

**UNITED STATES OF AMERICA
BEFORE THE CONSUMER FINANCIAL PROTECTION BUREAU**

IN THE MATTER OF
BANK OF AMERICA CORP.

**PETITION TO SET ASIDE OR, IN THE ALTERNATIVE, MODIFY THE CIVIL
INVESTIGATIVE DEMAND**

Bank of America Corporation (the “Bank”) submits this Petition to Set Aside, or, in the Alternative, Modify the Civil Investigative Demand issued by the Consumer Financial Protection Bureau (“CFPB” or the “Bureau”) on March 1, 2019 (the “CID”).¹ This CID is [REDACTED] issued by the Bureau in this investigation, which is now [REDACTED] despite the absence of any evidence that the Bank has a systemic sales misconduct issue. Not only has information already provided to the Bureau failed to indicate any systemic problem, but [REDACTED]

Even with this definitive record, the Bureau Staff continues to issue CIDs, evidently hoping to find support for a different answer. This is not an appropriate use of the Bureau’s enforcement powers. In her recent testimony before Congress, the Director rightly noted that the Bureau’s enforcement tools are for “those true bad actors who have no intention of complying.”² The current CID simply cannot satisfy that standard given the Bank’s extensive compliance with the [REDACTED]

¹ In its March 20, 2019 modification letter, the Bureau granted the Bank a one-week extension to March 28, 2019 to file its petition.

² *CFPB to Focus on ‘Prevention of Harm’ Under Kraninger’s Leadership*, ABA Banking J. (Mar. 7, 2019) <https://bankingjournal.aba.com/2019/03/cfpb-to-focus-on-prevention-of-harm-under-kraningers-leadership/>.

[REDACTED] of its sales practices and the significant evidence showing no institution-wide problem.

In the wake of Wells Fargo, the Bank understands the Bureau's desire to ensure that other institutions did not engage in similar abuses, and respects the Bureau's right to conduct an investigation of its own design. But an investigation's progress should reflect its results, and fairness dictates that its outcome flow from the facts disclosed. An investigation is a *truth-seeking* exercise: when the facts refute an investigation's initial hypothesis, as they do in this case, the right approach is to acknowledge those findings and conclude the investigation.³ For those reasons, the Bank respectfully requests that the Bureau set aside the current CID and close the matter, or, in the alternative, refer the matter to Supervision, the proper mechanism for resolving any remaining issues when an investigation fails to uncover evidence warranting Enforcement action.

I. BACKGROUND

This investigation [REDACTED] after the CFPB issued a consent order regarding Wells Fargo's "widespread illegal practice of secretly opening unauthorized deposit and credit card accounts."⁴ That misconduct was "[s]purred by sales targets and compensation incentives," which led employees to go to great lengths to achieve their targets, including "by covertly opening accounts . . . without [customers'] knowledge or consent."⁵ Given the scale and

³ The Bank's assertion is not that the Bureau misapprehends the facts or law or lacks jurisdiction to investigate, but rather that the Bureau already has the information it seeks, and in light of that information, which strongly indicates that the Bank has not engaged in the conduct described in the CID's Notification of Purpose, the current CID's broad set of requests are unreasonable and unduly burdensome. *Contra In re FirstSource Advantage, LLC*, 2017-MISC-FirstSource Advantage, LLC-0001 (July 23, 2018), at 2.

⁴ *Consumer Financial Protection Bureau Fines Wells Fargo \$100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts*, CFPB (Sept. 8, 2016), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/>.

