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April 26, 2018

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:

On behalf of America's credit unions, I am writing in response to the Consumer Financial Protection Bureau's (CFPB or Bureau) Request for Information (RFI) Regarding Bureau Civil Investigative Demands and Associated Processes. The Credit Union National Association (CUNA) represents America's credit unions and their 110 million members.

The CFPB has requested additional information concerning all aspects of its civil investigative demand (CID) process. In response to this RFI, CUNA offers the following comments.

I. Executive Summary

CUNA and its membership have observed since the Bureau's inception in 2011, that the Bureau's policies and procedures related to issuing CIDs have room for improvement.

- The CID process should be amended to encourage in most instances the Bureau's enforcement staff to speak to the institution prior to initiating a CID.
- While it is reasonable to require that a CID recipient contact Bureau investigators within ten days of receiving a CID, institutions cannot meaningfully meet and confer about the CID's specific requests within ten days. This leads to inefficiency in the investigations and waste of resources.
- CID statements of basis and purpose of investigations can be improved by requiring the CID to (a) identify the institutional product lines under review; (b) specify applicable enumerated statutes; (c) articulate the specific conduct under investigation—particularly when the Bureau is relying upon theories of unfair, deceptive, or abusive acts or practices (UDAAP); (d) specify when substantially-assisting the violations of another covered person is at issue; and (e) specify when the Bureau is investigating as to whether an individual director or officer may be personally liable for violations.
- Neither the meet and confer process, nor the Petition to Modify or Set Aside processes provide CID recipients a meaningful opportunity to challenge administratively a CID that

(1) exceeds Bureau jurisdiction; (2) asks for information that is irrelevant to the violations investigated; or (3) seeks information that is indefinite.

- The Bureau deprives CID recipients of due process when it makes public CID recipients' Petitions to Modify or Set Aside a CID.

II. Credit Unions Differ from Banks and Savings Associations.

The Credit Union National Association (“CUNA”) appreciates the opportunity to comment on the Bureau’s CIDs and associated processes. CUNA is the largest trade association in the United States serving America’s credit unions. With its network of affiliated state credit union associations, CUNA serves over 5,650 credit unions, which are owned by 110 million members collectively. Credit unions, which may be federally chartered or state chartered, are not-for-profit, tax-exempt organizations that are owned and operated by their members.

Credit unions are not-for-profit financial cooperatives that operate for the benefit of their members. In contrast, banks and savings associations are for-profit financial institutions that are either investor owned or mutually owned by their customers. Credit unions grew out of the Great Depression to address the difficulty Americans were having in obtaining credit to start a business, buy a home, or meet every day financial needs. In response, Congress, in 1934, passed the Federal Credit Union Act (“FCUA”), which authorized the creation of federally chartered credit unions “for the purpose of promoting thrift among [their] members and creating a source of credit for provident or productive purposes.”¹ Pursuant to the FCUA, members of a credit union must share a “common bond.”² Thus, unlike banks, membership in credit unions is limited to specific groups, defined in the credit union’s charter, who must share a common bond of occupation or association, or be located within a well-defined neighborhood, community, or rural district.³ The FCUA bars credit unions from serving the general public.⁴ The restricted group eligible for membership in a particular credit union is called a field of membership.

By law, therefore, credit unions serve specific populations, such as employees of a specific company, union or agency, or specific geographic areas, and only those individuals who are within the field of membership may become members of the credit union. This membership structure creates strong incentives for credit unions to ensure that their members are well served.

Moreover, many credit unions are small businesses with extremely limited staff and resources and they often serve smaller or rural local communities that may otherwise have limited options for financial services.⁵ Some credit unions are the only federally-regulated financial institutions in underserved areas with high poverty rates.⁶ In the United States, nearly half of all credit

¹ 12 U.S.C. § 1752(1).

² *Id.* § 1759.

³ *Id.* § 1759(b)(1)-(3).

⁴ *See id.*

⁵ Nat. Credit Union Administration, *Chartering and Membership Manual* at 3-4.

⁶ “Underserved” areas include those where the percentage of the population living in poverty is at least 20 percent, where the median family income is at or below 80 percent of the metropolitan area or national median family income. *Id.*

unions employ eight or fewer full-time equivalent employees.⁷ Moreover, 27% of credit unions have less than \$10 million in assets,⁸ and credit unions with less than \$100 million in assets account for 72% of all U.S. credit unions (4,091).⁹ Nationally, 41% of credit union loans are first mortgage real estate loans. Credit unions' second-largest loan category, at 35%, is vehicle loans.¹⁰ State chartered credit unions are also similarly restricted by state laws that require they establish a field of membership that shares a common bond.

