

CONFIDENTIAL TREATMENT REQUESTED

United States of America

Before the Consumer Financial Protection Bureau

IN THE MATTER OF
ACTIVE Network, LLC

PETITION TO SET ASIDE CIVIL INVESTIGATIVE DEMAND

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Pursuant to section 1052(f) of the Consumer Financial Protect Act (“CFPA” or “Act”), 12 U.S.C. § 5562(f) and 12 C.F.R. § 1080.6(e), ACTIVE Network, LLC (“ACTIVE”) respectfully petitions the Consumer Financial Protection Bureau (“Bureau” or “CFPB”) to set aside the July 20, 2020 Civil Investigative Demand (“CID”) served on ACTIVE, which is attached as Exhibit A. Because ACTIVE has previously provided information sufficient to demonstrate that it is not a covered person pursuant to the CFPA and provided information sufficient to show compliance with The Electronic Fund Transfer Act and its implementing regulation, Regulation E, the CID exceeds the CFPB’s jurisdictional authority and must be set aside. ACTIVE should not be required to respond to additional burdensome discovery.

I. INTRODUCTION

ACTIVE offers three main products: web-based event registrations (ACTIVE), event management software (ACTIVE Endurance), and a membership product (ACTIVE Advantage).¹ The products ACTIVE sells are not financial products, and the fact that ACTIVE accepts payments for those products is an insufficient basis to confer UDAAP jurisdiction.

Using the ACTIVE website, consumers register for events, such as races. When a customer registers and pays for an event, the customer does so with ACTIVE, and ACTIVE is the merchant selling that registration. The event organizer has a contractual relationship with ACTIVE whereby it agrees to honor that event registration. Thus, ACTIVE is a merchant processing payment for its own product—the event registration—that must be honored by the event organizer. This arrangement is no different than how Ticketmaster or others contractually agree to be the merchant of a transaction, but their business partner (concert or other event organizer) must honor the sale to the consumer of the service or admission. ACTIVE also offers Endurance, which is a suite of

¹ ACTIVE also sells other, unrelated products.

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business-to-business event management software that allows event organizers to manage their events. Finally, ACTIVE sells its Advantage membership program, which offers discounts and deals to consumers. As the evidence previously provided to the CFPB establishes, this membership product is sold to a consumer by ACTIVE as the merchant. This product is not sold by anyone else, so no payments can be processed related to the sale of it, except by and for ACTIVE. The current investigation concerns the Advantage product and whether the details of the product being sold are adequately disclosed to consumers.

ACTIVE previously responded to a CID from the CFPB. In its response to that CID, ACTIVE produced information demonstrating that ACTIVE sells event registrations and membership products directly to consumers and that any collection or use of consumers' payment information is done as part of these sales. This activity falls under the merchant exception as stated in the CFPA, and ACTIVE is not subject to the CFPB's UDAAP jurisdiction.

In responding to the first CID, ACTIVE also provided the Bureau with the necessary evidence to demonstrate that ACTIVE is in full compliance with the specific, narrow subsection of Regulation E cited in the CID, which covers written preauthorization of electronic payment transactions. Any further demands for information would be repetitive and unduly burdensome, but the more troubling issue with the Bureau's citation to Regulation E is that it is clearly a pretext.

The current CID purports to seek information about whether ACTIVE has failed to follow the requirements in Regulation E for written authorizations of electronic payments. ACTIVE, however, has already provided the Bureau with information demonstrating that ACTIVE obtains the requisite preauthorization. Moreover, the CID requests go well beyond this narrow topic. Many of the requests have nothing to do with Regulation E compliance, including a written report with 25 subparts detailing customer-level transaction data and aggregate company data; ten

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document requests (excluding subparts) related to corporate financials, internal company emails, and data fields; and a nine-topic investigative hearing not related to the issuance of written preauthorization. Rather than being directed at the Bureau's alleged subject of its investigation (Regulation E), these requests relate to potential UDAAP violations. The current CID attempts to use discovery related to Regulation E as a pretext for a UDAAP fishing expedition, which goes against both the intent of Congress in limiting the CFPB's authority and the plain reading of the CFPA.

Notwithstanding the evidence already gathered by the CFPB in this investigation, the Bureau maintains that it is not required to determine whether it has jurisdiction over the subjects of its investigations prior to demanding that the targets comply. Essentially, the CFPB argues that when it issues a CID, the exceptions to its jurisdiction are irrelevant until after the potentially exempt CID recipient has completely responded to all requests—related to jurisdiction or otherwise—and the CFPB on its own determines that its jurisdiction should have been limited. Statutory limits to an agency's jurisdiction, which are meant to protect the potential targets of an agency's power, are hardly useful if they are recognized and enforced only after the target has been forced to comply.

While there may be circumstances where the CFPB needs discovery to determine whether it has jurisdiction over the target of an investigation, that is not the case here, particularly as it relates to this second CID. ACTIVE previously produced to the CFPB ample evidence that ACTIVE is a merchant selling event registrations and, most significantly, Advantage memberships on its own behalf and collecting payment information for its own sales. As a result, ACTIVE falls within the merchant exception. Similarly, ACTIVE provided ample evidence that it obtains the

preauthorization required by Regulation E. The CFPB has what it needs to make a determination on jurisdiction; it is choosing not to do so because it patently lacks UDAAP jurisdiction.

To hold that the CFPB has UDAAP jurisdiction over ACTIVE would effectively render the merchant exception meaningless and give the CFPB jurisdiction over virtually every good and service sold nationwide—regardless of whether it is defined as a consumer financial product or service. The law does not give administrative agencies this unfettered jurisdiction. Nor should the CFPB be permitted to use the guise of an inquiry into Regulation E to expand its UDAAP jurisdiction. The CID exceeds the CFPB’s authority and should be set aside.

II. FACTS AND PROCEDURAL HISTORY

a. ACTIVE Sells Event Registrations and Memberships.