⁵ *Id.*

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severity of the misconduct at Wells Fargo, it was entirely appropriate for bank regulators, including the Bureau, to review whether other banks had similar issues.⁶ During the same period, the Office of the Comptroller of the Currency (“OCC”) initiated a horizontal review of sales practices issues at large and mid-size national banks.⁷ By January 2018—over a year ago—the OCC’s review was nearly complete and had identified no “systemic issues with bank employees opening accounts without the consumers’ consent.”⁸

With respect to Bank of America, that conclusion should come as no surprise. First, the Bank’s compensation program [REDACTED]

[REDACTED] Second, the Bank controls and monitors for misconduct and conducts vigorous internal reviews to remediate wrongdoing. As Bureau Staff are aware, the Bank [REDACTED]

[REDACTED]

[REDACTED] Finally, the Bank collects and

⁶ [REDACTED]

⁷ [REDACTED]

⁸ Letter from Joseph Otting, Comptroller of the Currency, to Sen. Robert Menendez 4 (Jan. 25, 2018).

⁹ See BAC-SP-00000706–BAC-SP-00003802; BAC-SP-00007445–BAC-SP-00007453; Letter from Daniel Chaudoin to Leanne Hartmann and Barry Reiferson, CFPB (June 13, 2017); Letter from Daniel Chaudoin to Leanne Hartmann (December 15, 2017).

¹⁰ Letter from Daniel Chaudoin to Leanne Hartmann, CFPB (Dec. 15, 2017).

¹¹ See BAC-SP-00003818–BAC-SP-00004781; BAC-SP-00004783–BAC-SP-0006965; BAC-SP-00007483–BAC-SP-00008992; BAC-SP-00009097–BAC-SP-00009171; BAC-SP-00009182–00023755.

addresses customer complaints. [REDACTED]

[REDACTED]

The information already provided to the Bureau and other regulators shows that the Bank's corporate culture and controls worked as intended. And yet, the Bureau Staff continues to ignore this evidence by seeking an alternative set of data on which they hope to base a different conclusion. It is inexplicable how a fair assessment of the previously produced evidence could have led the Staff to issue yet another sweeping CID for information about potentially unauthorized credit card accounts. Nevertheless, the current CID would require:

1. That the Bank conduct an expensive and burdensome lookback file review to tally specific instances of potentially unauthorized credit card accounts, in spite of having produced to the Bureau multiple analyses, covering various portions of the in-scope period, which have consistently identified a vanishingly small number of such accounts;
2. That the Bank conduct a manual assessment of over [REDACTED] never-used credit card accounts to identify those for which specific physical or electronic evidence of authorization can be located, in spite of evidence in the record that the Bank did not provide incentive credit for accounts that were never used and that the Bank's account opening process for many of those accounts did not generally require retention of a physical artifact of the type the Bureau demands¹²; and
3. That the Bank collect and review six-plus years of reports, documents, and emails from dozens of custodians, in spite of the Bank having already obtained consent from other regulators to [REDACTED]

The CID also seeks information outside any statute of limitations. Against the weight of the evidence provided to the Bureau to date, imposition of these substantial burdens would be improper.

¹² A customer may elect to close an account without use for a variety of reasons, including dissatisfaction with the annual percentage rate or credit limit, identifying a preferred product offered by a competitor, receiving the incorrect credit card type, or simply changing his or her mind. A customer may also choose to apply for but not activate an account because she intends to use the account as a "rainy day" financial management tool for credit flexibility.

II. PROCEDURAL HISTORY

This investigation began [REDACTED] and the Bank has diligently and faithfully complied with all prior CID requests, as modified. A timeline follows:

- [REDACTED] The Bureau opened its investigation into the Bank, which requested information about [REDACTED]
 - [REDACTED] Two Bank executives voluntarily met with the Bureau to explain the structure of the Bank's incentive compensation system for consumer products.
 - [REDACTED] The Bank completed its response [REDACTED]
 - [REDACTED] The Bank submitted a letter to the Bureau describing its responsible business strategy, incentive compensation plans, performance management systems, and internal controls to monitor sales practice issues, attaching a presentation on its independent corporate audit testing results.
- [REDACTED] the Bank produced [REDACTED]
- [REDACTED]
 - [REDACTED] The Bank completed its response [REDACTED] The responses conclusively demonstrated that [REDACTED]
 - [REDACTED] The Bank submitted a letter summarizing its findings to date and requesting that the Bureau accordingly close its investigation.
- [REDACTED]
 - [REDACTED] The Bank completed its final, supplemental production in response to the CID.
- [REDACTED] The Bureau issued the present, [REDACTED] CID.

