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FEDERAL CONSUMER PROTECTION METHODS: CFPB'S INVESTIGATIONAL HEARINGS

When the CFPB receives information leading it to suspect that a covered entity has engaged in a violation of a consumer finance protection law, it may initiate an investigational hearing. The authors set out the background and legal framework governing such hearings, and suggest practical tips for entities and witnesses summoned to testify.

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In response to the Great Recession of 2008, Congress took steps to enhance consumer protection and prevent lending abuse through the enactment of the Dodd-Frank Act.¹ Title X of Dodd-Frank (the Consumer Financial Protection Act or “CFPA”) creates the Consumer Financial Protection Bureau as a mechanism to “police the way banks manage mortgages, credit cards, payday loans, and other financial products.”² The CFPB’s mission is to protect consumers from deceptive and abusive loan and financial services practices by enforcing rules for both bank and nonbank entities, and

by conducting examinations of consumer-related business.³

Within this context, practitioners in CFPB matters have seen an upswing in Bureau investigational hearings since the recent transition of leadership at the agency. This article explains the legal framework for CFPB investigational hearings, the proposed changes in the

¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 15 U.S.C. § 78o).

² See *id.* tit. X, 124 Stat. at 1955-2113; see also Renae Merle, *Consumer Financial Protection Bureau One Step Closer to Getting New Chief*, L.A. TIMES (Nov. 29, 2018, 1:35 PM), <https://www.latimes.com/business/la-fi-cfpb-kraninger-senate-vote-20181129-story.html>; 12 U.S.C. § 5511 (2010).

³ The CFPB’s enabling expressly identifies three groups of nonbanks the CFPB supervises regardless of size: mortgage companies (such as lenders, brokers, and servicers), payday lenders, and private education lenders. The CFPB also has some discretion to exert supervisory authority over “larger participants” in certain consumer financial markets involving nonbanks if the CFPB has “reasonable cause to determine that the nonbank poses risks to consumers in offering its financial services or products,” and identifies such larger participants through public rulemaking. See, e.g., *Introduction to Financial Services: the Bureau of Consumer Financial Protection (CFPB)*, CONG. RESEARCH SERV. (updated Jan. 8, 2019), <https://crsreports.congress.gov/product/pdf/IF/IF10031>.

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federal regulation governing such hearings, and practical tips for entities or individuals in receipt of a demand to provide testimony at such a hearing.

I. BACKGROUND: THE STATUS OF CFPB POWER TO CONDUCT ENFORCEMENT ACTIVITY

Despite reports from the popular press suggesting a reduction in CFPB activity,⁴ both public and non-public data demonstrate that the Bureau continues to remain active. The contrast between external-facing efforts to curb the CFPB's powers and the vast CFPB authority in pertinent regulations is fascinating. Depicting one example of attempted reforms to the scope of CFPB power, on January 17, 2018, past Acting Director Mick Mulvaney announced that the CFPB would be issuing a call to the public, via Requests for Information ("RFI"), to solicit ideas to improve enforcement, supervision, rulemaking, market monitoring, and education activities, which were to be published in the Federal Register.⁵ The first such RFI, deeply relevant to the purpose of this article, had requested public comment on Civil Investigative Demands ("CIDs").⁶ Thirteen months later, on April 23, 2019, the CFPB announced an updated policy that CIDs will "provide more information about the potentially applicable provisions of law that may have been violated . . . [and] typically specify the business activities subject to the Bureau's authority."⁷

Policy is not law, however. The RFI-based effort described above did not yield any amendments to the CFPB's rules on investigations or the requirements of investigational hearings grafted into the CFPA. Instead, the Bureau has proceeded steadily over the last two years — continuously since the inauguration of President Trump — to conduct investigational hearings and examinations based upon the CFPB's powers set out in the rule governing investigations and investigational hearings. Depicting this trend, 12 C.F.R. 1080, which governs investigations, was initially promulgated under the Obama Administration and has not since been amended, even despite calls to do so in past Acting Director Mulvaney's 2018 RFI. As one example, the Consumer Mortgage Coalition, Consumer Bankers Association, and Financial Services Roundtable, submitted a 35-page letter to limit the CFPB's authority to collect information through a CID,⁸ yet lawmakers have not conceded to industry demands. Accordingly, it is critical that regulated entities understand how the Bureau's conduct and approach to investigational hearings continues to remain rooted in existing law and applicable rules.