ACTIVE is a merchant that sells nonfinancial products and services. *See, e.g.*, ACT0001072 (ACTIVE Advantage Website Homepage); ACT0000164 (ACTIVE Advantage Terms of Use).² Among other things, ACTIVE operates a website focused on selling registrations for a variety of athletic and other recreational activities (e.g., endurance running events, triathlons, art camps).³ To sell the registrations, ACTIVE contracts with various event owners, who agree to honor the registrations ACTIVE sells.⁴ In return, ACTIVE charges a fee to customers who buy registrations on its website.⁵

When an event registrant or participant goes to a website for an event and clicks on the registration button, they are directed to the ACTIVE website and the registrant then buys the event registration from ACTIVE through the ACTIVE website. *See* ACT0000097-104 (Sample Event

² Citations are to documents ACTIVE produced to the CFPB in response to the previous CID.

³ *Terms of Use, Active.com*, https://www.activenetwork.com/information/terms-of-use?clkmp=activecom_global_footer_termsfuse (“*Terms of Use*”) (last visited March 19, 2019).

⁴ *Id.*; *Products and Services Terms, Active.com*, <https://www.activenetwork.com/products-services-terms> (last visited March 19, 2019) (representative contract with event owners).

⁵ *Terms of Use*.

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Registration); ACT0000105-113 (Sample Camps and Class Registration Flow). Some registrants go directly to the ACTIVE site initially and browse for events. As part of selling the registrations, ACTIVE accepts payment, but it does so as a merchant selling the registration.⁶ The actual payment processing is done by a third party, not ACTIVE.⁷

ACTIVE also offers registrants the opportunity to join a membership program called ACTIVE Advantage, which provides discounts on registration fees, as well as related products (e.g., running shoes, compression garments, sunglasses). *See, e.g.*, ACT0001072 (ACTIVE Advantage Website Homepage); ACT0000164 (ACTIVE Advantage Terms of Use).

Finally, ACTIVE sells a suite of business solutions for event organizers, ACTIVE Endurance, which permits users to analyze their sales, connect with customers, manage registrations, and manage events. *See* ACT0000081 (AWE Registration Flow).⁸

⁶ Active Endurance, Solutions Overview, <https://www.activeendurance.com/solutions.htm> (last visited Aug. 8, 2020); Active Endurance, Online Event Registration Software, <https://www.activeendurance.com/solutions/event-registration/online-event-registration-software.htm> (last visited Aug. 8, 2020); Active Endurance, Event Management Software Overview, <https://www.activeendurance.com/solutions/event-operations/event-management-software.htm> (last visited Aug. 8, 2020); Product and Services General Terms, <https://info.activenetwork.com/general-terms> (last visited Aug. 8, 2020); Endurance, Sports, and Ticketing Product Attachment, <https://info.activenetwork.com/sports-terms> (last visited Aug. 8, 2020).

⁷ This contract was previously provided to the Enforcement Office as part of the investigatory file. The Director has previously determined that the identity of the third-party payment processor should remain confidential (Supplemental Decision and Order on Request for Confidential Treatment By Active Network, LLC Pursuant to FOIA Exemption 4, at 2-3) and ACTIVE does not repeat the name in the instant petition.

⁸ ACTIVE Endurance, Solutions Overview, <https://www.activeendurance.com/solutions.htm> (last visited Aug. 8, 2020); ACTIVE Endurance, Analytics & Reporting, <https://www.activeendurance.com/solutions/analytics-reporting.htm> (last visited Aug. 8, 2020); ACTIVE Endurance, Event Registration, <https://www.activeendurance.com/solutions/event-registration/online-event-registration-software.htm> (last visited Aug. 8, 2020); ACTIVE Endurance, Event Management, <https://www.activeendurance.com/solutions/event-operations/event-management-software.htm> (last visited Aug. 8, 2020).

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As ACTIVE has explained to the CFPB and now demonstrated with its previous productions, nothing that ACTIVE sells requires it to process payments for anyone but itself. ACTIVE contracts primarily with an unaffiliated third party to process customer payments for the registrations and for the membership product.⁹ Similar to virtually every merchant in the country, ACTIVE must also obtain consumer payment information through its gateway so that the third-party payment processor can process payments for ACTIVE's transactions. In selling event registrations and Advantage memberships, ACTIVE acts no differently than any other seller of goods or services. That ACTIVE remits some or all of the fee for the event that ACTIVE sold to the event sponsor, pursuant to ACTIVE's contract with the sponsor, does not somehow transform ACTIVE into a payment processor or negate the merchant exception. Indeed, as it relates to the Advantage product, which is the focus of the Bureau's investigation, ACTIVE keeps the all of the fees generated, thereby eliminating any argument that the merchant exception somehow does not apply.

b. The Procedural History.

The CFPB served the first CID on ACTIVE on February 13, 2019. During the mandatory meet and confer, ACTIVE explained that the CID exceeded the jurisdiction of the CFPB. The CFPB disagreed, and the parties were at an impasse as to the threshold question of jurisdiction.¹⁰ ACTIVE timely filed its first petition to set aside the CID on March 22, 2019. On July 29, 2019, the Bureau issued its Decision and Order on Petition By ACTIVE Network, LLC To Set Aside Civil Investigative Demand (the "Order"). The Bureau granted in part and denied in part the first

⁹ See *supra* note 7.

¹⁰ As such, the parties discussed ACTIVE's additional objections. ACTIVE includes these objections in the instant petition out of an abundance of caution, although the objections are necessarily broad given the uncertain jurisdictional issues and theories presented in the CID.