III. Background of CIDs.

The Bureau investigates potential violations by issuing civil investigative demands (CIDs) and compelling testimony at investigative hearings.¹¹ This investigative authority is broad and extends beyond covered persons to “any person” that the Bureau reasonably believes has evidence relevant to a violation of federal consumer financial law.¹² A CID permits the Bureau to demand production of documents, written responses, and oral testimony, among other things.¹³

A typical CFPB CID has a form cover page, which includes the name of the recipient, deadlines, certain statements of rights, the name of the litigation deputy who issued the CID, and a notification of the CID's basis and purpose. The demand itself appears much like any other document request or interrogatory. The “definitions” section follows a template that enforcement staff can modify as necessary. CFPB enforcement staff attach a copy of the CFPB's Rules Relating to Investigations, 12 CFR Part 1080, along with several pages of technical instructions to facilitate electronic productions of documents and data to the Bureau.¹⁴

The Bureau's power to investigate is not without limits, as noted by a federal district court that ruled against the Bureau on a CID challenge, *Consumer Finance Protection Bureau v. Accrediting Council for Independent Colleges and Schools (ACICS)*.¹⁵ The CID must meet statutory and common law requirements for a court to order its enforcement. The CID must first notify recipients of the “nature of the conduct constituting the alleged violation that is under investigation.”¹⁶ The nature and conduct must be under the Bureau's jurisdiction.¹⁷ Second,

⁷ Nat. Credit Union Administration Call Report Data (December 31, 2017).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ 12 U.S.C. §5562(b).

¹² *Id.* §5562(c).

¹³ *Id.*

¹⁴ Auchterlonie & Sickler, *Consumer Fin. Law & Compliance* (2017) at 6-26.

¹⁵ 854 F.3d 683 (D.C. Cir. 2017), *aff'g* 183 F. Supp. 3d 79, 83 (D.D.C. 2016) (holding that the Bureau lacked authority to issue a CID to the Accrediting Council for Independent Colleges and Schools targeting its accrediting process). For more on the limits of the Bureau's CID's process, see E. Sylvester Kisluk, “*Fishing*” for Trouble?: *On the Appropriate Limits of a Civil Investigative Demand Issued by the CFPB*, 21 N.C. BANKING INST. 299 (2017).

¹⁶ 12 C.F.R. §1080.5.

¹⁷ *Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. 3d 79, 83 (“a court must consider (1) whether the agency has the authority to make the inquiry, (2) whether the information sought is reasonably relevant, and (3) whether the demand is not too indefinite”).

courts consider whether the information sought is reasonably relevant to the alleged violation.¹⁸ Finally, a court will not enforce a CID with indefinite demands.¹⁹

IV. CUNA's Observations and Recommendations

A. Policies should encourage talking to institutions before issuing a CID.

There presently is no policy in the Bureau's enforcement office that encourages informal engagement with investigation subjects prior to issuing a CID. This is a critical flaw in the CID process. If the CID process were amended to allow for a meaningful exchange between the Bureau and institutions prior to launching an investigation, this would likely result in a more effective enforcement process. By engaging early to learn about institutions' structure, CIDs issued after such discussions will be more narrowly tailored and effective. By engaging in discussions prior to a CID, the institutions could preliminarily answer the Bureau's questions and make any necessary modifications to their processes for compliance. Ultimately, the opportunity for meaningful exchange prior to a CID would have a positive impact on the process and improve prospects for an early resolution.

B. Initial Meet and Confer and Modifying Civil Investigative Demands Process requires revision.

CUNA has observed indicators that broad Bureau CIDs are leading to multi-year fishing expeditions that are both burdensome to recipients and an inefficient use of government resources. The CFPB's Office of Enforcement measures its performance by completing enforcement actions within two years of opening its investigations. In 2015, the Bureau resolved open investigations within two years for 70 percent of its matters. In 2016, the Bureau resolved open investigations within two years only in 42 percent of instances.²⁰ This drop-in efficiency is most likely due to overly broad and burdensome CIDs that fail to seek targeted information designed to uncover specific statutory or regulatory violations.

By enacting policies to promote targeted CIDs, the Bureau will reduce government waste. Burdensome and broad requests return voluminous and broad responses. Not only does this place a high burden on the CID recipient, voluminous responses take an excessive amount of time for government employees to review and sort. This wastes Bureau resources.

In addition, developing policies to enhance the use of targeted CIDs will improve compliance with federal law. Courts reviewing CIDs and administrative subpoenas must ensure that subpoenas are not "unduly burdensome or unreasonably broad."²¹ The Bureau should ensure compliance with these requirements through self-imposed policies and procedures. The

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ In Bureau metrics, filing a lawsuit counts as completing an action. Thus, higher litigation rates do not account for the reduced efficiency on this scale.

²¹ *Texaco*, 555 F.2d at 881-82; *see also Arthur Young*, 584 F.2d at 1031-33.

enforcement office presently lacks any type of rigorous controls to internally prevent overly-broad CIDs. The current administration can improve this situation.

