American Bankers Association
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By electronic delivery to:
www.regulations.gov

The Honorable J. Michael Mulvaney
Acting Director
Bureau of Consumer Financial Protection
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 Acting Director Mulvaney:

The American Bankers Association (ABA)[1] appreciates your leadership in exposing the policies and procedures of the Bureau of Consumer Financial Protection to public comment through the Request for Information (RFI) process. This process provides a transparent, efficient, and timely opportunity for all of those affected by the Bureau's work to help the Bureau identify how it might improve the way it pursues its important mission.

Like all government agencies, the Bureau must strike a balance that allows it to pursue its objectives without undermining other important values, including fairness to those it regulates. As you have noted, the Bureau works for everyone: "those who use credit cards, and those who provide those cards; those who take loans, and those who make them."[2] Unfortunately, the Bureau's focus all too often has been on increasing the scope of its authority, rather than on instituting checks and balances to ensure that its authority is exercised wisely and fully for the benefit of consumers and consistent with law and due process. The resulting enforcement practice has too often been unnecessarily rushed and unfair to the regulated, has misallocated Bureau resources, and not infrequently has inflicted harm rather than promote consumer access to financial services.

ABA's goal throughout the RFI process will be to provide constructive feedback on the Bureau's policies and procedures. Our intent is that the Bureau implement programs and policies that are transparent, fully consistent with the law, and are focused on promoting the interests of financial consumers in enjoying a strong, vibrant, and innovative market that offers the variety of financial products and services that consumer want.

[1] The American Bankers Association is the voice of the nation's $17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard $13 trillion in deposits, and extend more than $9 trillion in loans.
[2] Mick Mulvaney, Opinion, *The CFPB Has Pushed Its Last Envelope*, by Mick Mulvaney, Wall St. J., Jan. 23, 2018 (Mulvaney Op-ed).

Summary of Comment

The Bureau's decision to begin the RFI process with Civil Investigative Demands (CIDs) was insightful, as the Bureau's use of CIDs offers a concrete way to start a broader conversation about how the Bureau can bring more balanced judgment to all of its activities. Like many of the Bureau's powers, CIDs are an important tool. But any tool can be over-used or misused, and some of the ways the Bureau has exercised its CID authority have created unnecessary and improper burdens on CID recipients.

Any review of the Bureau's use of CIDs should begin by recognizing the substantial costs that they impose on the person or entity that receives them. Several ABA members report spending over a million dollars on outside counsel fees to respond to CIDs in a single investigation. These out-of-pocket costs may be matched by thousands of hours in employee time, including considerable involvement by senior business-line executives, in-house counsel, and senior information technology professionals.

Moreover, there is often no relationship between the costs imposed and seriousness of the potential consumer harm being investigated. Indeed, CID costs are often highest when the Bureau staff is least certain about the facts to be investigated or the legal theory under which it may proceed. In some cases, CIDs are issued to obtain information about *third parties*, and thereby impose substantial costs on firms that are mere witnesses. In other cases, the CID imposes burdens that are disproportionate to the size of the financial institution or the population of consumers at issue. Too often, the Bureau issues CIDs without considering these and other costs, including the diversion of resources from serving customers and the development of new products and services.

In this response to the Bureau RFI on CIDs, ABA seeks to provide the Bureau with a sense of how the CID process looks from the point of view of a CID recipient. This fresh perspective recommends reforms that are rooted in common sense:

- The Bureau should reconsider its overdependence on CIDs as a means for obtaining information.

- The Bureau should evaluate and weigh the burdens imposed by the CIDs it issues and weigh those costs against the likely value of the information to be gained.

- The Bureau should provide the CID Recipient with more information about the underlying purpose of a CID.

- The Bureau should be more flexible on CID modifications and extensions of time.

- The Bureau should stop penalizing—and start granting—Petitions to Modify CIDs.