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petition. The Order reiterated ACTIVE's arguments that it is not a covered person under the CFPA, nor is ACTIVE a service provider, which in turn means the CID is outside of the CFPB's authority. The Order further summarized ACTIVE's argument that ACTIVE falls under the statutorily provided merchant exception. In response, the Order pointed out the Bureau's authority allows it to "conduct an investigation so that the Bureau can determine for itself whether (among other things) ACTIVE engages in providing payments or other financial data processing products or services to consumers, and if so, *whether ACTIVE nevertheless may not be deemed a covered person in light of the exception applicable to merchants, retailers, or sellers of any nonfinancial good or service.*" (Order, at 4 (emphasis added).) Rather than force the CFPB to seek judicial relief, ACTIVE complied in good faith with both the Order and the request to assist the CFPB in its investigation about whether ACTIVE is a merchant; and ACTIVE produced documents, a written report, and responses to interrogatories. ACTIVE also provided follow-up information at the CFPB's request. The materials produced at the CFPB's request demonstrate that ACTIVE is a merchant selling non-financial products (event registrations, software, and ACTIVE Advantage) and processing payments for itself.

Sixteen months after the first CID, the CFPB issued a second CID. The new CID focused on account-level data for individual customers, requiring an extensive data pull; document productions; and a multi-topic investigational hearing. The second CID also demands information on ACTIVE's financial reports and past regulatory investigations. The parties met and conferred on July 31, 2020. Counsel for ACTIVE notified the CFPB that further productions would be unduly burdensome because the agency lacked jurisdiction over ACTIVE for the reasons stated

herein. The CFPB disagreed and counsel for ACTIVE indicated that ACTIVE planned to file the instant petition.¹¹

III. THE CID IS INVALID BECAUSE IT EXCEEDS THE JURISDICTION OF THE CFPB

The CFPB, like any federal agency, has the power to act only to the extent Congress authorized it to do so under law. *See, e.g., Fed. Trade Comm’n v. Nat’l Lead Co.*, 352 U.S. 419, 428 (1957) (“As the Court has said many times before, the Commission may exercise only the powers granted it by the [FTC] Act.”); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1998). Thus, the CFPB’s authority to require that parties comply with CIDs is grounded in its enabling statute. *See* 12 U.S.C. § 5562 (c)(1). To this end, “the validity of a CID is measured by the purposes stated in the [CID’s] notification of purpose.” *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs.*, 854 F.3d 683, 690 (D.C. Cir. 2017) (hereinafter “ACICS”). Here, the statement of purpose provides: “The purpose of this investigation is to determine whether ACTIVE Network, LLC or associated persons: (1) is a covered person that offers or provides payment processing services; (2) has, in connection with offering or providing payment processing services, made false or misleading representations to consumers or improperly imposed charges on consumers” in violation of the CFPB Act; “or (3) has failed to follow the requirements for written authorization by consumers for preauthorized transfers” in violation of the EFTA. As described above, and as is apparent on the face of the CID’s requests, the vast majority of the discovery sought related to the second purpose, i.e., UDAAP violations.

“Agencies are . . . not afforded ‘unfettered authority to cast about for potential wrongdoing’” *ACICS*, 854 F.3d at 689 (quoting *In re Sealed Case (Admin. Subpoena)*, 42

¹¹ In good faith, the parties also conferred on the burden, relevancy, and scope of the CID. ACTIVE also preserved all claims to privilege.

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F.3d 1412, 1418 (D.C. Cir. 1994)). A CID that falls outside an agency's statutory jurisdiction cannot be enforced. *Id.* While an agency is entitled to some deference when interpreting ambiguous terms in its enabling statute, including those terms that define its jurisdiction, the agency is not entitled to deference if the statute clearly and unambiguously demonstrates that Congress intended to confine an agency's authority. *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 296 (2013). As the Supreme Court noted in *City of Arlington*, "[t]he fox in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decision making that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where Congress has established a clear line, the agency cannot go beyond it[.]" *Id.* at 307.

The second CID must be set aside for three reasons. First, ACTIVE, as a merchant of non-financial goods and services, is not a "covered person" under the CFPA. The CFPA is clear that the CFPB does not have jurisdiction over nonfinancial consumer products and services that are not provided in connection with financial products or services. As ACTIVE has demonstrated, it is not "a covered person that offers or provides payment processing services" as defined by the Act or regulations promulgated under the CFPA. Rather, ACTIVE operates as a merchant that sells to consumers event registrations and discount program memberships, none of which are financial products or services as defined by the CFPA. The CFPA specifically exempts merchants that process their own payments from the definition of a "covered person" (the merchant exception). As with any merchant, ACTIVE accepts customers' payment information, and uses a third-party payment processor that processes ACTIVE's customers' payments. The CFPB's current inquiry focuses on the ACTIVE Advantage product, which is ACTIVE's own product that it sells.

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Similarly, ACTIVE does not process payment on behalf of others. Rather, ACTIVE sells event registrations directly to consumers for events sponsored by others. While ACTIVE's marketing describes its generic ability to process payments or provide a payment solution, this marketing must be viewed in the context of ACTIVE's contractual arrangement with consumers and event organizers that makes it clear ACTIVE is accepting payments for the event registrations that ACTIVE sells directly to consumers.¹² To the extent the CFPB finds this purposeful contractual arrangement and payment structure constitutes "payment processing," it falls within the statutorily defined merchant exception, especially as it applies to the Advantage product. Any other interpretation would render the merchant exception meaningless. Moreover, ACTIVE has already complied with a CID and in so doing, provided the CFPB with information to verify these facts and to conclude that it is not subject to the CFPB's jurisdiction.