1. Time to prepare for the Meet and Confer is insufficient.

The CFPB's Rule Regarding Investigations at 1080.6(c) requires that CID recipients meet and confer with enforcement staff within 10 days after receipt of the CID.²² The meeting may be in person or by telephone.²³ Failure to meet and confer does not forgo the recipient's right to ask for CID modifications. It might, however, waive the party's right to file a Petition to Modify or Set Aside the CID due to the effect of Rule 1080(g), which establishes meaningful participation in meet and confers as a prerequisite to filing a petition.²⁴

If CID recipients want to fully preserve their arguments for judicial remedies, they must raise during the meet-and-confer all the arguments they anticipate raising in their petitions to the Director, lest they waive the arguments in the administrative proceeding under the Rule 1080.6(c)(3) or in court under exhaustion principles. If a party fails to raise issues during the meet-and-confer, the Bureau will deem the issues waived if the party includes them in a Petition to Modify the CID.²⁵ Under exhaustion principles, if the Bureau files in court a motion to compel compliance, a judge may rule that the CID recipient should have first filed a petition to challenge the CID administratively.²⁶

Given the high stakes of the CID meet-and-confer, it's unreasonable to expect a meaningful meeting with enforcement staff only 10 days after the company receives the CID. First, recipients must consider the CID's statement of basis and purpose for compliance with the CFPA Section 1052 and applicable cases. Second, recipients must consider whether the definitions, phrases, and descriptions in the CID are overbroad. Specifically, recipients must consider the "Company" definition and how the CID describes the relevant product or service. Carefully defining the services, products, or activities at issue in the CID can significantly focus an investigation. Third, recipients must consider whether any requests are confusing.²⁷ Finally, recipients should identify which requests will take nearly no time to produce and which carry significant burdens and ought to be modified.

The information required for a successful meet and confer generally cannot be obtained a mere 10 days after a CID's receipt. The burdens associated with receiving a CID have the potential to be high, and responding may involve identifying the number of custodians that a request touches;

²² 12 C.F.R. §1080.6(c).

²³ *Id.*

²⁴ *Id.* §1080.6(g).

²⁵ *Id.*

²⁶ *John Doe Co. v. CFPB*, 849 F.3d 1129, 1131 (D.C. Cir. 2017) (citing *Jarkesy v. SEC*, 803 F.3d 9, 12 (D.C. Cir. 2015)) (even if a party is the subject of an arguably unconstitutional regulatory action, that constitutional argument should be raised within the context of an administrative enforcement proceeding). This position is questionable, however, as the CFPB can and does refuse to consider challenges to its constitutionality based on the precedent that, "government agencies may not entertain a constitutional challenge to authorizing statutes." Order on Petition to Modify or Set Aside CID, *In re Selia Law*, 2017-MISC-SELIA LAW, LLC-0001 (Apr. 10, 2017) (quoting *United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68, 97 n.10 (D.D.C. 2011)).

²⁷ General objections of "vague and indefinite" without meaningful engagement in conferring and clarifying requests can waive petition to modify or set aside rights. See *In re Selia Law*, Order on Petition to Modify or Set Aside CID, 2017-MISC-SELIA LAW, LLC-0001, at 4 (Apr. 10, 2017) (citing 12 C.F.R. §1080.6(c)(3)).

limitations on database fields, flexibility, or processing capacity; the unavailability of backup tapes or other recording media—particularly for information that goes back far in time; workforce disbursal; mode of maintaining records; labor hours required to review for responsive paper records; and any other specific information about how records are stored, maintained, indexed, or retrieved.

For a smaller institution without myriad resources to respond both quickly and comprehensively to a CID, such as a credit union, the burden associated with a CID is almost always substantial. Half of all credit unions employ eight or fewer full-time equivalent employees, meaning that credit unions do not have resources to devote the time and labor into combing through every facet of the CID and identifying responsive information within the initial 10-day period. When faced with a CID, an extensive review must occur (as articulated above) and several points of analysis must be conducted. With the mandatory 10-day meet and confer requirement, there is no way that most credit unions can complete a meaningful analysis of the CID in order to have a productive meet and confer with the Bureau’s attorney, as the responsive information and documentation may not yet be known to the credit union. Accordingly, the time to prepare for a meet and confer regarding a CID is currently insufficient.

C. CIDs must sunset at some point.

Notwithstanding the initial fast-paced deadlines, the CFPB should not be permitted to investigate CIDs perpetually. The lack of requirements to close an investigation within a certain period of time is costly and results in not only a vast expenditure of resources, but a waste of resources. Small institutions such as credit unions cannot afford to defend costs over the course of years and years. The lack of closure creates uncertainty to the responding party, and fails to accomplish the Bureau’s policy of resolving CIDs. To improve efficiency in the CID process, CUNA suggests that the CFPB implement a reasonable timeframe by which it must close out its investigations.

V. CID Statements of Basis and Purpose of Investigations Can Be Improved.

The Bureau fails to provide specificity when it provides generic statements about the nature of the conduct that CID seeks to investigate. In particular, it’s overly general to state that a CIDs purpose is to determine whether there have been violations of the CFPA or “any other Federal consumer financial protection law.” This exact statement appears on nearly all CIDs the Bureau has issued since inception. By adopting a policy that requires Bureau investigators to limit their investigations to violations of specifically-articulated statutes, CIDs will become more targeted and efficient.