CFPB investigational hearings are unique and reside within the broader context of a relatively new, increasingly active CFPB. Case volume summaries support a trend of decreased activity during the change in Administration, followed by a steady uptick: in 2016, the CFPB filed 40 enforcement actions; in 2017, 36 actions; in 2018, 11 actions; and by September 2019, 18 had been brought. Despite a reduction in volume of actions, these recent enforcement efforts have produced a record-setting high in the amount of penalties and

⁴ See, e.g., Kate Rainowitz, "This Watchdog Agency Has Gotten Smaller, Quieter And Less Active Under Trump," WASH. POST (Dec. 4, 2018), https://www.washingtonpost.com/politics/2018/12/04/this-watchdog-agency-has-gotten-smaller-quieter-less-active-under-trump/?utm_term=.fa537176e913.

⁵ *Acting Director Mulvaney Announces Call for Evidence Regarding Consumer Financial Protection Bureau Functions*, CONSUMER FIN. PROT. BUREAU (Jan. 17, 2019), <https://www.consumerfinance.gov/about-us/newsroom/acting-director-mulvaney-announces-call-evidence-regarding-consumer-financial-protection-bureau-functions/>.

⁶ *Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes*, Fed. Reg. (Jan. 26, 2018), <https://www.federalregister.gov/documents/2018/03/22/2018-05783/request-for-information-regarding-bureau-civil-investigative-demands-and-associated-processes>.

⁷ *CFPB Announced Policy Change Regarding Bureau Civil Investigative Demands*, CONSUMER FIN. PROT. BUREAU

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April 23, 2019), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-policy-change-regarding-bureau-civil-investigative-demands/>.

⁸ See *Pushing the Envelope: The Consumer Financial Protection Bureau Under the Trump Administration, Minority Staff Report*, U.S. Senate 23 (Nov. 2018), <https://www.banking.senate.gov/imo/media/doc/Pushing%20the%20Envelope%20-%20Mick%20Mulvaney%20at%20CFPB%20FINAL.pdf>; see also *FSR-CBA-CMC Joint CFPB Enforcement Comment Letter*, CONSUMER BANKERS ASS'N (May 14, 2018), <https://www.consumerbankers.com/cba-issues/comment-letters/fsr-cba-cmc-joint-cfpb-enforcement-comment-letter>.

restitution in recent years. In April 2018, the CFPB, together with the Office of the Comptroller of the Currency, imposed a \$1 billion civil money penalty against Wells Fargo Bank, N.A. for auto lending and mortgage practices. Quite recently, in July 2019, the CFPB announced settlements of \$20 million in restitution, and \$5 million in civil money penalties, against Freedom Debt Relief, LLC for the company's violation of the Telemarketing Sales Rule. There, the CFPB alleged that the company had misled consumers about its fee provisions and had charged consumers inappropriately.⁹ Later that month, the CFPB made headlines when it announced a \$700 million settlement with Equifax relating to its 2017 data breach. Of this sum, \$425 million comprises consumer monetary relief, with an additional \$100 million in civil monetary penalties.¹⁰ In recent months, Director Kraninger has denied at least six petitions to modify or quash CIDs, depicting strict enforcement efforts by the Bureau. Further, current enforcement case matter topical areas remain diverse — spanning a variety of industries, including payday, small dollar, and pension advance lenders; debt collectors; mortgage lenders and servicers; auto finance companies; credit card providers; and consumer reporting agencies. Enforcement in previous years has also involved credit repair companies, online lenders, and providers of deposit products. The CFPB has investigated and brought suit against both entities and individuals.

Consequently, a decline in volume of enforcement actions may instead indicate a shift in CFPB efforts toward a “purposeful enforcement regime” that addresses wrongdoing, fosters compliance, and prevents consumer harm through increased efforts at consumer education and heightened transparency.¹¹ Nonetheless, the new CFPB Director, Kathy Kraninger, who assumed

leadership in December 2018,¹² has indicated that the Bureau will utilize enforcement tools to remain focused on preventing violations of consumer financial laws and addressing wrongdoing where it is deemed to have occurred, as indicated by the recent consent orders involving Equifax and Freedom Debt Relief.

Because the CFPB will remain active under new Director Kraninger, banks, lenders, and other consumer financial entities will benefit from understanding how CFPB investigational hearings differ from the bank examination processes undertaken by both the CFPB and the prudential regulators. An overarching distinction of the Bureau is that it differs from other regulators by “focus[ing] directly on consumers, rather than on bank safety and soundness or on monetary policy,”¹³ and the examinations protocol of the Bureau are more “bank-exam like” than adversarial. The powers and purpose of the Bureau, as presently established in the CFPB and applicable rules, are essential to adequate preparation for an investigational hearing. As we explain in further detail below, the distinct attributes of investigational hearings as compared to examinations are that the former tend to be more adversarial, are not known about significantly in advance, and involve a tighter timeframe for preparation as compared to interviews done during examinations.