Put simply and as demonstrated in the previous documentation and in publicly available information on ACTIVE's website, ACTIVE is an event registration reseller. In making its sales, ACTIVE confirms that its customer's payments are processed by a third-party payment processor. ACTIVE then adheres to its contractual obligations with the event organizer by remitting a portion of the registration sales to the event organizer. ACTIVE does not believe its acceptance of its customer's payment information is "payment processing," but to the extent that the Director

¹² Active Endurance, Solutions Overview, <https://www.activeendurance.com/solutions.htm> (last visited Aug. 8, 2020); Active Endurance, Online Event Registration Software, <https://www.activeendurance.com/solutions/event-registration/online-event-registration-software.htm> (last visited Aug. 8, 2020); Active Endurance, Event Management Software Overview, <https://www.activeendurance.com/solutions/event-operations/event-management-software.htm> (last visited Aug. 8, 2020); Product and Services General Terms, <https://info.activenetwork.com/general-terms> (last visited Aug. 8, 2020); Endurance, Sports, and Ticketing Product Attachment, <https://info.activenetwork.com/sports-terms> (last visited Aug. 8, 2020).

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disagrees, ACTIVE's acceptance of its customer's payment information is clearly done on its own behalf for products it sells. This fits squarely within the merchant exception.

Second, while ACTIVE's activity may fall under the conduct regulated by an Enumerated Statute (12 USC 5481(15)(C) and Regulation E), the Bureau's CID seeks only information related to one particular section of Regulation E, 12 C.F.R § 1005.10, and specifically that provision's requirements for written authorization for preauthorized transfers. The CFPB should not be allowed to use one subsection of a regulation as a pretext to conduct a limitless investigation into potential UDAAP violations for which it lacks jurisdiction.

Finally, even if the CFPB had jurisdiction over ACTIVE, the requests as drafted are overly burdensome because they seek information from 2011 to present, which is well beyond the statute of limitations and present a significant burden to ACTIVE—both as it relates to the statute of limitations governing Regulation E (one year) and UDAAP (three years from date of discovery or five years from the date of occurrence). 15 U.S.C. § 1693m(g); 28 U.S.C. § 2462.

a. ACTIVE Is Not a Covered Person or Service Provider Under the Act.

The investigatory and enforcement authority of the CFPB is limited to “covered persons” as defined under the Act. 12 U.S.C. § 5511(c)(4); 12 U.S.C. § 5531(a). Under the CFPA, a “covered person” includes “(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person.” 12 U.S.C. § 5481(6). A “service provider” to a covered person, includes any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service, including a person that:

- (i) participates in designing, operating, or maintaining the consumer financial product or service; or

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(ii) processes transactions relating to the consumer financial product or service (other than knowingly or incidentally transmitting or processing financial data in a manner that such data is undifferentiated from other types of data of the same form as the person transmits or processes).

12 U.S.C. § 5481(26)(A).¹³ The CFPB's enforcement power and thus its power to investigate potential targets of enforcement is limited to "prevent[ing] a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." 12 U.S.C. § 5531(a).

The CFPB's statutory enforcement power, as well as the terms "covered person" and "service provider," require the provision of a "consumer financial product or service." The CFPA provides, in relevant part, that a "financial product or service" means:

providing payments or other financial data processing products or services to a consumer by any technological means, including processing or storing financial or banking data for any payment instrument, or through any payments systems or network used for processing payments data, including payments made through an online banking system or mobile telecommunications network

12 U.S.C. § 5481(15)(A)(vii). This definition excludes anyone who is:

a merchant, retailer, or seller of any nonfinancial good or service who engages in financial data processing by transmitting or storing payments data about a consumer exclusively for purpose of initiating payments instructions by the consumer to pay such person for the purchase of, or to complete a commercial transaction for, such nonfinancial good or service sold directly by such person to the consumer

12 U.S.C. § 5481(15)(A)(vii)(I). This provision is commonly called the "merchant exception."

¹³ The third-party payment processor provides a service to ACTIVE by processing ACTIVE's own payments as its service provider. ACTIVE does not provide services to the third-party payment processor and, of course, ACTIVE cannot provide services to itself.

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ACTIVE does not “offer[] or provid[e] a consumer financial product or service.” It therefore cannot be a covered person under 12 U.S.C. § 5481(6)(A). Nor is ACTIVE a “service provider” to a covered person. Between the consumer and ACTIVE, there is no “offering or provision” of a consumer financial product or service, because there is no consumer financial product or service.

b. ACTIVE Does Not Sell Financial Products or Services.

Congress limited the CFPB’s enforcement authority to consumer financial products and services, and products and services provided in connection with the provisions of financial products and services. Through its website, ACTIVE sells various products and services, all of which are nonfinancial. ACT0000097-104 (ACTIVE NET Registration Flow Example); ACT0000081-96 (ACTIVEworks Endurance Registration Flow Example); ACT0001072 (ACTIVE Advantage Website Homepage). ACTIVE also does not process other merchants’ or its own payments. Rather, as discussed above, ACTIVE contracts with an unaffiliated third party, which processes ACTIVE’s customers’ payments. *See supra* note 7; *see also* Contract, Attachment A to March 5, 2019 Letter from Gerald S. Sachs to Casey Triggs.

ACTIVE’s primary products are registrations for various recreational events. *See, e.g.*, ACT0000097-104 (ACTIVE NET Registration Flow Example); ACT0000081-96 (ACTIVEworks Endurance Registration Flow Example); ACT0000334 (Commerce Review, State of the Business, Nov. 2016); ACT0000712-713 (Commerce Programs); ACT0000824-826 (Commerce Programs). To offer these products, ACTIVE enters into contractual agreements with the event owners.¹⁴ Under these agreements, the owners must honor the registrations ACTIVE sells and allow the

¹⁴ Product and Services General Terms, <https://info.activenetwork.com/general-terms> (last visited Aug. 8, 2020); Endurance, Sports, and Ticketing Product Attachment, <https://info.activenetwork.com/sports-terms> (last visited Aug. 8, 2020).