The Bank and Bureau Staff held a telephonic "meet and confer" about the CID on March 13, 2019, pursuant to 12 C.F.R. § 1080.6(c). During the meeting, the Bank reiterated its interest

in working cooperatively with the Bureau and made several requests for modification. On March 19, 2019, the Bank submitted a letter setting forth its requests from the meet and confer.

In response, the Bureau issued a modification letter on March 20, 2019, making only three substantive changes to the CID that were ultimately insufficient to remedy the prejudice imposed by the continued investigation. First, it narrowed the Applicable Period so as to begin on [REDACTED] instead of [REDACTED]—a timeframe that still extends more than a year beyond the statutes of limitations and fails to account for the scope of the review already conducted by [REDACTED]

[REDACTED] Second, though the Bureau limited the number of custodians for one of the document requests, the relief offered is illusory insofar as the Bureau Staff declined to reasonably narrow the other outstanding document requests, which, as drafted, would continue to require a burdensome and expensive review of communications and documents from dozens of Bank employees. And finally, while the Bureau withdrew one of its requests for production related to a prior written report encompassing [REDACTED] [REDACTED] accounts, as discussed below it continues to seek information about each of these accounts that would require a highly burdensome manual undertaking.

III. THE DIRECTOR SHOULD SET ASIDE THE CID

The Director should set aside this CID for three reasons. First, further investigation is unnecessary and redundant of work already completed: everything provided to [REDACTED] [REDACTED] the Bureau—has shown no systemic sales misconduct issue at the Bank, and a new CID directed to that same essential issue will not produce a different result. Second, even though the CID is largely ploughing the same terrain as [REDACTED] its sweeping requests would impose significant and needless burdens on the Bank. Finally, to the extent any further inquiry is necessary to complete the Bureau's understanding of the Bank's practices and to

close out this issue, that work should be performed through Supervision, not through an enforcement investigation.

A. The Bureau's Prolonged Investigation Is Unnecessary And Reflects A Failure to Coordinate With Other Regulators' Reviews

As already noted, the Bank has been subject to numerous reviews on this topic by various regulators [REDACTED]. In response to those reviews, [REDACTED]

[REDACTED]

[REDACTED] Those results are buttressed by two analyses performed for the Bureau. An analysis [REDACTED]

[REDACTED]

[REDACTED] Yet the latest CID takes no account of this data; the Bureau Staff indicated during the meet and confer process that the results of those prior analyses are not sufficient to answer Interrogatory 1.

¹³ Compare BAC-SP-00000704, BAC-SP-00009180, and BAC-SP-00023759 with BAC-SP-00023960

¹⁴ See BAC-SP-00023945. [REDACTED]

[REDACTED]

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The same concerns are evident in Document Requests 1 and 2 of the present CID, which seek [REDACTED] The Bank has already provided the Bureau with [REDACTED] [REDACTED] including materials prepared to answer the very question the Bureau now poses.¹⁵

The Bureau also received [REDACTED]

[REDACTED]⁶ Additional reports on the same subject matter will not meaningfully add to or change the information the Bureau already has. This type of indiscriminate request fails entirely to balance the burden of compliance with the benefit to the Bureau's investigative process in light of the evidence to date.

The Bureau's resistance to the work performed by and for other regulatory agencies is puzzling. Given the OCC's aforementioned conclusion of the lack of systemic sales practices issues, there is no basis to press forward. Proceeding further with yet another investigation of the same issue runs counter to stated policy favoring regulatory coordination. In particular, one goal of the Task Force on Market Integrity and Consumer Fraud (of which the CFPB Director is a member) is to "enhance cooperation among agencies in the investigation and prosecution of fraud and other financial crimes."¹⁷ Deputy Attorney General Rosenstein stated that the Task Force would seek to eliminate the "piling on" of overlapping investigations and that "enforcement agencies" would instead pursue their missions with "the coordinated resources of all [their] law enforcement partners."¹⁸ That policy against piling on investigations should prevail here; at a

¹⁵ See BAC-SP-00023760–BAC-SP-00023939.