II. STATUTORY POWERS AND PURPOSE OF THE CFPB

The CFPB protects consumers “in borrowing money or using other financial service . . . [by] implementing and enforcing [f]ederal consumer financial laws; reviewing business practices to ensure that financial services providers are following the law; monitoring the marketplace, and taking appropriate action to make sure markets work as transparently as they can for consumers”¹⁴ To achieve this focus, Congress gave the CFPB jurisdiction over those financial service entities with the greatest impact to a large number of consumers or with the most influence over retail financial markets. This statutory framework remains unchanged under the

⁹ *Consumer Financial Protection Bureau Settles Lawsuit Against Freedom Debt Relief*, CONSUMER FIN. PROT. BUREAU (July 9, 2019), <https://www.consumerfinance.gov/about-us/newsroom/bureau-settles-lawsuit-against-freedom-debt-relief/>.

¹⁰ *CFPB, FTC and States Announce Settlement with Equifax Over 2017 Data Breach*, CONSUMER FIN. PROT. BUREAU (July 22, 2019), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-ftc-states-announce-settlement-with-equifax-over-2017-data-breach/>.

¹¹ *See, e.g.*, Speech at the Bipartisan Policy Center By Kathleen L. Kraninger, Director, Consumer Financial Protection Bureau, CONSUMER FIN. PROT. BUREAU (Apr. 17, 2019), <https://www.consumerfinance.gov/about-us/newsroom/kathleen-kraninger-director-consumer-financial-protection-bureau-bipartisan-policy-center-speech/>.

¹² *Kathy Kraninger, Director, Consumer Financial Protection Bureau*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/about-us/the-bureau/about-director/>.

¹³ The CFPB was created in 2010. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, *supra* note 1.

¹⁴ *Consumer Financial Protection Bureau*, Fed. Reg. (last visited July 17, 2019), <https://www.federalregister.gov/agencies/consumer-financial-protection-bureau>.

Trump Administration. First, the Bureau is the primary supervisor of consumer compliance for banks with assets exceeding \$10 billion.¹⁵ Banks with assets valued at \$10 billion or less are typically supervised by their primary regulators, but CFPB rules will apply to such banks even if they are not directly regulated by the CFPB.¹⁶ Second, while the CFPB generally lacks jurisdiction over certain non-depository institutions, such as retailers, sellers of non-financial goods and services, merchants, automobile dealers, real estate brokers, and accountants,¹⁷ the CFPB continues to grant the Bureau with authority to define new markets within its jurisdiction, including those industries that are “larger participants” in the non-bank consumer financial protection sector.¹⁸ Third, the Bureau may obtain jurisdiction over these non-covered entities if their activities trigger the CFPB’s regulatory authority by engaging in the “offering or providing” a “consumer financial product or service,” or in other covered activities.¹⁹ Fourth, the CFPB has broad jurisdiction over “affiliates” of banks or financial services businesses, and over those who give “substantial assistance” to banks or financial services businesses in committing violations of federal law.²⁰

The CFPB has limited authority to either examine or investigate smaller insured depository unions or credit unions with \$10 billion or less in assets.²¹ If the CFPB finds cause to believe these smaller entities have violated a federal consumer financial law, it must alert the appropriate federal regulator.²²

III. CFPB INVESTIGATIONAL HEARINGS

Generally, a CFPB investigational hearing is a tool to further the investigation into whether there has been a violation of federal consumer financial law by banks, or nonbank entities, or individuals. By contrast, CFPB examinations (and analogous examinations by the

prudential regulators) are regularly scheduled and occur even if the supervised entity has not engaged in wrongdoing.²³ The CFPB’s bank examination differs from those of other banking regulators in that, instead of focusing on operational aspects such as the bank’s solvency, the CFPB bank examinations focus on consumer issues.²⁴ Despite differing focuses, the CFPB bank examination procedure is similar logistically to that of other federal bank regulators.²⁵

Akin to a subpoena for testimony, CFPB investigational hearings are initiated by a CID, which requests the “giving of oral testimony in the course of any Bureau investigation, including inquiries initiated for the purpose of determining whether or not a respondent is complying with an order of the Bureau.”²⁶ Investigations are the primary tool by which the CFPB’s Office of Enforcement ascertains whether a federal consumer financial law has been violated, and allows the Bureau to determine whether it should begin a judicial or other administrative proceeding to impose penalties or obtain legal relief for consumers.²⁷