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customers to participate in the events.¹⁵ Put another way, the event owners engage ACTIVE to sell tickets to their events. This arrangement benefits owners and customers because owners are able to reach a broader customer base through ACTIVE's website and customers can shop for a variety of events on one website, rather than having to visit each event's website individually. ACTIVE receives payment for each registration it sells in the form of a fee paid by the customer. *See, e.g.,* ACT0000097-104 (Sample Event Registration); ACT0000105-113 (Sample Camps and Class Registration Flow); ACT0001071 (Sample final payment page).¹⁶ A third party processes the actual payment transaction. A comparable arrangement would be that of Ticketmaster selling tickets to a sporting event or concert put on by other companies. That ACTIVE remits some or all of the price paid by the participant to the event sponsor for the registration services does not somehow transform ACTIVE from a reseller into a payment processor. ACTIVE sells the event registration directly to the consumer, and if the participant seeks a refund that is paid by ACTIVE. *See* ACTIVE Network, LLC's Responses and Objections to Civil Investigative Demand for Production of Answers to Interrogatories, Written Report, Documents and Tangible Things, 11-12 (Request for Written Report); 12-13 (Request for Production No. 3; 14 (Request for Production No. 6); 14-15 (Request for Production No. 8), and all citations included therein.

ACTIVE also sells products it develops itself, including its membership product, "ACTIVE Advantage" (the "Membership Product"). *See* ACT0000874-882 (Commerce Offer Talking Points); ACT0000912-920 (ACTIVE Advantage Program Overview). Members of

¹⁵ Product and Services General Terms, <https://info.activenetwork.com/general-terms> (last visited Aug. 8, 2020); Endurance, Sports, and Ticketing Product Attachment, <https://info.activenetwork.com/sports-terms> (last visited Aug. 8, 2020).

¹⁶ *See also* Endurance, Sports, and Ticketing Product Attachment, *supra* note 14, at Section 4.1 ("Unless otherwise set forth in the applicable Schedule, Active will charge registration fees to individuals who register for the Events or purchase goods or services online, and will process and collect such fees as a merchant of record according to the card networks.").

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ACTIVE Advantage receive various benefits, including not having to pay a registration fee for events and receiving registrations to certain events for free. *See* ACT0000874-882 (Commerce Offer Talking Points); ACT0000912-920 (ACTIVE Advantage Program Overview). Members also receive discounts on athletic products and services. *See* ACT0000874-882 (Commerce Offer Talking Points); ACT0000912-920 (ACTIVE Advantage Program Overview). Customers are offered the option to purchase the Membership Product during checkout or they can purchase it on their own. *See* ACT0000874-882 (Commerce Offer Talking Points); ACT0000912-920 (ACTIVE Advantage Program Overview). The Membership Product is analogous to membership in Amazon Prime, which allows members to receive discounts on shipping costs and free video streaming, among other benefits.

Finally, ACTIVE sells a suite of software solutions for event organizers that permit the organizers to track participants, register participants, track times for events, manage data from events, and market events.¹⁷

Neither the registrations, the Membership Product, nor the event management software are “financial products or services” as defined by the CFPA. As discussed above, the registrations are basically tickets—they permit the customer to enter an event—the Membership Product is a discount program that reduces the fees a customer pays to buy the ticket, in addition to providing discounts on other products such as apparel, and the Endurance product is software. To the extent that ACTIVE engages in any behavior that could be interpreted as being related to payment processing, such as collecting payment information to forward to its payment processor, ACTIVE is performing these activities (as every merchant that sells goods and services does) “exclusively

¹⁷ *See* ACTIVE Endurance Website, <https://www.activeendurance.com/home> (last visited Aug. 8, 2020).

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for the purpose of initiating payments instructions by the consumer to pay [ACTIVE] for the purchase of, or to complete a commercial transaction for, [the registrations and/or Membership Product] sold directly by [ACTIVE] to the consumer.” 12 U.S.C. § 5481(15)(A)(vii)(I).

ACTIVE will not be permitted to review the CFPB’s response to this petition.¹⁸ ACTIVE has previously provided evidence demonstrating it is a merchant selling three main products: admissions to events, software, and a membership. Based on the Director’s Order, it appears the CFPB may argue that because ACTIVE promotes “payment technology solutions” to “event organizers in the communities and health and fitness vertical markets,” ACTIVE is somehow a payment processor. (Order, at 4.) This strained and myopic view of ACTIVE’s business model ignores that the service ACTIVE is selling to “event organizers in the communities and health and fitness vertical markets” is the act of selling tickets to their events and software to help them manage events. If ACTIVE sells the event registration, the event sponsor does not have to do so, meaning the event sponsor does not need to have a merchant account or other means of accepting payment online. That is the payment solution that ACTIVE provides; it sells the registrations so that the sponsor does not have to do so. That does not transform ACTIVE from a merchant into a payment processor. This is especially true with the Advantage product, which Active sells directly to consumers independent of the registration services it provides.

Interpreting 12 U.S.C. § 5481(15)(A)(vii) to include ACTIVE’s products as financial products or services would broaden the scope of the provision to the point of rendering it meaningless. Any company that accepts payment information for any product or service it sells or resells would be within the Bureau’s jurisdiction, vitiating the merchant exception. To put it in

¹⁸ ACTIVE formally lodges its objection to the fact that the CFPB Enforcement Office’s response to this Petition will not be shared with ACTIVE. The lack of transparency is contrary to the adversarial process and fundamentally unfair.

practical terms, the CFPB's reading of the merchant exception would mean that it has jurisdiction over every store in the country, merely because in connection with the offering of their product the merchant accepts a credit card, debit card, check, or other form of payment. Nothing in the language of the statute supports ignoring the merchant exception nor such an expansion of authority.

Because ACTIVE does not provide a consumer financial product or service or provide a service to another party in connection with the provision of a consumer financial product or service, but rather accepts payments on its own behalf which are then processed through its service provider, ACTIVE is not a covered person under the Act.¹⁹ As such, the CID seeks to extend the CFPB's jurisdiction beyond that provided in the statute and is invalid.