These reforms will help the Bureau be focused and efficient in issuing CIDs while reducing costs and confusion for CID recipients. Indeed, these principles would be already be part of the CID process if the Bureau had taken a more balanced approach when it initially promulgated its Rules Relating to Investigations[3] and designed its internal processes. ABA is confident that these reforms will put the Bureau's CID process on a more stable and lasting footing by simultaneously promoting fairness for CID recipients and providing the Bureau with checks and balances that will ensure a more thoughtful approach to CIDs.

Issuing a CID

In light of the enormous costs and disruption associated with CIDs, the Bureau routinely should explore other ways of obtaining information before issuing a CID. A first step would be for the Bureau to rely upon Supervision to initiate requests for information from supervised entities. Because the staff of Supervision have experience with the entities they examine, they can target and phrase requests to obtain the most relevant materials available and often in a more expeditious manner, which will also facilitate the work of the Bureau. Accordingly, the cost of responding to supervisory requests, while significant, is typically a fraction of the cost of responding to a CID. A document request from Supervision is typically handled in-house and responded to in days. CIDs—which include detailed requirements relating to document submission standards, certification, and privilege, as well as raising the potential for an enforcement action—are far more likely to require the expense of outside counsel, and not infrequently are responded to over several months. Replacing most CIDs with supervisory requests would also give Supervision the opportunity to identify and resolve Bureau concerns expeditiously.

When the Bureau decides to move a matter from Supervision to Enforcement, that process should not automatically penalize the entity involved. To begin with, Enforcement should not require the entity to repackage and reproduce the record it has already produced to Supervision. ABA members report that Enforcement often insists upon new productions that overlap or duplicate materials already provided to the Bureau, citing its need for the information in a particular format. At the same time, however, the Bureau should ensure that Enforcement does not receive any *privileged materials* shared with Supervision. Such materials are not available to Enforcement when it initiates an investigation and should not be available to Enforcement when it inherits an investigation.

In those cases where Enforcement requires materials beyond those already collected by Supervision, it should begin its efforts with requests for information rather than CIDs. Making CIDs the last resort of the Bureau when it needs information would make an important contribution to the Bureau's new goal of making enforcement "the most final of last resorts."[4] Proceeding informally first can facilitate greater dialogue, quicker productions, and reduced burdens for the institution and Bureau alike. Moreover, the supervised institution is highly likely

[3] 77 Fed. Reg. 39101 (June 29, 2012).
[4] *Mulvaney Op-ed, supra* note 2.

to cooperate in order to obviate the need for a CID. Such a practice would allow cooperation to replace coercion as the Bureau's initial approach to those it regulates.

ABA believes that, before issuing a CID, the Bureau should go through an internal process that is commensurate with the burden a CID may impose. The current process for issuing CIDs allows a Deputy Assistant Director in Enforcement to authorize a CID.[5] While often highly qualified lawyers, Deputy Assistant Directors are so far removed from the Bureau Director that they do not appear in the Bureau's on-line organizational chart.[6] Within the Bureau, Deputy Assistant Directors do not have the authority to direct the Bureau to spend millions of dollars and thousands of hours. For the same reasons, Deputy Assistant Directors should not have the authority to direct a financial institution to spend millions of dollars and thousands of hours to respond to a CID.

The need for additional supervision of CIDs is apparent from the disconnect between the Bureau's own written standards for CIDs and actual CIDs received by ABA members. The Bureau's Enforcement Policies and Procedures Manual states that, "Staff should consider the burden the CID will impose upon the recipient," and that a CID "should be narrowly tailored."[7] In fact, while some Bureau CIDs are tailored, too many range widely to encompass disparate products, policies, procedures, and periods. Broad CID language, such as requests for *all* of a particular type of document (e.g., communications, complaints, policies, reports, contracts)—combined with instructions that require every draft of every responsive document—flout the "narrowly tailored" guideline.