¹⁶ BAC-SP-00023945.

¹⁷ Executive Order No. 13844 §§ 3, 4(c)(i), 83 Fed. Reg. 33,115, 33,116 (July 16, 2018).

¹⁸ Dep. Att'y Gen. Rod Rosenstein, Remarks Announcing the Establishment of the Task Force on Market Integrity and Consumer Fraud (July 11, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-announcing-establishment-task>.

minimum, the Bureau's investigation should give significant weight to the work of other regulators and tailor its requests accordingly.

B. The CID Creates Unreasonable and Unnecessary Burdens

The Bureau does not possess "unfettered authority to cast about for potential wrongdoing," and thus a CID may not be "unduly burdensome or unreasonably broad."¹⁹ Since [REDACTED] the Bank has spent [REDACTED] on this investigation and others focused on sales practices issues, including [REDACTED]

[REDACTED] These efforts also have significant operational impacts to the Bank: more than [REDACTED] employees, approximately [REDACTED] [REDACTED] invested more than [REDACTED] hours to complete the reviews conducted for the Bank's other regulators. Despite having incurred those expenses and having provided the results to the Bureau Staff, the Bank now faces another highly burdensome CID that is not sufficiently tailored to the information previously provided or to filling in any gaps in the Bureau's knowledge. Responding to the CID would require the Bank to incur similar, further expense in order to replicate those efforts for additional time periods and to conduct additional manual file reviews. Demanding that the Bank do so is unreasonable and unduly burdensome in light of the information already in the Bureau's possession.²⁰

1. Requests for Documents 1-6 and Request for Written Report

Each of these requests is unfocused and unduly burdensome. According to the modification letter, the Request for Written Report demands [REDACTED]

¹⁹ *CFPB v. Accrediting Council for Indep. Colls. & Schs.*, 854 F.3d 683, 689 (D.C. Cir. 2017); *see also EEOC v. Children's Hosp. Med. Ctr. of N. Calif.*, 719 F.3d 1426, 1428 (9th Cir. 1983).

²⁰ *See EEOC v. Maryland Cup Co.*, 785 F.2d 471, 479 (4th Cir. 1986) (subpoena overbroad when "gathering the information would threaten [respondent's] normal business operations").

[REDACTED]

[REDACTED] There is no automated way for the Bank to collect this information or respond to [REDACTED] posed in the Request for Written Report. Because the data must be collected manually, the burden of this request is substantial. Yet, it is a mystery how the Bureau's receipt of [REDACTED] would meaningfully further the Bureau's knowledge of the Bank's practices.²¹ Instead, the request appears to be a vehicle by which to establish [REDACTED] wherein the Bureau Staff will suggest [REDACTED]

[REDACTED] But of course, that presumption does not reflect the Bank's practices, as the Staff already knows. In particular, many of the accounts [REDACTED] were opened in-person at Bank branches. Prior to March 2017, the opening of accounts in branches did not require signatures evidencing customer authorization because the customer was interacting directly with the Bank associate and customer authorization was captured via a digital interface in the financial center. The Bank has changed this practice, but there is no evidence to support—and indeed the Bank's prior productions to the Bureau refute—any suggestion that the pre-2017 process fostered unauthorized account openings.

Full compliance with Document Request 3 would also be unduly burdensome. Though the Bureau limited this request to specific custodians in its modification letter, it continues to raise a host of privilege issues. The analysis of those issues as they arise during the Bank's review, as

²¹ In the modification letter, the Bureau [REDACTED]

[REDACTED]

well as the creation of the inevitable privilege log, would be a time-consuming exercise that is disproportionate to the Bureau's need for the information. The Bank's prior productions demonstrate that the Bureau's continued investigation will show, at worst, a negligible degree of misconduct by individual employees, and certainly not any systemic misconduct. And even as modified, the CID continues to request information outside any relevant statute of limitations.