A CID requiring testimony at an investigational hearing would never occur outside the confines of an existing CFPB investigation, whether that investigation is of the CID recipient or of a third party. Furthermore, and notably, the CFPB’s investigative authority is broader than its examination authority; this, in turn, spills over into a broad power to initiate investigational hearings. The CFPB has broad authority to investigate entities or individuals who are under suspicion to have violated federal consumer financial law, and can send CIDs to entities that are not “covered persons.”²⁸ Ironically, former Acting Director Mulvaney’s policies led to a CFPB pronouncement, made “in the interests of further transparency,” that “[i]n investigations where determining the extent of the Bureau’s authority over the relevant activity is one of the significant purposes of the investigation, staff may specifically include that issue in

¹⁵ *Introduction to Bank Regulation: Supervision*, CONSUMER FIN. PROT. BUREAU (April 23, 2019), <https://crsreports.congress.gov/product/pdf/IF/IF11055>.

¹⁶ *Id.*

¹⁷ *Introduction to Financial Services: The Bureau of Consumer Financial Protection (CFPB)*, CONG. RES. SERV. (Jan. 8, 2019), <https://fas.org/sgp/crs/misc/IF10031.pdf>.

¹⁸ 12 U.S.C. § 5514(a).

¹⁹ *Id.* §§ 5531(a) and 5481(6)(A).

²⁰ *Id.* §§ 5481(6)(B) and 5536(a)(3).

²¹ *Id.* § 5516(a)(2010).

²² *Id.* § 5516(d)(2)(A).

²³ CFPB SUPERVISION AND EXAMINATION PROCESS, CONSUMER FIN. PROT. BUREAU 8 (Oct. 2012), https://files.consumerfinance.gov/f/documents/032017_cfpb_examination-process-overview_supervision-and-examination-manual.pdf.

²⁴ *Introduction to Financial Services*, *supra* note 17.

²⁵ CFPB SUPERVISION AND EXAMINATION PROCESS, *supra* note 23.

²⁶ 12 C.F.R. § 1080.7(a) (2012).

²⁷ 12 U.S.C. § 5562 (2010).

²⁸ Title X § 1052; 12 C.F.R. § 1080.4.

the CID.”²⁹ This pronouncement thus underscores the CFPB’s position that it will continue to issue CIDs to entities, sweeping them into CFPB investigative purview, even if it has not yet been determined that the CFPB has enforcement power over those entities.

The CFPB investigative process bears many similarities with its enforcement agency counterparts, drawing from those procedures employed by the Federal Trade Commission, Securities & Exchange Commission, and other regulators.³⁰ In particular, the CFPB’s investigative procedures are most similar to those of the FTC, in large part due to Dodd-Frank’s similarities to the Federal Trade Commission Act of 1914.³¹ The FTC also shares concurrent enforcement authority with the CFPB to enforce certain key federal consumer laws, including the Equal Credit Opportunity Act, Fair Debt Collection Practices Act, Fair Credit Reporting Act, Truth in Lending Act, and Gramm-Leach-Bliley Act. While the FTC has enforcement authority over all “acts or practices in or affecting commerce,” the CFPB oversees acts and practices relating only to consumer financial matters, generally speaking. In addition, the CFPB has authority over banks, whereas the FTC does not.³²

A. The CID Process for Testimony

By the time a CID for an investigational hearing has been issued, the CFPB has already been working on the matter for quite some time. Prior to opening an investigation, the CFPB may first decide it is necessary to conduct preliminary research into any allegations of wrongdoing. Such preliminary research is called a research matter.³³ The CFPB may gather basic information and assess the potential for “successful enforcement of suspected violations of federal consumer financial law, while minimizing the disruptions and risks

associated with contacting investigation subjects during an investigation.”³⁴ This process concludes with a determination into whether the research matter should be closed or become an investigation.³⁵ If warranted, an investigation is promptly opened. As noted above, a CID for an investigational hearing would be drafted and approved for issuance in the context of an investigation, after it has been opened. Notably, the CFPB need not undertake an examination prior to deciding to open an investigation.

The CFPB can send a CID to any person that it has reason to believe has information or documents relating to a violation.³⁶ The CFPB may use a variety of sources for its reasonable belief, including media stories, whistleblowers, and consumer complaints.³⁷ The CID will enunciate “the nature of the conduct constituting the alleged violation that is under investigation and the provisions of law applicable to such violation.”³⁸ The CID must, by law, describe its request “with such definiteness and certainty” that the recipient can appropriately produce the requested materials.³⁹ In response to criticisms that CIDs have often included broad terms, Director Kraninger has responded that Dodd-Frank’s Title X confers significant latitude in drafting a CID,⁴⁰ so long as “the demand is not too indefinite [] and the information sought is reasonably relevant.”⁴¹

To what extent does the recipient of the CID receive advance notice that oral testimony is required? It depends. If the CID is the first one in the investigation,

²⁹ “CFPB Announced Policy Change Regarding Bureau Civil Investigative Demands,” CONSUMER FIN. PROT. BUREAU April 23, 2019), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-policy-change-regarding-bureau-civil-investigative-demands/>.