The Federal Trade Commission's (FTC) CID process offers a much more robust model for the issuance of CIDs. As the Comments of the Staff of the FTC Bureau of Consumer Protection (BCP) on this RFI describe, FTC Staff may propose a CID, but it then goes through a rigorous process of drafting, explanation, and review that does not stop until the BCP Director approves an entire package of materials that must then obtain the approval of at least one Commissioner.[8] The FTC Comments do not suggest that this review process is unduly burdensome or inefficient for the Commission.

A similarly robust process at the Bureau would address many of the concerns noted and promote consistency and accountability. For example, the Bureau's process should include detailed, publicly available standards for when the Bureau will issue a CID. Responsibility for following

[5] 12 C.F.R. § 1080.6 (2012).
[6] *See* Bureau Structure, https://www.consumerfinance.gov/about-us/the-bureau/bureau-structure/. (last updated December 5, 2017).
[7] Consumer Financial Protection Bureau, *Policies and Procedures Manual, Office of Enforcement* | Version 3.0 (May 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201710_cfpb_enforcement-policies-and-procedures-memo_version-3.0.pdf.
[8] The Bureau of Consumer Protection of the Federal Trade Commission, *Comments of the Staff of the Federal Trade Commission's Bureau of Consumer Protection in the Matter of Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes*, Docket No. CFPB-2018-00001 (March 26, 2018) (FTC Comments).

those standards would include the Assistant Director for Enforcement, who is in a unique position to insist upon consistency across the entire Bureau enforcement staff. For example, such a review could ensure that CIDs are in fact "narrowly tailored." Moreover, as described below, the Bureau should offer CID recipients a more genuine opportunity to object to a CID.

Explaining the Purpose of a CID

A more robust CID process would also require the Bureau to communicate clearly about the purpose of a particular CID. Under the Bureau's Rules, a CID recipient "shall be advised of the nature of the conduct constituting the alleged violation that is under investigation and the provisions of law applicable to such violation."[9] In practice, Bureau CIDs often offer a Notification of Purpose, identical to the statement of purpose used to open the underlying investigation, that provides only a general description of the financial products or services potentially at issue, and a long list of laws that may have been violated—ending with "or any other Federal consumer financial law." With a net that is spread this broadly, it is no wonder that many CID recipients see CIDs as fishing expeditions.

The Federal Reserve Inspector General has criticized the Bureau for "suggesting [its] attorneys craft a statement of purpose 'in very broad terms.'"[10] The Bureau's defense of this approach—that such broad language will "allow for an investigation to develop over time"[11]—reflects a failure by the Bureau to balance its requests against the costs to and impact on the CID Recipient. As the Inspector General noted, a statement of purpose should be revised if the purposes of the investigation evolve rather than initially drafted to cover any contingency.[12] Such a step-by-step approach, in combination with additional oversight of the CID process, would provide the Bureau with an important management tool. For similar reasons, the CID should make clear on the face of the CID if the recipient is not a target of an investigation and merely a source of information.

The deficiencies in the CID Notification of Purpose could be ameliorated by further explanation, early in the process, from Enforcement Attorneys regarding the Bureau's concerns and priorities. Currently, ABA members report significant variation among Bureau staff on the amount of information that may be shared, and that meaningful dialogue is more the exception than the rule.

While Bureau regulations and fundamental fairness dictate that CID recipients should be able to understand why they received a CID, such clarity is also in the interests of the Bureau and the consumers served by the Bureau and by the recipient firm. Requiring Bureau staff to communicate clearly and concisely about the purpose of a CID will force the staff to think

[9] 12 C.F.R. § 1080.6.
[10] Board of Governors of the Federal Reserve System, Office of Inspector General, *The CFPB Generally Complies With Requirements for Issuing Civil Investigative Demands but Can Improve Certain Guidance and Centralize Recordkeeping*, Evaluation Report 2017-SR-C-015 (Sept. 20, 2017) at 8.
[11] *Id.*
[12] *See id.* at 9.

clearly about the purpose of a CID and to tailor the CID to that clear purpose. Such a focused approach prevents the misallocation of resources of the Bureau and the recipient in seeking and reviewing documents that do not further the investigation.