IV. THE CFPB'S LIMITED JURISDICTION RELATED TO ENUMERATED CONSUMER LAWS DOES NOT PROVIDE THE CFPB WITH BROAD-BASED JURISDICTION OVER ALL OF ACTIVE'S ACTIVITIES

In the notification of purpose, the CFPB specifically cites the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. 1693 *et seq.*, and its implementing regulation, Regulation E (12 C.F.R.

¹⁹ Although the CFPB's authority to investigate ACTIVE suffers from the fundamental flaw that ACTIVE not a covered person under the CFPA, the CFPB also did not have any legal authority to regulate non-banks prior to July 2013, because it lacked a lawfully-appointed Bureau Director. *See* 12 U.S.C. § 5586(a); *See* Letter, Joint Response by the Inspectors General of the Department of the Treasury and Board of Governors of the Federal Reserve System: Request for Information Regarding the Bureau of Consumer Financial Protection, 5-7 (Jan. 10, 2011), <https://www.treasury.gov/about/organizational-structure/ig/Documents/OIG-CA%2011004%20Committee%20of%20Financial%20Services%20Response%20CFPB.pdf> (explaining that absent a Senate-confirmed Director, the CFPB will not have authority to, *inter alia*, "prohibit unfair, deceptive, or abusive acts or practices under subtitle C in connection with consumer financial products and services"). Although the Director later attempted to cure this defect through ratifying previous actions, a ratifying party must have the legal authority to perform the act "at the time ratification was made." *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994). The CFPB did not have authority over non-banks until the Director was confirmed by the Senate and therefore the Director had no authority to ratify actions taken prior to that time and they remain outside the agency's power. Thus, even if ACTIVE were a covered person, and it is not, it would only be a covered person starting in July of 2013. The CFPB's attempt to extend its inquiry as far back as 2011 is therefore another example of the CID exceeding the agency's powers.

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§ 1005.10(b), one of the enumerated consumer laws, 12 U.S.C. § 5481 (12)(C). This invocation is unavailing in providing the CFPB with broad-based jurisdiction over all of ACTIVE's activities. Specifically, the CFPB states in its Notification of Purpose that its Regulation E inquiry is related to whether ACTIVE "has failed to follow the requirements for written authorization by consumers for preauthorized transfers in a manner that violates Regulation E, 12 C.F.R. § 1005.10(b)." This provision "applies to any person, other than [certain motor vehicle dealers]" and relates to written authorization for preauthorized transfers from the consumer's account. More specifically, this subsection relates only to two items: (i) whether a consumer has provided an authenticated written preauthorization to have an electronic transfer from the consumer's account and (ii) whether the consumer was provided a copy of that authorization. Notwithstanding this specificity in the Bureau's CID, it seeks information wholly untethered from its notification of purpose. The entire 25 subpart written report seeks consumer and corporate transaction data; all 9 of the requests for documents relate to internal company emails, corporate financials, and rates of chargebacks, but nothing related to written preauthorizations; and the investigative hearing topics are focused on customer complaints, lawsuits, chargeback policies, and A/B testing. The requests also seek information from as far back as 2011, well beyond the 1 year statute of limitations for EFTA actions. 15 U.S.C.A § 1693m. Finally, ACTIVE's response to the First CID evidences that it is compliant with this provision of Regulation E, and ACTIVE's compliance with Regulation E is apparent on ACTIVE's public website.

Given this background, it is clear that the purpose of the CID is not to seek information relating to 12 C.F.R. § 1005.10(b). Rather, this is a jurisdictional "hook" designed to avoid the inescapable conclusion that the CFPB otherwise lacks jurisdiction to issue the bulk of the CID.

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The CID should, at a minimum, be limited to 1 year of information related to 12 C.F.R. § 1005.10(b), which the CFPB has already received.

V. ACTIVE HAS DEMONSTRATED THE CFPB LACKS AUTHORITY OVER IT AND SHOULD NOT BE REQUIRED TO RESPOND TO THE NEW CID

ACTIVE should not be required to provide further responses to CID requests. In her Order, the Director stated that the CFPB “is not required to accept as true ACTIVE’s factual assertions concerning its activities. Rather, the Bureau’s administrative subpoena authority lets the Bureau conduct an investigation so that the Bureau can determine for itself whether (among other things) ACTIVE engages in providing payments or other financial data processing products or services to consumers” and, if they do, whether ACTIVE falls under the merchant exception. (Order, at 4.) ACTIVE provided the CFPB with the information it needed to determine it lacked jurisdiction over ACTIVE. Despite its meager attempt to claim it is seeking information as to whether ACTIVE is a covered person, the CID is, in fact, on its face, assuming jurisdiction and demanding a full inquiry into the merits of potential UDAAP violations.

Whether the CFPB has jurisdiction to demand ACTIVE comply with a CID is a threshold issue. ACTIVE already provided the CFPB documents to demonstrate that it falls within the merchant exception of the CFPA. Any required compliance with the second CID in the absence of jurisdiction is unduly burdensome. *ACICS*, 854 F.3d at 688-89. If the CFPB or a federal court ultimately finds, as it should, that ACTIVE is a merchant and therefore not subject to the CID, ACTIVE will have wasted its time and resources compiling responses to a CID that was issued beyond the power of the agency. The combination of fairness and practicality is precisely why courts permit inquiry into jurisdictional issues prior to full merits discovery. *See, e.g., Davis v. United States*, 196 F. Supp. 3d 106 (D.C. Cir. 2016) (permitting plaintiff to engage in jurisdictional discovery when considering an exception to the Federal Tort Claims Act, but denying plaintiff

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discovery on the merits of the case); *In re KBR, Inc., Burn Pit Litig.*, 2016 WL 9724971 (D. Md. Feb. 8, 2016) (stating the court's intention to hold a hearing before the parties engaged in merits discovery in order to determine whether subject matter jurisdiction existed); *Capital Engineering & Mfg. Co., Inc. v. Weinberger*, 1988 WL 13272 (D.C. Cir. Feb. 5, 1988) (staying discovery on the merits until jurisdictional issues were resolved).