An administrative agency’s authority to issue subpoenas “is created solely by statute,”²⁸ so requiring that CIDs cite specific statutes in their notification of purpose complies more squarely with federal law. Indeed, the CFPA itself requires the Bureau to state “provisions of law”, not generic references to the whole spectrum of Bureau authority: “[e]ach [CID] shall state the nature of the conduct constituting the alleged violation which is under investigation and the

²⁸ *Peters v. United States*, 853 F.2d 692, 696 (9th Cir. 1988).

provision of law applicable to such violation.”²⁹ Since courts measure a CID’s validity by the purposes stated in the notification of purpose, the adequacy of the notification of purpose is an important statutory requirement that the Bureau can improve by reformulating its stock descriptions.³⁰

The formula for the statement of basis and purpose rarely changes:

The purpose of this investigation is to determine whether [covered persons] has engaged or is engaging in unlawful acts and practices in connection with [activity under the CFPB’s authority], in violation of sections [enumerated statute and/or implementing regulation, and/or 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§5531, 5536], or any other Federal consumer financial protection law. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

For several reasons, the Bureau must take more than the usual care when fashioning notifications of the basis and purpose of investigations:

- The Bureau’s authority is very broad. The CFPB has authority over 20 enumerated statutes, the CFPA, and at least as many federal financial services regulations. The generic statements used now cannot provide meaningful notice of the alleged violations because the possibilities are too numerous.
- Financial institutions like credit unions and other depository institutions often have multiple product lines. A notification that simply identifies a class of covered persons and “any other Federal consumer financial protection law” could cover the entire gamut of a company’s business.
- Upon receiving a CID, companies must initiate litigation holds. CIDs that lack specificity could create unduly broad record-retention requirements.
- State-licensed CID recipients must usually report the CIDs. CIDs that lack specificity create guess-work for the CFPB’s partner regulators.
- The CFPB’s authority covers not just companies, but also individual persons who direct company conduct. Individuals must know if they are being personally investigated. Investigations that result in charging individuals without giving them notice may result in denying them independent counsel in the course of the investigation.
- The CFPB’s UDAAP authority could encompass an array of conduct that is not tethered to any specific regulatory violation and makes financial institutions guess as to the relevancy of CID requests.
- The CFPB can charge financial institutions that are not ordinarily “covered persons” with substantially assisting the violations of third parties. CIDs that fail to specifically identify this theory could deprive CID recipients of the right to understand that the government is investigating them—as they might wrongfully assume they are mere witnesses.

²⁹ *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. 3d 79, 89 (D.D.C. 2016), *aff’d*, 854 F.3d 683 (D.C. Cir. 2017) (quoting 12 U.S.C. §5562(c)(2)); *see also* 12 C.F.R. §1080.5.

³⁰ *ACICS*, 854 F.3d at 689 (citing *FTC v. Church & Dwight Co.*, 665 F.3d 1312, 1315 (D.C. Cir. 2011)).

Bureau CID statements of basis and purpose should be required to (a) identify the institutional product lines under review; (b) continue to specify applicable enumerated statutes; and (c) articulate the specific conduct under investigation—particularly when the Bureau is relying upon theories of unfair, deceptive, or abusive acts and practices.

Moreover, the Bureau could improve CID recipients' understanding of investigations and necessity to acquire legal counsel by improving the templates for the "notification of purpose" to require specificity when (a) investigations are based on violations of the Consumer Financial Protection Act's prohibitions against unfair, deceptive, or abusive acts and practices; (b) when substantially-assisting the violations of another covered person is at issue; and (c) when the Bureau is investigating as to whether an individual director or officer may be personally liable for violations.

Finally, another flaw with current CID formulations is that if a CID recipient has business lines that are outside the CFPB's jurisdiction, like commodities, insurance, or broker-dealer services, the Bureau's formulations do not carve-out these jurisdictional limits.

VI. The Process for Petitions to Modify or Set Aside a CFPB Civil Investigative Demand Process Is Not Meeting Its Stated Purpose.

Bureau Deputy Assistant Enforcement Directors (commonly, "litigation deputies") can sign and authorize enforcement staff to issue CIDs for documents, reports, or testimony with a considerable amount of discretion. In the beginning stages of an enforcement matter, the Bureau employs a process to vet the stated nature and purpose of any proposed investigation. Once an investigation opening is approved, litigation deputies can issue CIDs with no oversight within the agency, as long as the CIDs stay within the parameters identified by the Bureau when the investigation was opened.³¹

The Bureau regulation, at 12 C.F.R. §1080.6(e–g) (2012), which provides recipients of the Bureau's investigative demands with the option to petition the Bureau Director for an order to Modify or Set Aside the CID, was intended to provide recipients with a meaningful opportunity to object to demands that exceed the Bureau's authority, lack merit, or are overly burdensome. Petitioners must file within 20 days after receiving the CID (or by the time for CID response, if less than 20 days)³² and must have good faith engagement in the mandated meet-and-confer process.³³ The Bureau's position is that the failure to file a petition to Set Aside or Modify within the 20-day limitation results in denial of the petition for lack of standing.³⁴ The Rule at 1080.6(e) implements CFPB Section 1052(f).