Moreover, a CID recipient that understands the concerns underlying a Bureau CID is in a better position to address those concerns promptly, both on the merits and in responding to the CID.[13] Such proactive efforts may include a settlement proposal, or an effort to identify and remediate any ongoing consumer harm even before the CID response is complete. A Bureau that is more transparent about its concerns will provide greater and earlier opportunities for its concerns to be addressed.

The Scope of CIDs

CIDs are written by Bureau enforcement lawyers who, by definition, need additional information in order to understand fully the relevant operations and data systems of the entity receiving the CID. ABA members have found wide disparities in the Bureau staff's willingness to consider modifications when CID requests do not fit the facts and/or the way records are actually kept. Too often, good faith modification requests are viewed as challenges to the Bureau's authority. In addition, the fact that the CID recipient has sharply limited options to contest a CID allows inflexibility on the part of the Bureau that would not pass muster before a neutral third party.

In particular, ABA urges the Bureau to work more constructively with CID recipients when requesting Electronically Stored Information (ESI). ESI is often stored across multiple systems. This distribution of data may be an artifact of acquisitions, organizational structure, or the replacement of outdated systems. In any event, Bureau CIDs—and particularly requests for written reports—routinely ignore the difficulties in pulling information together across such systems. Similarly, the Bureau's prescriptive requests dictating the precise content and format of ESI submissions impose organizational and technical requirements that make production unnecessarily difficult and costly. For example, the Bureau has sought document metadata as a matter of course, even when it is highly unlikely to prove relevant to its investigation. The FTC has noted that its guidelines for submission of ESI are "significantly shorter and less complex" than the Bureau's requirements.[14]

The Bureau should take at least three steps to address these issues. *First*, the Bureau should have a presumption against requesting information from years that are outside the relevant statute of limitations. Such requests are of limited value. They are also the requests most likely to involve data and systems that are inaccessible. Limiting the relevant time periods for data requests also will focus Bureau resources on investigating activities that may present ongoing consumer risk.

[13] The FTC also noted, "Articulating a more specific purpose for investigations in which CIDs are issued has imposed little cost on the FTC, but has minimized confusion and facilitated the ability of CID recipients to raise concerns about their compliance obligations." FTC Comments, supra n. 8, page 8.
[14] FTC Comments, *supra* note 8, at13.

Second, the Bureau should reduce its reliance on requiring written reports, particularly when the CID recipient explains that the relevant data are spread out over different systems. Many such requests may become far more reasonable when disaggregated or limited. Currently, the Bureau simply decrees that the CID recipient should compile, collate, and analyze data for the convenience of the Bureau. If the CID recipient explains why such a request is burdensome, the Bureau should reconsider whether this work must be done, and whether it would be more appropriate for the Bureau to accomplish the task itself by requesting only the data and not its assembly.

Third, the Bureau should streamline the document submission standards relating to ESI and be open to alternative approaches that meet the Bureau's needs while reducing the difficulty and cost of production. By comparison, the FTC has already taken steps in this direction.[15]

CID Timeframes and the *Meet and Confer*

The lack of balance in the Bureau's CID regime is particularly evident in the timeframes and processes that are triggered by the service of a CID. To start, while the Bureau has unlimited time to prepare a CID, the recipient has typically had only ten days before it must meet and confer with the staff regarding that CID.[16] This ten day period is routinely too short for the CID to reach the right person(s) and for them to ascertain the whereabouts and accessibility of information responsive to the CID, or when the Bureau does not provide a copy of the CID directly to the relevant law department. This challenge grows exponentially with the breadth of the CID.