³⁰ POLICIES AND PROCEDURES MANUAL, OFFICE OF ENFORCEMENT, CONSUMER FIN. PROT. BUREAU (May 2017), https://files.consumerfinance.gov/f/documents/201710_cfpb_enforcement-policies-and-procedures-memo_version-3.0.pdf.

³¹ Compare, Dodd-Frank Act, Title X, § 1052, with FTC Act 15 U.S.C. § 41. See POLICIES AND PROCEDURES MANUAL, *supra* note 30.

³² 15 U.S.C. § 45(a)(1).

³³ POLICIES AND PROCEDURES MANUAL, *supra* note 30.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Title X § 1052(c)(2); 12 U.S.C. § 5562(c)(2); 12 C.F.R. Part 1080.5.

³⁹ *Id.*

⁴⁰ Title X § 1051(5); 12 U.S.C. § 5562(c).

⁴¹ See, e.g., Decision and Order on Petition By Fastbucks Holding Corp. To Modify or Set Aside Civil Investigative Demand, *In re Fastbucks Holding Corp.*, No. 2018-MISC-Fastbucks Holding Corporation-0001 (Apr. 25, 2019) https://files.consumerfinance.gov/f/documents/cfpb_petition-to-modify_fastbucks-holding-corporation_decision-and-order.pdf; see also Decision and Order on PHH Corporation’s Petition to Modify or Set Aside Civil Investigative Demand, *In re PHH Corporation*, No. 2012-MISC-PHH Corp., at 4-5 (Sept. 20, 2012).

the CID recipient may get no notice of the requirement for testimony. In such a situation, the CID may seek documents, interrogatories, written reports (typically data reports), and oral testimony all at the same time.⁴² (Generally, there is, however, an opportunity to extend the deadlines for compliance if the requests demonstrate a need for information that can still be met with elongated timeframes for production.)

By contrast, if the CFPB has issued multiple CIDs, which is not atypical, then generally the first CID will seek documents and interrogatories, followed up by a subsequent CID for an investigational hearing if necessary.⁴³ CFPB investigators often find it helpful to first learn about the business lines in the documents before deciding whether an investigational hearing will be worth the resources and effort by the CFPB. Indeed, the initial CID enables the CFPB to learn, through documentary materials, more about the investigation subject's practices to determine whether additional investigation, through a hearing, for instance, is needed.⁴⁴

Whether the recipient of a CID should challenge it is usually not clear-cut. It depends on the matter, and the posture and phase of the investigation, among other considerations. If the CID recipient wants to make such a challenge, this can be done through a petition to modify or set aside the CID.⁴⁵ However, this challenge cannot be initiated until after a good-faith meet and confer process has occurred under the regulation. The CID recipient must put forth a good faith effort to resolve any issues relating to the CID; if these issues cannot be resolved, then the CID recipient may seek to have the CID modified or set aside.⁴⁶ To do so, the CID recipient must file a petition to modify or set aside with the CFPB, and the CFPB Director will rule on it.⁴⁷ Petitions to modify or set aside, as well as the CFPB's orders, are public records unless good cause exists.⁴⁸

While the CID for investigational hearing is styled as a request for oral testimony, compliance with it is mandatory. The regulation requires that testimony be provided, and intricate mechanical requirements govern

the testimony (discussed below). If a CID recipient does not comply with the CID, the CFPB will file an action in federal court seeking compliance, as the requests are not self-enforcing.⁴⁹ The CFPB may also seek civil contempt or other forms of relief if the CID recipient does not comply with any court order that has been issued.⁵⁰

B. Protecting Privileged Information During Investigational Hearings

Is information protected from subsequent disclosure when it is in the hands of the CFPB? In some instances, yes. "Privileged" information generally remains so unless the privilege is waived. Further, some information obtained during CFPB examinations may constitute "confidential supervisory information," and thus be protected from disclosure.

"Confidential supervisory information" ("CSI") may be obtained during an examination, and can only be shared internally within the subject entity (such as to officers, directors, as well as the entity's lawyers and accountants, among other persons), but may not be disclosed to third parties.⁵¹ Neither the subject entity nor CFPB may disclose such information.⁵² The CFPB has expressed its intent that CSI remain confidential — most recently by issuing a compliance bulletin on January 25, 2015 "as a reminder" that CSI should not be disclosed to third parties by persons with access to this confidential information.⁵³

The CFPB has issued rulemaking enunciating that entities are not considered to have waived privilege merely by submitting privileged material to the CFPB within the context of supervisory or regulatory processes.⁵⁴ The CFPB's General Counsel, Leonard J.