³¹ For example, under 12 C.F.R. Pt. 1080, Litigation Deputies can grant upon request extensions of the 20-day time for filing. Rule 1080.6 provides that extensions are disfavored and are not routinely granted. But Litigation Deputies may do so in their discretion.

³² 12 C.F.R. §1080.6(e)(1) (referencing the meet-and-confer requirements at 12 C.F.R. §1080.6(c)).

³³ *Id.*

³⁴ Order on Petition to Modify or Set Aside CID, *In re* Transworld Sys., 2016-MISC-Transworld Systems, Inc.-0001 (May 29, 2015); Order on Petition to Modify or Set Aside CID, *In re* Next Generation Debt Settlement, Inc., 2012-MISC-Next Generation Debt Settlement, Inc.-0001 (Oct. 5, 2012).

A. 12 C.F.R. §1080.6(e)'s stated purpose is not being met.

The objectives of Section 1080.6(e) are to provide CID recipients a meaningful opportunity to challenge administratively CIDs that might be costly yet meritless, issued for an unauthorized purpose, or outside the scope of the Bureau's authority. Official staff commentary provides that one of purposes of Section 1080.6(e) is to protect covered persons from the fees and costs incurred by defending against a meritless investigation:

A commenter recommended that covered persons be allowed to recover attorneys' fees and costs incurred by defending against an investigation that is shown to be without merit. The Dodd-Frank Act does not provide the right to recover fees and costs by defending against an investigation. Further, as explained below, the Bureau believes that the procedures for petitioning to modify or Set Aside a CID set forth in §1080.6(d) of the Interim Final Rule (now 1080.6(e) of the Final Rule) provide sufficient protections to a recipient of a demand it believes lacks merit.³⁵

A second stated purpose is to allow CID recipients to petition to Set Aside or modify the demand that is for an unauthorized purpose or outside the scope of the investigation:

[T]o the extent recipients of CIDs consider the demands to be for an unauthorized purpose or outside the scope of the investigation, they will have an opportunity to negotiate the terms of compliance pursuant to §1080.6(c) of the Interim Final Rule (now §1080.6(d) of the Final Rule) or to petition to set aside or modify the demand pursuant to §1080.6(d) of the Interim Final Rule (now §1080.6(e) of the Final Rule).³⁶

1. The Single-Director CFPB structure contributes to the due process failures in the Petition to Modify Process.

The Bureau's processes for Petitions to Modify or Set Aside CIDs lack the rigor found at similar agencies. The Bureau modeled Section 1080.6(e) after the Federal Trade Commission's (FTC) similar rule at 16 C.F.R. §2.10.³⁷ But differences in FTC and Bureau internal process and structure prevent Bureau Petitions to Modify from operating like FTC petitions. Ordinarily, FTC staff issue informal letter requests and do not send demands through a compulsory process unless parties refuse to provide the information voluntarily.³⁸ Moreover, before the FTC can issue a subpoena or CID, the Commission must first issue a resolution to send a CID.³⁹ When a CID recipient files a "petition to limit or quash," a single Commissioner may decide the matter, but the petitioner may appeal the ruling to the full bipartisan Commission. None of these features appear in CFPB structure, policies, or procedures. As such, the FTC's practice leading up to the

³⁵ Final Rules Relating to Investigations, 77 Fed. Reg. 39101, 39103 (June 29, 2012).

³⁶ *Id.* at 39104.

³⁷ *Id.* at 39101.

³⁸ FEDERAL TRADE COMMISSION, OPERATION MANUAL, Ch. 3.2.3.2.

³⁹ 16 C.F.R. §2.7(a).

issuance of a CID or to challenge it after it has been issued includes more robust structural safeguards than those that are employed at the Bureau.

VII. Past Judicial Decisions Demonstrate that CID Subjects Lack a Meaningful Mechanism to Challenge Legally-Deficient CIDs.

Bureau CIDs are not universally perfect; so meaningful internal review is necessary. But the Bureau currently will not entertain “substantive” challenges to CIDs. In *Consumer Finance Protection Bureau v. Accrediting Council for Independent Colleges and Schools (ACICS)*,⁴⁰ the D.C. Circuit held that the CFPB’s statement of basis and purpose for the investigation did not adequately inform the CID recipient of the link between the relevant conduct and the alleged violation and therefore was unenforceable.⁴¹ The lower court first ruled that the Bureau exceeded its statutory authority when it issued a CID for the purpose of “determin[ing] whether any entity or person has engaged or is engaging in unlawful acts and practices in connection with accrediting for-profit colleges.”⁴² The CFPB does not give the Bureau authority over college accrediting, the district court explained, and thus the investigation exceeded its statutory authority.⁴³ Upon review, the D.C. Circuit determined that the CFPB’s purpose to investigate “unlawful acts and practices in connection with accrediting for-profit colleges” did not provide the recipient with sufficient notice about the nature of the conduct and the alleged violation under investigation.⁴⁴

The Bureau’s Petition to Modify process should have identified and amended the ACICS investigation’s deficiencies, but failed. This is largely due to the Bureau’s position that the Director need not consider “substantive defenses”, such as whether the Bureau has authority over the CID subject, when deciding a Petition to Modify.⁴⁵

CID recipients should have a private and cost-effective method to administratively challenge CIDs that exceed the Bureau’s authority.