The CID recipient must then participate in a meeting that has been, apparently by design, a bureaucratic runaround. The CID requires the recipient to arrange a *meet and confer* with a designated Enforcement Attorney. During that meeting, the CID recipient must "discuss and attempt to resolve all issues regarding compliance with the civil investigative demand."[17] The CID recipient must also "make available at the meeting personnel with the knowledge necessary to resolve any issues relevant to compliance with the demand."[18] However, the CID recipient cannot possibly "resolve all issues" during the meet and confer because the Bureau forbids its Enforcement Attorney from modifying the terms of the CID.[19] Only the Assistant Director or the Deputy Assistant Director is authorized to modify the terms of the CID,[20] and both are routinely absent from the meet and confer.

As a result, the Enforcement Attorney is relegated to discussing the issues and taking notes back to the Deputy Assistant Director. The CID recipient may spend hours with one or more Enforcement Attorneys describing the obstacles to compliance with the CID without knowing

[15] *Id.* at 2.
[16] 12 C.F.R. § 1080.6.
[17] 12 C.F.R. § 1080.6(c).
[18] 12 C.F.R. § 1080.6(c)(1).
[19] 12 C.F.R. § 1080.6(d).
[20] *Id.*

what information actually will be provided to the person making the decision on CID modifications. While the CID recipient may also draft a detailed letter that makes the same points, such a letter adds time and expense to the process, and the need for such a writing simply underscores the inefficiency of the required meeting. There is no deadline for the Deputy Assistant Director to respond to the issues raised during the meet and confer, nor is there an automatic stay of the other CID deadlines while the Bureau considers its response.

The date of CID service also initiates a twenty-day window during which a CID recipient may file a Petition for an Order Modifying or Setting Aside a CID (Petition).[21] That Petition, however, is limited; the recipient of the CID may only raise issues discussed at the meet and confer.[22] As a result, a bank must conduct a far-reaching factual review in the ten days before the meet and confer, and then turn that investigation into a Petition that sets forth "all factual and legal objections" to the CID, complete with "all appropriate arguments, affidavits, and other supporting documentation" in the ten days that follow.[23] Extensions of the twenty-day window are possible but explicitly disfavored by Bureau rule.[24]

The Bureau's tight timetable for Petitions, and its aversion to extensions, further demonstrate the lack of balance in the design of the CID process. After forcing the CID recipient to draft and support its Petition in twenty days, the Bureau sets no timetable for its review of the Petition. A search of the Bureau's website indicates that it has taken 53, 34, 94 and 72 days for the Bureau to rule on the four most recently resolved Petitions.[25]

A Bureau that gives itself all the time it needs to resolve complex CID issues should not deny CID recipients the time they need to identify, explain, and document those same complex issues. In one recent case, the Bureau denied a request for a substantial extension of time and instead granted an extension of just seven days—only to then take 94 days to rule on the Petition.[26] In another case, the Bureau refused to modify a CID that required the production of documents within 30 days—but then took six months to respond to a Petition seeking such a modification.[27]

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[21] 12 C.F.R. § 1080.6(e).
[22] 12 C.F.R. § 1080.6(c)(3).
[23] 12 C.F.R. § 1080.6(e).
[24] 12 C.F.R. § 1080(e)(2). The 20 day period is established by statute, but the statute also allows for its extension "by any Bureau investigator." 12 U.S.C. § 5562(f)(1) (2012). The Bureau has discouraged such extensions by limiting extension approval to the Assistant Director and Deputy Assistant Directors of Enforcement and by explicitly disfavoring extensions. *See* 12 C.F.R. § 1080.6(e)(2). The FTC, which has a similar process, has more broadly delegated authority to grant such extensions and does not disfavor extensions. *See* 16 C.F.R. § 2.10(a)(5) (2015).
[25] *See* Petitions to Modify or Set Aside, https://www.consumerfinance.gov/policy-compliance/enforcement/petitions/.
[26] *See* Synchrony Financial, *Combined Petition to Set Aside and Petition to Modify (June 6, 2017)*, https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201709_cfpb_synchrony-financial_combined-petition.pdf (describing grant of one week of a requested 40 day extension).
[27] *See Assurant. Inc. Petition to Modify or Set Aside Civil Investigative Demand* (October 12, 2015); *Decision and Order on Petition by Assurant Inc. to Modify or Set Aside Civil Investigative Demand* (April 25, 2016), https://www.consumerfinance.gov/policy-compliance/enforcement/petitions/assurant-inc/.