Because ACTIVE is not a covered person, the CFPB's likely reliance on *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 507 (1943) is unavailing. In *Endicott*, the target of the subpoena was indisputably covered by the Walsh-Healey Public Contracts Act, which applies only to contractors who voluntarily enter into competition to obtain government business on terms of which they are fairly forewarned by inclusion in the contract." *Id.* at 507. The dispute in *Endicott* was whether the Secretary could subpoena records from Endicott plants that did not do government work. *Id.* at 506-07. By comparison, ACTIVE has not voluntarily subjected itself to the CFPA. Where there was no dispute that the Secretary of Labor could investigate Endicott, whether the CFPB has the power to investigate ACTIVE is both disputed and refuted. *Endicott* stands for the proposition that agencies should not be placed in the untenable position of having to prove jurisdiction prior to obtaining necessary facts and should instead be allowed to gather facts to determine if they have jurisdiction. *See Fed'l Maritime Com'n v. Port of Seattle*, 521 F. 2d 431 (9th Cir. 1975) (citing cases). In this case, the CFPB was given this opportunity and now has the necessary information, which shows jurisdiction is lacking. To force ACTIVE to respond to the second CID wastes resources and is contrary to law.

VI. THE REQUESTS IN THE CID ARE OVERLY BROAD

To preserve its objections, ACTIVE stated at the meet-and-confer, and states again now, that it reserves the right to withhold any document based on privilege. ACTIVE further states that

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the requests for information extending as far back as 2011 are overly broad and burdensome. As the CFPB is aware, ACTIVE has been the subject of multiple inquiries from various regulators in the time since 2011 and changed its practices in response. The CFPB has not articulated why it needs almost a decade of data, much of which will be difficult, if not impossible to produce, due to changes in ACTIVE's systems. Further, what is available will be associated with a number of programs and policies that have not been in effect for years, requiring considerable effort to gather and produce. Under 12 U.S.C. § 5564(g)(1), the time limit for the CFPB to bring an action for an alleged violation of the CFPA is "3 years after the date of discovery of the violation to which an action relates." This limit exists to prevent, among other ills, the exact phenomenon here, wherein a business has taken steps in response to regulatory inquiries and now another regulator seeks to re-trod well-covered ground. Such an exercise is unwarranted and, in the instant case, likely to be technologically impossible.

It is also contrary to law. The CFPB believes that it may bring an action for violations that occurred at any time, provided the action commences within 3 years of the discovery of the violation. Thus, under the CFPB's interpretation, it can bring a charge based on 20-, 30-, or 40-year-old actions that constituted violations of the CFPA, so long as it does so within 3 years of discovering the violations. This is a sophistic way of stating that there is no statute of limitations at all. But a federal civil cause of action or criminal offense must have some statute of limitations. *See* 28 U.S.C § 2462; 18 U.S.C. § 3282. This has been true for centuries. Allowing parties to sue "at any distance of time" would be "utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture." *Adams v. Woods*, 6 U.S. 336, 342 (1805); *Gabelli v. SEC*, 568 U.S. 442, 448 (2013) ("Statutes of limitations are intended to

promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.”). For this reason, federal law provides for a 5-year statute of limitations for all actions, suits or proceedings “for enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise.” 28 U.S.C. § 2462.

There is no statutory indication that Congress intended to jettison centuries of jurisprudence for the benefit of the CFPB. *See PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 54 (D.C. Cir. 2016), *reh’g en banc granted, order vacated* (Feb. 16, 2017), *order reinstated as to statutory issues on reh’g en banc*, 881 F.3d 75 (D.C. Cir. 2018). “‘Congress does not, one might say, hide elephants in mouseholes.’ If by means of the Dodd-Frank Act, ‘Congress intended to alter’ the fundamental details of the statutes of limitations for enforcement of this critical consumer protection law, ‘we would expect the text of the amended’ statute ‘to say so.’” *Id.* (quoting *Puerto Rico v. Franklin California Tax-Free Tr.*, 136 S. Ct. 1938, 1947 (2016)). Nothing in the statutes nor the legislative history supports the CFPB’s belief that it is unfettered by a statute of limitations.

In the instant case, the applicable statute of limitations is much narrower than 5 years. The CFPA allows the CFPB to enforce alleged violations of the Enumerated Consumer Laws, including EFTA and Regulation E. 12 U.S.C. § 5581; 12 U.S.C. § 5481(12)(C). The CFPB may enforce those federal laws “unless such Federal law specifically limits the Bureau from conducting a hearing or adjudication proceeding.” *Id.* § 5563(a)(2) (emphasis added). “Obviously, one such ‘limit’ is a statute of limitations.” *PHH Corp.*, at 51. EFTA, the only Enumerated Consumer Law

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at issue here and the source of the CFPB's jurisdiction, provides for a 1-year statute of limitations. If any portion of the CID is enforced, all requests should be so limited.²⁰

VII. REQUEST FOR CONFIDENTIAL TREATMENT

The Director has previously found that there was good cause to protect ACTIVE's payment processor's name and information related to ACTIVE's agreement with the payment processor in light of FOIA Exemption 4. Exemption 4 protects information that is "(1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential." *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir 1983). The Director held that (1) ACTIVE has a commercial interest in the identity of its payment processor and in their contract; (2) the information was obtained from a person (ACTIVE) outside the government; and (3) ACTIVE customarily kept the information private, or at least closely held the information. ACTIVE has not included the name of the payment processor in this petition but has cited to highly confidential information provided to the CFPB in the course of its investigation. ACTIVE will provide courtesy copies of this information to the Director, and ACTIVE requests that all documents produced as a part of or in response to the first CID remain confidential pursuant to 12 C.F.R. §§ 1080.6(g) and 1080.14. In the alternative, if the CFPB determines that confidential treatment of these portions of the Petition are unwarranted, ACTIVE requests advance notice, pursuant to 12 C.F.R. § 1070.46(b).