Federal court oversight of Bureau CIDs is inadequate assurance that CIDs are legal because it is expensive, public, and uncertain. Thus far, the *ACICS* matter is the only successful CID challenge in federal court. Parties have challenged Bureau CIDs in court and failed on the basis of failing to exhaust their administrative remedies,⁴⁶ failing to demonstrate irreparable harm from

⁴⁰ 854 F.3d 683 (D.C. Cir. 2017), *aff’g* 183 F. Supp. 3d 79, 83 (D.D.C. 2016).

⁴¹ *ACICS*, 854 F.3d 683 (D.C. Cir. 2017) (“As the district court correctly noted, the Notification of Purpose ‘says nothing’ about this potential link.”) (citing *ACICS*, 183 F. Supp. 3d at 83)).

⁴² *ACICS*, 183 F. Supp. 3d at 81.

⁴³ *Id.* at 83.

⁴⁴ *ACICS*, 854 F.3d 683 (citing *In re Sealed Case*, 42 F.3d 1412, 1418 (D.C. Cir. 1994) (“broad language used to describe th[e] purpose makes it impossible to apply the other prongs of the Morton Salt test.”); *cf.* *FTC v. Carter*, 636 F.2d 781, 788 (D.C. Cir. 1980) (“The Commission . . . allowed our examination of the relevance of their subpoena requests[] by identifying the specific conduct under investigation. . . .”)).

⁴⁵ *Order on Petition to Modify or Set Aside CID* at 2, *ACICS*, 2015-MISC-ACICS-0001 (Oct. 8, 2015).

⁴⁶ *John Doe Co. v. CFPB*, 849 F.3d 1129, 1131 (D.C. Cir. 2017) (citing *Jarkesy v. SEC*, 803 F.3d 9, 12 (D.C. Cir. 2015) (even if a party is the subject of an arguably unconstitutional regulatory action, that constitutional argument should be raised within the context of an administrative enforcement proceeding)); *Morgan Drexen, Inc. v. CFPB*,

CID enforcement that would justify enjoining the CID,⁴⁷ and failing to demonstrate that the CFPB expressly excluded Native American tribes from the Bureau's investigation authority.⁴⁸

Challenging legally deficient CIDs in federal court is a long and costly process. There should be a meaningful mechanism to challenge unlawful CIDs at the administrative level. Currently, if a CID exceeds the CFPB's jurisdiction, seeks irrelevant information, and/or seeks indefinite information, a responding party is without options in terms of bringing forth a legal challenge in a quick and private setting. CUNA recommends that a mechanism be created whereby a responding party may challenge the legal sufficiency of a CID at the administrative level prior to expending significant resources to responding to a potentially unlawful CID.

VIII. The Practice of Posting Petitions to Modify on the Internet Is a Serious Due Process Deprivation.

Another flaw with Bureau CID processes are that Petitions to Modify or Set Aside are made public. Despite a general practice of keeping its investigations confidential and non-public, the CFPB publicly posts on the internet CID recipients' Petitions to Modify or Set Aside a CID, potentially resulting in a deprivation of due process rights. Moreover, the CFPB's practice of making CID Petitions to Modify or Set Aside public ultimately discourages institutions from filing these petitions, even when there are legitimate grounds to Modify or Set Aside. CUNA thus suggests that the CFPB reconsider its policy if posting the petitions or the identity of the petitioners on its website, as the rules and regulations require neither.

1. The Bureau's practice of posting petitions on the Internet deviates from its usual confidentiality policies.

By posting petitions to Set Aside or Modify CIDs on the internet for the general public to peruse, the Bureau is directly contravening from its own established policies of protecting this type of information from disclosure during an active investigation. The Bureau's Rule Relating to Investigations at 12 C.F.R. §1080.14 provides that "Bureau investigations generally are non-public. Bureau investigators may disclose the existence of an investigation to potential witnesses or third parties to the extent necessary to advance the investigation."⁴⁹ Employees' failure to comply with the rule is grounds for reprimand. The Federal Reserve Board's Office of Inspector General investigates and reports the CFPB's compliance with the confidentiality rules.⁵⁰

785 F.3d 684, 694 (D.C. Cir. 2015) (same); *cf.* *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215–16 (1994) (holding that petitioner's constitutional claims could first be brought before the agency).

⁴⁷ As the Supreme Court has explained, "the expense and disruption of defending [oneself] in protracted adjudicatory proceedings" is not an irreparable harm. *FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232, 244 (1980); *see also Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1980) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.").