The foregoing are particularly clear examples of a more general problem, which is that the Bureau often imposes an urgency on others that is belied by the pace of its own work. Many ABA members have had the experience of being rushed to produce materials that relate to products or practices that have been discontinued, or for which there is no plausible claim of ongoing consumer harm. Others report that tight CID deadlines are followed by long delays before there is any sign that the staff has reviewed the requested materials. Likewise, the Bureau may also take months before deciding to issue a follow-up CID, only to refuse reasonable extension requests for responses to that CID. In general, the Bureau too often will rely upon "an arbitrary date that serves only to give . . . an artificial sense of urgency"—a tactic that the Bureau has called "deceptive" and "abusive" when engaged in by others.[28]

ABA recognizes that some investigations are urgent, and that all investigations should be handled efficiently. Its members are experienced in quickly producing materials requested by regulators, both in supervisory and enforcement contexts. However, when a bank needs additional time to respond to a CID, the Bureau can and should be a great deal more flexible than it has been historically. Much of the issue could be resolved by a more liberal approach to extensions in individual cases. However, a more permanent reform would be for the Bureau to extend the deadlines set forth in its regulations and place the burden on Enforcement staff to demonstrate that exigent circumstances require more immediate responses. Additional potential reforms include—

- eliminating the *disfavoring* of extensions for Petitions to Modify or Set Aside a CID;
- extending deadlines by the amount of time it takes the Bureau to respond to issues raised in the meet and confer;
- providing Enforcement Attorneys with the authority to provide extensions and/or modify CIDs; and/or
- requiring that the Deputy Assistant Directors with the authority to modify a CID actually participate in the meet and confer.

All of these reforms would add efficiency and fairness to the CID process without impeding the Bureau's ability to move investigations along at an appropriate pace.

Witnesses

As the RFI questions indicate, the Bureau should give more appropriate attention to the rights of witnesses. For example, even after a Bureau investigator has completed an examination, the

[28] *See* Complaint in *CFPB v. Global Financial Support et. al.*, 15-cv-2440-GPC-WVG (S.D. Cal. Oct. 29, 2015), paragraphs 60, 75 (claiming deception); *see also* Consent Order, *In the Matter of: CFPB v. ACE Cash Express, Inc.*, 2014-CFPB-0008 (July 10, 2014) (creating an "artificial sense of urgency" was abusive).

investigator may forbid the witness from clarifying his or her answers on the record.[29] In contrast, the Securities and Exchange Commission provides a right to such clarifying questions.[30] Such a right to clarify answers or questions can help the Bureau avoid misunderstandings and misinformation that waste time and resources in the long run, while facilitating justice based on more accurate information. Similarly, Bureau rules should provide that a witness has an absolute right to a reasonable limit on the length of the investigational hearing and to obtain a copy of the transcript.

Petitions to Modify the CID

As noted above, the Bureau has created a system that gives CID recipients the right to file a Petition to Modify or Set Aside the CID—but it has made filing such a Petition impractical and burdensome. (*See supra* at 7-8.) However, a more substantial obstacle to filing a Petition is the fact that the Bureau routinely makes the Petition public and thereby makes the underlying investigation public.