Moreover, as stated above, the modification to Request for Documents 3 provides little relief because Requests for Documents 1, 2, 4, and 5 seek documents from a much broader range of custodians, which remains unchanged by the Bureau's modification letter. The responses would implicate the same privilege issues as the response to Request 3 and again provide the Bureau with minimal useful information. Bureau Staff refused to modify these requests on the grounds that the Bank "provided insufficient information to assess the claimed undue burden." But an expansive request for every version of every document and every communication related to an issue that has captured the focus of the financial services industry and its regulators for nearly two years is facially burdensome, and becomes even more so when expanded to demand six-plus years of materials and to include information related to instances of third party fraud by non-employees, as this CID would require.²²

2. Interrogatory 1

Interrogatory 1 demands that the Bank [REDACTED]

[REDACTED]

[REDACTED] As described above, the Bank has repeatedly provided data addressing this question, based on various methodologies—including those of the Bureau's design—and over various timeframes.

²² Simply identifying all the custodians that might have received some covered communication or possess a responsive document is burdensome in its own right, and as should be obvious, an initial telephonic meet and confer is neither an appropriate nor practical setting for the Bank to provide an in-the-weeds explanation of the contemplated design of its document review procedures.

of those resources would harm the Bank and its customers. Considering the body of the investigative record, there is no reason to believe such an effort would do anything other than affirm the results of the multiple reviews the Bank has already undertaken.

C. Any Further Work on this Issue Should Be Conducted by Supervision

The record in this matter strongly supports closing the investigation with no further action. However, even if the Bureau is unwilling to close this matter entirely, any further work to supplement other regulators' reviews should be completed through the supervisory process, not an enforcement investigation. Supervision is by far the better mechanism for conducting the detailed, account-level analysis that may be required, and Supervision's familiarity with the Bank's lines of business, through its ongoing oversight, makes it uniquely qualified to perform this function. Elsewhere, Supervision's nuanced understanding of the Bank's business processes and data capabilities has greatly assisted in bring matters efficiently to a close. Enforcement's information gathering tools are blunt in contrast, and enforcement mechanisms should be reserved for "those true bad actors who have no intention of complying"—a circumstance that is not remotely present here.²⁵

IV. IN THE ALTERNATIVE, THE BUREAU SHOULD MODIFY THE PETITION

In the alternative, if the petition is not set aside altogether, several critical elements of the CID should be modified.

A. The CID's Applicable Period Extends Beyond Any Statutes of Limitations

As originally contemplated, the CID's Applicable Period extended back [REDACTED] [REDACTED] a manifestly unreasonable timeframe that reached well beyond any relevant

²⁵ CFPB to Focus on 'Prevention of Harm' Under Kraninger's Leadership, ABA Banking J. (Mar. 7, 2019) <https://bankingjournal.aba.com/2019/03/cfpb-to-focus-on-prevention-of-harm-under-kraningers-leadership/>.

statutes of limitations. Even as modified, the current Applicable Period beginning on [REDACTED] still seeks data outside an enforceable timeframe. The longest relevant limitations period is the five-year period in the Fair Credit Reporting Act, which would reach back to March 2014.²⁶ The statute of limitations periods are three years from the date of discovery of the violation under both the Consumer Financial Protection Act and the Truth in Savings Act,²⁷ and one year under both the Truth in Lending Act²⁸ and the Electronic Fund Transfer Act.²⁹ Moreover, the CFPB's ability to obtain any penalties or disgorgement is subject to a five-year limitations period.³⁰ A CID may not request information pertaining to conduct outside the statutes of limitations unless such information is reasonably "relevant to conduct for which liability can be imposed."³¹ At a minimum, the CID's Applicable Period should run from no later than March 1, 2014, as the Bureau has no basis to impose liability on the Bank for any conduct before that date.³²

B. Additional Modifications

Interrogatory 1. The Bank requests that the Bureau accept the above-referenced analysis performed for [REDACTED]

²⁶ See 15 U.S.C. § 1681p.