⁴⁸ *CFPB v. Great Plains Lending, LLC*, Case No. CV-14-2090, Doc. 28, (filed May 27, 2014) (D.C. C. Cal. 2014), *aff'd*, *CFPB v. Great Plains Lending, LLC*, No. 14-55900 (9th Cir. 2017).

⁴⁹ 12 C.F.R. §1080.14(b).

⁵⁰ *E.g.*, Bd. of Governors of Fed. Reserve Sys., Office of Inspector General, *The CFPB Can Improve Its Practices to Safeguard the Office of Enforcement's Confidential Investigative Information*, CFPB Report: 2017-SR-C-011 (May 15, 2017).

Moreover, when the Bureau's Freedom of Information Act (FOIA) office receives requests for confidential investigative information, it is the office's policy to deny the request, invoking FOIA exemptions, as long as the investigation continues. The FOIA office structures the denial so the response does not confirm nor deny the existence of an investigation (commonly known as a "Glomar" response).⁵¹

2. The Bureau strictly construes "good cause" for keeping Petitions to Modify confidential.

Despite the general rule regarding confidential investigations, the Bureau requires "good cause" to keep confidential Petitions to Modify. Rule 1080.6(g) discourages CID recipients from filing petitions by declaring that a Petition to Modify is a public document unless the Bureau decides the petitioner has articulated a reason for confidentiality using a "good cause" standard:

(g) Public disclosure. All such petitions and the Director's orders in response to those petitions are part of the public records of the Bureau unless the Bureau determines otherwise for good cause shown. Any showing of good cause must be made no later than the time the petition is filed.

The FOIA paradigm⁵² for purposes of Rule 1080.6(g) guides the Bureau's determination of "good cause."⁵³ The Bureau used the FOIA construct when it issued its first public order on a request for confidential treatment, *In Re Great Plains Lending*.⁵⁴ In doing so, the Bureau deliberately ignored the principal FOIA exemption regarding law enforcement investigations, exemption 7(A).⁵⁵ In *Great Plains Lending*, the order explains that the FOIA exempts nine categories of materials from disclosure in response to a request and that the CFPB will consider it "good cause" to keep material confidential if it falls within these exemptions.⁵⁶ Ordinarily, exemption 7(A) covers "records or information compiled for law enforcement purposes . . . to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings."⁵⁷ In *Great Plains Lending*, the petitioner raised the law enforcement privilege, exemption 7(A), as a reason to keep its petition confidential. Nevertheless, the CFPB rejected the reason, stating that exemption 7(A) "is a discretionary privilege belonging to the Bureau" and "[t]hat exemption is thus not applicable here."⁵⁸

⁵¹ Re: Case No.: 20160017, Office of Government Information Services, <https://ogis.archives.gov/Assets/2016-01-26-final-letter-201600171.pdf?method=1> Accessed (Feb. 1, 2017) ("The FOIA specialist also explained that the agency's Glomar response should not be taken as an indication that any records exist. This is a response the agency issues to all similar requests. However, the FOIA specialist explained that if such records were to exist, they would likely be exempt pursuant to FOIA Exemption 7(A), 5 U.S.C. §552(b)(7)(A)).

⁵² 5 U.S.C. §552(b)(1-9).

⁵³ Order on Petition to Modify or Set Aside CID, *In re Great Plains Lending LLC*, 2013-MISC-Great Plains Lending-0001 (Sept. 12, 2013).

⁵⁴ Decision and Order on Request for Confidential Treatment, *In re Great Plains Lending LLC*, 2013-MISC-Great Plains Lending-0001 (Sept. 12, 2013).

⁵⁵ 5 U.S.C. §552(b)(7)(A)).

⁵⁶ Decision on Request for Confidential Treatment, *Great Plains*, 2013-MISC-Great Plains Lending-0001.

⁵⁷ 5 U.S.C.A. §552(b)(7)(A).

⁵⁸ Decision on Request for Confidential Treatment, *Great Plains*, 2013-MISC-Great Plains Lending-0001.

The *Great Plains Lending* decision articulates the Bureau’s basis for adopting the FOIA as its model. But neither the orders on confidentiality nor Rule 1080.6(g) articulate why the Bureau can or should exercise its discretion to make public information that is ordinarily exempted from disclosure under the FOIA’s law enforcement privilege.

CUNA suggests that the CFPB reconsider its practice of posting Petitions to Modify on its website. As mentioned above, Rule 1080.6(g) deems petitions to Set Aside or Modify a CID to be public records “unless the Bureau determines otherwise for good cause shown.”⁵⁹ Thus, if the Bureau decides the materials are public records, they would not be subject to general regulations regarding the confidential treatment of investigative information. The rule, however, does not require the Bureau to post the petitions on its government website.