This approach to Petitions provides another example of the lack of balance in what has been the Bureau's approach. Bureau investigations are generally nonpublic.[31] Financial institutions are generally forbidden from disclosing any BCFP record.[32] Indeed, the Bureau has proposed a rule to forbid a CID recipient from disclosing the existence of the CID.[33]

However, despite all of these efforts to keep investigations nonpublic, the Bureau will inexplicably reverse course if a CID recipient exercises its right to petition to modify a CID.[34] This practice of making a Petition—and so the existence of the underlying investigations—public creates an enormous disincentive for any person or entity to exercise the right to file a Petition. The Bureau has dismissed the argument that the "publication of the fact that [an entity] was served with Bureau CIDs would amount to such a substantial penalty that would effectively preclude them from obtaining a ruling from the Director on the merits of their petition."[35] However, the data point in the other direction, as the Bureau website indicates that only one bank has filed a Petition in the past six years.

Any Bureau claim that this policy promotes transparency rings hollow in light of the Bureau's practice of shielding from public view its own staff responses to a Petition.[36] The Bureau also neglects to provide such transparency by not reporting on the CID modifications it makes outside

[29] *See* 12 C.F.R. § 1080.9(b)(4).
[30] *See* 17 C.F.R. § 203.7(c) (2008).
[31] 12 C.F.R. § 1080.14(b).
[32] 12 C.F.R. § 1070.4 (2013).
[33] *See*81 Fed. Reg. 58316 (August 24, 2016).
[34] 12 C.F.R. § 1080.6(g).
[35] CFPB, *Decision on Request for Confidential Treatment of Joint Petition by Great Plains Lending, LLC, Mobiloans, LLC and Plain Green LLC*, 2012-MISC-Great Plains Lending-0001, at 10, https://files.consumerfinance.gov/f/201309_cfpb_decision-on-confidentiality_greatplainslending-0001.pdf.
[36] *See* 77 Fed. Reg. 39105 (June 29, 2012).

of the Petition process. To the extent the Bureau seeks to provide more transparency and public guidance about the Petition process without discouraging actual Petitions, it could provide summaries of Petitions and its decisions, or publish its decisions with redaction of names and other identifying information.

In addition to discouraging Petitions by making them public, the Bureau also discourages Petitions by denying them all. The Bureau's website discloses roughly twenty Petitions. All have been denied. Many include requests for confidentiality. All such requests have been denied. Such a rubber-stamp rejection of such Petitions and requests—like too many of the Bureau's decisions relating to CIDs—is neither balanced nor helpful to the Bureau's credibility.

Certification and Privilege Logs

CIDs typically require that the recipient produce, at the close of its response, a wide range of additional documents. These include a log of materials withheld on grounds of attorney-client privilege and declarations relating to compliance with document requests and interrogatories, as well as a declaration that the produced documents are business records. These requirements are often treated as inviolable for the staff, even though a one-size-fits-all approach does not capture the wide differences among CIDs. For example, many Bureau CIDs require documents and information from disparate departments within the recipient firm. In such cases, the Bureau should allow the declarant to rely reasonably on others or, for multiple declarations, from persons familiar with a portion of the search. Narrower CIDs may not require certification at all, as the documents or interrogatory responses make plain that the production has been complete. Similarly, in some cases the Bureau does not need privilege logs, or could rely upon logs that describe generally the types of documents withheld, rather than providing a list of each and every document. In such cases, the Bureau's inflexibility often imposes costs that are not justified by the benefits of such documentation.

Conclusion

The foregoing demonstrates that the Bureau's CID process is broken, and also that it can be mended. Our proposals will not undermine Bureau investigations. Instead, they will strengthen the Bureau for the long term by reducing well-founded criticisms of the way it currently conducts itself, reduce unnecessary drain on resources at the Bureau as well as at the supervised firms, and enhance investigations with a better focus of its information requests and reviews.
If you have any questions about these comments or would like to discuss anything further, please contact Virginia O'Neill at 202-663-5073 or voneill@aba.com.

Sincerely,

Virginia O'Neill
Senior Vice President, Center for Regulatory Compliance