⁴² 12 C.F.R. § 1080.6.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Title X § 1052(f).

⁴⁶ 12 C.F.R. § 1080.6(c)(3).

⁴⁷ *Id.* § 1080.11.

⁴⁸ *Id.* § 1080.6(g).

⁴⁹ *Id.* § 1080.10.

⁵⁰ *Id.*

⁵¹ *Id.* § 1070.2(i)(1); *see also* Memorandum, "The Bureau's Supervision Authority and Treatment of Confidential Supervisory Information," (CFPB Bulletin 12-01, Jan. 4, 2012), CONSUMER FIN. PROT. BUREAU, https://files.consumerfinance.gov/f/2012/01/GC_bulletin_12-01.pdf.

⁵² *Id.*

⁵³ Memorandum, "Treatment of Confidential Supervisory Information," (CFPB Compliance Bulletin 2015-01, Jan. 27, 2015), CONSUMER FIN. PROT. BUREAU, https://files.consumerfinance.gov/f/201501_cfpb_compliance-bulletin_treatment-of-confidential-supervisory-information.pdf.

⁵⁴ 12 C.F.R. § 1070.48; *see CFPB Adopts Rule for the Protection of Privileged Information*, CONSUMER FIN. PROT. BUREAU (June 28, 2012), <https://www.consumerfinance.gov/about->

Kennedy, has reiterated this protection, stating that “because entities must comply with the Bureau’s supervisory requests for information, the provision of privileged information to the Bureau would not be considered voluntary and would thus not waive any privilege that attached to such information.”⁵⁵

Congress likewise installed protections for privileged materials submitted to the CFPB by amending 12 U.S.C. § 1828(x) so that, “[t]he submission by any person of any information to the Bureau of Consumer Financial Protection . . . for any purpose in the course of any supervisory or regulatory process . . . shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such Bureau”⁵⁶

Federal courts also appear to be supportive of privilege claims. In one of the few court decisions to address the CFPB and privilege — though limited to the context of enforcement — the U.S. District Court for the District of Columbia held that “a recipient may withhold responsive material based on a ‘claim of privilege.’”⁵⁷ The court further held that because CIDs are not self-enforcing, the CFPB cannot compel this information without turning to the courts, wherein any privilege claims may be validly presented.⁵⁸ In short, privilege is not waived as to otherwise privileged documents merely because such documents are requested as part of an investigation.

When is information obtained by the CFPB not protected from subsequent disclosure? In contrast to the treatment afforded to “privileged” information, “private” and “confidential” information is not protected from disclosure. The CFPB’s rights to disclosure are codified in 12 C.F.R. § 1070, which enables the Bureau to “disclose confidential consumer complaint information as it deems necessary to investigate, resolve, or otherwise respond to consumer complaints or inquiries

concerning financial institutions or consumer financial products and services.”⁵⁹

In fact, despite the CFPB rulemaking as to supervisory processes that we described above, this CFPB rule regarding the protection of privileged information does not explicitly apply to submissions of privileged material to the CFPB within the context of an investigation.

Private and confidential information obtained during CFPB investigations may be disclosed to other agencies, to Congress, to attorneys general, to state and federal regulators, as well as to third parties engaged in private litigation.⁶⁰ Even if documents or information that are produced to the CFPB as part of an investigation are marked confidential, such documents may still later be produced to third parties. In addition, although the information presented during investigational hearings is typically not publicly disclosed, certain information may be disclosed if it is necessary to further the investigation.⁶¹ The Bureau Director may also authorize in writing the disclosure of any other confidential information.⁶²

The CFPB also has discretion to produce information to third parties pursuant to a Freedom of Information Act (“FOIA”) request, even where those documents are confidential under an FOIA exception.⁶³ Other federal agencies have produced confidential documents during private litigation they had obtained during their investigations, even without receiving a FOIA request or providing an opportunity to object.⁶⁴ Agencies’ right to disclose this information has been upheld by the Second Circuit Court of Appeals.⁶⁵

Public awareness of potential violations of consumer financial laws is central to the CFPB’s mission. As a result, subject entities presenting confidentiality concerns relating to CFPB investigations to federal

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us/newsroom/consumer-financial-protection-bureau-adopts-rule-for-the-protection-of-privileged-information/.

