⁵ *Id.*

require the producing party scan and produce paper productions electronically. This allows the Bureau to store produced records more efficiently, reducing costs to the Bureau as well as recipients. However, the CFPB's Policies and Procedures Manual does allow for paper submissions when necessary, and the Office of Enforcement retains the discretion to modify these submission standards when circumstances justify doing so.

Moreover, the Inspector General's recent audit found no problems with the Bureau's document submission standards.⁴⁶ If there were any significant problems with the Bureau's document submission standards, the interviews and detailed review of CIDs, CID submissions, and petitions to set aside CIDs conducted during the Inspector General's audit would have disclosed them.⁴⁷ Our organizations are confident that the Bureau's career enforcement staff are carefully and reasonably balancing the burden imposed on CID recipients with the government's need to obtain documents that may reveal evidence of illegal activity.

We are concerned that some aggrieved subjects of enforcement actions may attempt to use this RFI to encourage unreasonable reforms that would frustrate the ability of the United States to enforce its laws. It should come as no surprise that federal investigations can impose costs and burdens on CID recipients. This is an unfortunate, but inevitable, consequence of law enforcement. Our organizations believe that the key to successfully managing these burdens is hiring highly qualified enforcement staff, treating them well, compensating them appropriately, and empowering them to do their very best to promote justice with respect to consumers as well as CID recipients. Micromanaging CFPB professional staff is unlikely to produce better outcomes and will erode the ability of the Bureau to deter illegal activity.

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

- a. Whether it is appropriate for Bureau investigators to provide the Director with a statement setting out a response to the petition without serving that response on the petitioner.**
- b. Whether petitions and the Director's orders should be made public, consistent with applicable laws; and**
- c. The costs and benefits of the petition to modify or set aside process, vis-à-vis direct adjudication in Federal court, in light of the statutory requirement for the petition process and the fact that CIDs are not self-enforcing.**

The CFPB should not modify existing CFPB CID rules or the Policies and Procedures Manual to require professional enforcement staff to serve internal staff responses to petitions to modify or set aside on the petitioner. Enforcement staff should not be required to disclose the basis for their suspicion of legal wrongdoing at an early stage of an investigation. Conducting an effective investigation requires enforcement staff to exercise considerable judgment about the point at which to disclose information and legal theories to the subjects of investigations and other CID recipients. The CFPB leadership should not tie the hands of investigators by requiring them to share internal communication with CID recipients any time the recipient decides to petition to modify or set aside a CID. Indeed, such a requirement would turn the CID process on its head: by petitioning against the CID, it would be CID recipients that gather information from the Bureau, rather than the other way

⁴⁶ See FED OIG CID EVALUATION REPORT, *supra* note 19, at executive summary.

⁴⁷ *Id.*, at 17.

around. Moreover, nothing prevents enforcement staff from sharing information relating to the basis of their legal theories and evidence prior to receiving a CID response when doing so makes sense within the strategic and tactical imperatives of an investigation.

Petitions and orders to modify or set aside CFPB CIDs should continue to be available to the public. Section 1080.6(g) of the CFPB's investigation rules states that the CFPB will make publicly available both the recipients' petition and the CFPB Director's order in response to the petition. The CFPB's approach in this regard is based on the longstanding practices of the FTC which also publishes petitions and the commission's response. Publication of petitions and the Bureau's response is necessary because it provides general transparency, allows future CID recipients to determine whether filing a petition is advisable, and how to effectively petition when it is appropriate to do so. The public has a right to know when the recipient of a federal CID is disputing the authority of the Bureau to investigate alleged violations of federal law. Over the long term, maintaining transparency in petitions to modify or set aside CIDs provides crucial sunlight that can avoid the potential for corruption, bribery, or special treatment. Under the current rules, petitioners can request confidentiality with the CFPB and ultimately seek relief in court to protect confidentiality. However, confidentiality should be highly disfavored and should not be granted without good cause. As recognized by the Inspector General, the CFPB has already instituted a process for redacting sensitive information from CID petitions when it is appropriate to do so.⁴⁸

Additionally, if the CFPB were to extend confidentiality to CID petitions, it would encourage CID recipients to engage in dilatory and wasteful challenges. Those CID recipients that simply want additional time to respond to CIDs could confidentially file petitions to modify or set aside for the purposes of delay without facing public accountability for challenging the authority of the government to conduct a lawful investigation. The existing policy strikes a reasonable balance between the public need for transparency in government and the CID recipient's wishes to obscure the public's view of their efforts to avoid or limit the scope of federal investigations.

The existing process for petitioning to modify or set aside a CFPB CID should not be revised. Historically, it is well settled that federal agencies such as the CFPB are entitled to "wield broad power to gather information through the issuance of subpoenas."⁴⁹ As the U.S. Supreme Court has explained, under their "power of inquisition" agencies may use administrative subpoenas such as civil investigative demands to "investigate merely on suspicion that the law is being violated, or even just because [they] want[] assurance that it is not."⁵⁰ Courts generally defer to an agency's interpretation of the scope of its own investigation,⁵¹ and place a "high burden" on the challenging party in order to prevent interference with federal agencies' investigations.⁵²

The CFPB's existing rules and practices on challenges to CIDs make sense given the limits to judicial review of administrative CIDs. The Bureau's existing process is sufficient to allow courts to

⁴⁸ FED OIG CID EVALUATION REPORT, *supra* note 19, at 12.

⁴⁹ Resolution Trust Corp. v. Thornton, 41 F.3d 1539, 1544 (D.C. Cir. 1994).

⁵⁰ U.S. v. Morton Salt Co., 338 U.S. 632, 642–43 (1950).

⁵¹ See FTC v. Church & Dwight Co., 665 F.3d 1312, 1315–16 (D.C. Cir. 2011)

⁵² See EEOC v. Fed. Exp. Corp., 558 F.3d 842, 848-49 (9th Cir. 2009) (upholding a challenge to the jurisdictional limits of an agencies administrative subpoena).

weigh in on CIDs under appropriate circumstances.⁵³ CID recipients should not have the right to immediately drag the CFPB into federal court every time a recipient wants to delay, challenge, or hinder an investigation. In the vast majority of circumstances, immediate judicial review of CIDs would be inappropriate, impose excessive costs on the Bureau and the recipient, and lead to unnecessary delays.

⁵³ *See, e.g.*, *CFPB v. Accrediting Council for Indep. Colleges and Schools*, 854 F.3d 683, 691-92 (D.C. Cir. 2017).