Nor does Rule 1080.6(g) require the Bureau to post the identities of petitioners. The CID recipient in *In re Zero Parallel* provided a public version of its petition that redacted the company name and the name of its principals.⁶⁰ In rejecting the redactions, the Bureau justified its decisions by discussing the FTC’s practice of posting its petitions online. The Bureau, however, declined to provide its own rationale for the practice of posting online the identities of CID recipients. The Bureau’s explanation is insufficient. Differences between the Bureau and FTC regulations and processes, discussed above, preclude the Bureau from summarily relying on FTC precedent in its own implementation of the Petition to Modify regulations.

a) *The Bureau has denied all but one Petition to Modify or Set Aside a CID.*

Since the Petitions to Set Aside or Modify regulation became effective, 33 CID recipients have filed Petitions to Modify or Set Aside a CID. The Director has partially granted only one petition—which amended the notification of basis and purpose, but upheld the CID. Thus, the Director denied 97% percent of Petitions to Modify or Set Aside.

The high denial rate of all Petitions to Modify or Set Aside CIDs discourages institutions from bringing compelling arguments challenging the CIDs. Institutions such as credit unions are especially dissuaded from filing these petitions because of the high amount of cost associated with these petitions, and the lack of any sort of benefit. In addition to the legal costs associated with complying with the CID process, credit unions cannot afford to waste their internal resources preparing for a Petition to Set Aside or Modify, as it is essentially a fruitless effort. The Bureau should implement specific standards by which institutions filing legitimate Petitions to Set Aside or Modify have an actual chance at being granted.

b) *The Bureau always reveals petitioners’ identities.*

Whether the Bureau grants or denies a Petition to Modify or Set Aside, the practice in any event is to always post the identities of the petitioners on its website. In the two instances when past petitioners requested confidential treatment under 12 C.F.R. §1080.6(g), the prevailing

⁵⁹ 12 C.F.R. §1080.6(g).

⁶⁰ Decision on Request for Confidential Treatment, *In re Zero Parallel*, 2016-MISC-Zero Parallel-0001 (July 1, 2016).

petitioners, Francesca Giampiccolo and Zero Parallel, LLC, did not win the relief they sought, which was nondisclosure of their identities.

Giampiccolo received a CID demanding that she appear for oral testimony related to activities she performed for her former employer. She timely filed her Petition to Modify along with a request for confidential treatment.⁶¹ Her petition requested that the Bureau forgo taking her oral testimony because she suffered from a medical condition that required medications which affected her memory. The petition listed her ailment and medicines. Her request for confidential treatment asked the Bureau to abstain from publishing her petition due to the personal medical information contained in her petition.⁶²

The Bureau granted in part and denied in part Giampiccolo's request for confidential treatment in a decision dated May 19, 2015.⁶³ The Bureau redacted only the portion of her petition that described the petitioner's specific ailment and the medications she took.⁶⁴ Thus, the Bureau publicized on its website the CID recipient's full name, former employer, and that she suffers from a medical ailment that requires regular administration of medications that affect her memory.⁶⁵ The order on her petition did not articulate any public interest justification for publicizing the witness's name along with her medical issues. The order did not contemplate that such information might damage her reputation or future job prospects.⁶⁶ Nor did it address the chilling effect on potential witnesses in Bureau investigations, who may in the future doubt any Bureau assurances of confidential protections.

The same consequences associated with the disclosure of Giampiccolo's identity have the same potential impact on credit unions. In financial services, an institution's reputation is its primary differentiator. Disclosure of a credit union's identity as a CID recipient could result in unwarranted assumptions. Consumers within a credit union's field of membership might avoid their desired credit union when their options are already greatly limited. This could result in consumers not being able to secure any type of credit services. Governments ought not to punish their citizens for exercising their legal rights. And in the case of credit unions—which are owned by the very consumers the Bureau seeks to protect—Bureau processes should be especially careful.

CUNA recognizes that aggressive use of CIDs may be necessary to investigate activities of profit-driven financial institutions and individuals that are engaging in fraud or other serious violations. However, credit unions genuinely wish to meet or exceed regulatory requirements designed to protect consumers and will cooperate with reasonable Bureau inquiries. Current Bureau CID processes do not have policies or procedures that protect legitimate financial

⁶¹ Petition to Modify, *Giampiccolo*, 2015-CFPB-GIAMPICCOLO-0001, at 5–6 (Feb. 19, 2015).

⁶² *Id.*

⁶³ Order on Confidential Treatment, *Giampiccolo*, 2015-CFPB-GIAMPICCOLO-0001 (May 19, 2015) (the CFPB did not publish the order on the petition for four months, until Aug. 1, 2015).

⁶⁴ Petition to Modify, *Giampiccolo*, 2015-CFPB-GIAMPICCOLO-0001, at 5–6.

⁶⁵ *Id.*

⁶⁶ *Id.*

institutions, such as credit unions, from unwarranted government intrusion. We respectfully urge the Bureau to address the issues we identified.

On behalf of America's credit unions and their 100 million members, thank you for your consideration.

Respectfully submitted,

Elizabeth A. Eurgubian
Deputy Chief Advocacy Officer & Senior Counsel