⁵⁵ CFPB Compliance Bulletin 12-01, *supra* note 51 at 2.

⁵⁶ 12 U.S.C.A. § 1828(x)(1) (West); *see* 12 U.S.C. § 1821(t).

⁵⁷ *Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 979 F. Supp. 2d 104, 108 (D.D.C. 2013), *aff’d*, 785 F.3d 684 (D.C. Cir. 2015)(citing 12 C.F.R. § 1080.8(a)).

⁵⁸ *Id.* at 120.

⁵⁹ 12 C.F.R. § 1070.44.

⁶⁰ *Id.* § 1070.45.

⁶¹ *Id.* § 1080.14.

⁶² *Id.* § 1070.46(a).

⁶³ *Id.* § 1070.11. One exception is that “business information” from a “business submitter” and labeled as such, may not be produced under FOIA for 10 years (with certain exceptions), *Id.* § 1070.20.

⁶⁴ *U.S. Commodity Futures Trading Comm’n v. Parnon Energy Inc.*, No. 13-4206(L) (2d Cir. Nov. 25, 2014).

⁶⁵ *Id.*

courts have largely been unsuccessful. For example, in *John Doe Company No. 1 v. CFPB*,⁶⁶ a CID recipient sought certain relief so that the public would not be informed that the CFPB was investigating it. The D.C. Circuit, applying a six-factor test set forth in *U.S. v. Hedt*, allowed for certain identifying information to be redacted, but required that most of the information be made available to the public.⁶⁷ Most efforts by CID recipients to petition the Bureau for confidentiality as to the identity of the CID recipient have also been unsuccessful. For example, in September 2013, the CFPB denied a recipient's request for confidential treatment during its petition to modify the CID, finding that no good cause existed because the petition did not fall within an exception under FOIA.⁶⁸

What then should a CID recipient expect with regard to the privacy of its information? The answer depends on the issues in the case. Put simply, the recipient's expectations of privacy hinge upon the issues in the investigation, what has already been disclosed, what information may already be available, what kind of privileged or confidential information is being sought, the likelihood of future litigation on the issues comprising the investigation, and the strategic costs and benefits of disclosure relative to penalties and reputational harm.

C. Mechanics of an Investigational Hearing and the Rights of Witnesses

Upon initiation by a CID, an investigational hearing for testimony will take place. CFPB investigational hearings are conducted by the CFPB's investigators,⁶⁹ typically the lead attorneys from the Office of Enforcement who are in charge of the investigation.⁷⁰ CFPB investigational hearings are not subject to a time limitation in the rule, and unlike depositions, may exceed seven hours. During the hearing, the investigator asks questions and the witness states his or her answers. In general, no responses are provided by the CFPB that day as to adequacy of the witness's answers.

If oral testimony is sought, the witness and his attorney(s) are the only persons that may appear on

behalf of that witness, unless the CFPB allows otherwise.⁷¹ During oral testimony, the witness is required to answer all questions, and objections are also generally prohibited, with the exception that attorney-client privilege and constitutional objections are permitted.⁷² In addition, the witness can decline to answer questions on the basis of the Bank Examiner Privilege, attorney-client communication, attorney work product protection, the Self-Regulatory Organization Privilege, or similar privileges.⁷³ Such privileges, if applicable to the subject matter of the questioning, are generally accepted by the CFPB as a basis for a proper objection.

Even though the witness may bring an attorney to the hearing, the role of the witness's attorney is somewhat constrained. The witness's attorney is not allowed to make objections, except for those objections made "for the purpose of protecting a constitutional or other legal right or privilege, including the privilege against self-incrimination."⁷⁴ After the hearing has concluded, the witness's attorney may also request that the investigator allow the witness to clarify certain answers. The investigator may grant or deny this request in his or her discretion.⁷⁵ If this request is granted, the investigator will demarcate those changes along with a statement explaining the reasons for the change.⁷⁶

In order to purchase a record of the transcript, the witness must explicitly ask the Bureau, and should not assume that he or she can order a copy from the court reporter. If good cause exists, the Bureau may deny the witness's request for a copy of the transcript and may limit the witness's rights to inspect the official transcript of the testimony.⁷⁷

IV. BEST PRACTICES: PREPARING FOR AN INVESTIGATIONAL HEARING

Supervised entities should remain proactive. In addition to engaging in regular audits and examination preparedness, which can help mitigate compliance risks before an investigation, those entities in receipt of a CID

⁶⁶ No 1:15-cv-1177 (D.D.C. Oct. 16, 2015).

⁶⁷ 668 F.2d 1238 (D.C. Cir. 1981).