²⁷ 12 U.S.C § 5564(g)(1).

²⁸ *Id.* § 1640(e).

²⁹ *Id.* § 1639o(a)(5).

³⁰ *Kokesh v. SEC*, 137 S. Ct. 1635, 1639 (2017) (holding that statute of limitations on government enforcement action for disgorgement begins running when the misconduct occurs); *Gabelli v. SEC*, 568 U.S. 442, 447-449 (2013) (holding that statute of limitations on government enforcement action for civil penalties begins running when the misconduct occurs); *id.* at 450 ("There are good reasons why the fraud discovery rule has not been extended to Government civil penalty enforcement actions").

³¹ *CFPB v. Future Income Payments, LLC*, 252 F. Supp. 3d 961, 969 (C.D. Cal. 2017) (internal quotation marks omitted), *vacated in part on other grounds* 2018 WL 7502720 (C.D. Cal. Dec. 18, 2018); see *NLRB v. Line*, 50 F.3d 311, 314-315 (5th Cir. 1995).

³² See *Kokesh*, 137 S. Ct. at 1639; *Gabelli*, 568 U.S. at 447-449; see also Letter Pursuant to FRAP 28(j), *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. June 7, 2017) (acknowledging post-*Kokesh* that statute of limitations "applies . . . to disgorgement"); cf. *CFPB v. TCF Nat'l Bank*, No. 17-cv-166, Dkt. No. 89 (D. Minn. Sept. 8, 2017) (dismissing claims prior to July 21, 2011, the effective date of the statute establishing the CFPB).

[REDACTED] as a complete response to Interrogatory 1. Under the Federal Rules of Civil Procedure, an Interrogatory is unduly burdensome to the extent that it requests information that is not "proportional to the needs of the case."³³ Any broader response would be disproportionate to the needs of this investigation, particularly where a significant portion of that response would reflect conduct that took place entirely outside the relevant limitations periods.

Requests for Documents and Written Report. For the reasons described above, these requests are overbroad and unduly burdensome, requiring analysis of millions of accounts, documents, and emails. No legitimate investigative purpose could be served by the Bureau's receipt of thousands of documents and emails or [REDACTED] when the best evidence of the ultimate issue is already in the investigative record. The Bank requests that they be stricken from the CID.

V. CONCLUSION

For these reasons, the Bureau should set aside or, in the alternative, modify the CID.

March 28, 2019

Respectfully submitted,

By:

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³³ Fed. R. Civ. Proc. 26(b).

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March 2019, pursuant to 12 C.F.R. 1080.6(e), I caused the foregoing Petition to Modify or Set Aside Civil Investigative Demand to be served via email upon the Executive Secretary of the Bureau and the Assistant Director for the Office of Enforcement.

Date: March 28, 2019

Daniel Chaudoin / CM
Daniel Chaudoin

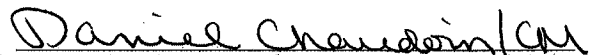
CERTIFICATION

Pursuant to 12 C.F.R. 1080.6(e)(1), I certify that I have conferred with counsel for the Consumer Financial Protection Bureau pursuant to 12 C.F.R. 1080.6(c), in a good faith effort to resolve by agreement all issues raised in this petition, but have been unable to reach such an agreement.

The conference took place telephonically on March 13, 2019 beginning at 12 p.m. The participants were Meghan Sherman Cater, Leanne Hartmann, and Barry Reiferson from the Consumer Financial Protection Bureau; Matt Pearson and Vicky Ayers from Bank of America Corp.; and attorneys Daniel Chaudoin, Daniel Kearney, Caitlin Mandel, and Paul Vanderslice of Wilmer Cutler Pickering Hale & Dorr LLP.

All known matters in controversy remaining unresolved are set forth in the accompanying petition.

Dated: March 28, 2019
Washington, District of Columbia


Daniel Chaudoin