⁶⁸ *In re Great Plains Lending, LLC; MobiLoans, LLC; and Plain Green, LLC*, 2012-MISC-Great Plains Lending-0001 (Sept. 26, 2013), at 1-3.

⁶⁹ 12 C.F.R. § 1080.7(b).

⁷⁰ *Id.* § 1080.4.

⁷¹ 12 U.S.C. § 5562(c)(13)(B).

⁷² 12 C.F.R. § 1080.9.

⁷³ *Id.* § 1070.48.

⁷⁴ *Id.* § 1080.9(b)(2).

⁷⁵ *Id.* § 1080.9(b)(4).

⁷⁶ *Id.* § 1080.9(a).

⁷⁷ *Id.* § 1080.9(b)(1).

seeking witness testimony should craft an adequate response plan prior to the hearing.

The CID recipient should first carefully review the CID to determine the scope and content of the information sought by the Bureau. The recipient should then begin identifying those persons who may have information to help the entity prepare for the topics of testimony. The investigative procedures can be found in the CFPB's Rules Relating to Investigations.⁷⁸ There are certain aspects of these rules to be mindful of, including that CID written responses must be made by sworn certificate, and that electronic information must be produced in its ordinarily maintained form.⁷⁹

The CID recipient should strategize as to whether it wishes to petition the CFPB Director to set aside or modify the CID. The recipient must file this petition by the CID's response deadline or within 20 days of being served, whichever occurs first. As a reminder, this petition will likely be publicly available, so reputational risks should be considered. This decision is best made with the assistance of legal counsel to prevent unintended repercussions.

While the CFPB investigational hearing is a civil investigatory matter, a witness's testimony is given under oath and is subject to criminal penalties for perjury under 18 U.S.C. § 1621 and 18 U.S.C. § 1001. It hardly needs repeating that more than anything, a witness's first obligation is to tell the truth and, of almost equal importance, to avoid speculation.

How a subject entity will appear at the CFPB investigative hearing depends upon whether the Bureau has sought information from the subject entity or from an individual person. In short, an individual being investigated in a CFPB hearing will be deposed themselves, while a corporation may designate representatives who are knowledgeable as to its operations to testify on the corporation's behalf. How much preparation to memorize facts or business details will depend on whether the person is a percipient witness testifying based on his knowledge, or whether the person has been identified by the corporation to appear as a corporate designee to "bind" the corporation. The latter has a duty to undertake diligence to prepare for the topics set forth in the hearing notice.

In such an instance, the witness should ensure adequate preparation time. The witness should meet with

other business line members or compliance individuals in the company to ensure that he or she will be communicating with the Bureau accurately on behalf of the corporation. If the CID recipient is an individual witness, then prepare similarly to the extent needed. During this preparation, the witness should consider those issues that arose due to the entity's policies, procedures, and training materials, as compared to those issues that were an aberration of those policies.

Outside counsel can assist a CID recipient in preparing for a CFPB investigative hearing, including familiarizing the witness as to the questions that may be asked and proper forms of response. As always, maintaining a deferential and communicative approach to the Bureau is likely to wield the best outcome to an investigation.

Finally, a CID recipient should take certain steps to protect privileged materials sought as part of the investigation. It may be necessary to work with an attorney to ensure that any preparatory work for the hearing is privileged. An attorney can also provide guidance concerning the likely topics and goals of the hearing, and can determine which topics are covered by privilege, so that the witness's testimony does not inadvertently waive privilege for which protections are entitled.

V. CONCLUSION

As explained above, covered entities should not assume that the CFPB's investigative efforts have lessened. The Bureau's investigations may be fewer in volume of cases, but increasingly address thornier, more difficult topics. Those investigations that are remaining open under the new Administration have seemed to increase in level of intensity. Because of the CFPB's more targeted focus and the intricacies associated with crafting a CID response, entities should take heed to acquire legal counsel experienced before the CFPB to steer clear of liability and mistakes. Missteps can prove costly: failing to provide information requested in a CID constitutes a legal violation for which the Bureau, in recourse, may "pursue all available remedies."⁸⁰ The failure to craft a strategic response to a CID may also cause reputational loss to the investigated entity and increased legal expenses. Given the limited privacy inherent in CFPB investigations and reputational risks to the subject entity, it makes good business and legal sense to seek the guidance of specialists with expertise regarding the CFPB's workings and procedures. ■

⁷⁸ *Id.* § 1080.

⁷⁹ *Id.* § 1080.6(a)(1)(ii)-(b).

⁸⁰ 12 U.S.C.A. §§ 5536(a)(2), 5565 (West); CFPB Compliance Bulletin 12-01, *supra* note 51 at 2.