VIII. CONCLUSION

As detailed above, the entirety of the CID should be set aside. ACTIVE falls squarely under the merchant exception to the CFPA's definition of a covered person, which limits the

²⁰ To the extent the Director believes that the CFPB still has jurisdiction over its UDAAP claims, those claims should be limited to transactions occurring no more than 5 years ago. *See* 28 U.S.C. § 2462.

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CFPB's UDAAP authority. While the Director could limit the CID to only any inquiry over the specific subpart of Regulation E referenced in the Notification of Purpose, this CID seeks no information arguably related to Regulation E and ACTIVE has already provided information related to its compliance with Regulation E's subpart on preauthorized transfers. For these reasons alone, the CID should be set aside. Should the Director feel some additional discovery is warranted as to Regulation E, ACTIVE requests that the CID be limited to the relevant time period and subject matter.

Respectfully submitted,

Date: August 10, 2020

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Counsel for ACTIVE Network, LLC

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CERTIFICATION

Consistent with 12 C.F.R. § 1080.6(e)(1), counsel for ACTIVE hereby certifies that they have conferred with counsel for the Bureau, Casey Triggs, via phone during a telephonic conference on July 31, 2020, from 11:30 AM to 12:30 PM, in a good-faith effort to resolve by agreement the issues raised by this Petition, but were unable to reach an agreement.

/s/ Leonard L. Gordon
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Baltimore, MD 21230

Counsel for ACTIVE Network, LLC

Exhibit A



United States of America
Bureau of Consumer Financial Protection

Civil Investigative Demand

To **ACTIVE Network, LLC**
Attn: Joseph R. Anderson, Esq.
717 North Harwood Street, Suite 2500
Dallas, TX 75201

This demand is issued pursuant to Section 1052 of the Consumer Financial Protection Act of 2010 and 12 C.F.R. Part 1080 to determine whether there is or has been a violation of any laws enforced by the Bureau of Consumer Financial Protection.

Action Required (choose all that apply)

☒ **Appear and Provide Oral Testimony**

Location of Investigational Hearing	Date and Time of Investigational Hearing
Testimony to be taken remotely via WebEx	9/16/2020 9:30 a.m. Eastern Time
	Bureau Investigators
	Casey R. Triggs

☒ **Produce Documents and/or Tangible Things** **Ugghzfh Jbh YUHWYXXcWa Ybz** by the following date **08/24/2020**

☒ **Provide Written Reports and/or Answers to Questions** **Ugghzfh Jbh YUHWYXXcWa Ybz** by the following date **08/24/2020**

Notification of Purpose Pursuant to 12 C.F.R. § 1080.5

The purpose of this investigation is to determine whether ACTIVE Network, LLC or associated persons: (1) is a covered person that offers or provides payment processing services; (2) has, in connection with offering or providing payment processing services, made false or misleading representations to consumers or improperly imposed charges on consumers in a manner that is unfair, deceptive, or abusive in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536; or (3) has failed to follow the requirements for written authorization by consumers for preauthorized transfers in a manner that violates Regulation E, 12 C.F.R. § 1005.10(b), implementing the Electronic Fund Transfer Act, 15 U.S.C. § 1693 et seq. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

Custodian / Deputy Custodian

John C. Wells / Cheryl Goodwin
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

Bureau Counsel

Casey R. Triggs
Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

Date Issued

07/20/2020

Signature

Name / Title **John C. Wells, Deputy Enforcement Director**

Service

The delivery of this demand to you by any method prescribed by the Consumer Financial Protection Act of 2010, 12 U.S.C. § 5562, is legal service. If you fail to comply with this demand, the Bureau may seek a court order requiring your compliance.

Travel Expenses

Request a travel voucher to claim compensation to which you are entitled as a witness before the Bureau pursuant to Section 1052 of the Consumer Financial Protection Act of 2010, 12 U.S.C. § 5562.

Right to Regulatory Enforcement Fairness

The Bureau is committed to fair regulatory enforcement. If you are a small business under Small Business Administration standards, you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

Paperwork Reduction Act

This demand does not require approval by OMB under the Paperwork Reduction Act of 1980.

**CIVIL INVESTIGATIVE DEMAND FOR
PRODUCTION OF ANSWERS TO INTERROGATORIES,
WRITTEN REPORTS, DOCUMENTS AND TANGIBLE THINGS,
AND ORAL TESTIMONY**

I. Requests

Interrogatories

1. Identify all Persons who participated in responding to this CID and the specific tasks performed by each Person.

Requests for Written Reports

1. In a file compatible with Microsoft Excel, provide a Written Report containing the following information about each Person who became enrolled in an ACTIVE Advantage trial or paying membership on or after July 21, 2011:
 - a. Name used for enrollment;
 - b. Unique member identification number;
 - c. Email address supplied for enrollment;
 - d. Phone number supplied for enrollment;
 - e. Street address supplied for enrollment;
 - f. Email address, if one was later supplied to the Company (e.g., as part of a complaint, cancelation, or refund request—see e.g., ACT000039) that is different than the response above to c.;
 - g. Phone number, if one was later supplied to the Company that is different than the response above to d.;
 - h. Street address, if one was later supplied to the Company that is different than the response above to e.;
 - i. Date enrolled in ACTIVE Advantage trial membership;
 - j. Date converted to ACTIVE Advantage paid membership;
 - k. State whether enrollment occurred through a direct enrollment, post-sell offer and enrollment, or a cross-sell offer and enrollment
 - l. Total membership fees paid;
 - m. Date, if Person attempted to cancel their membership by contacting the Company and remained enrolled;
 - n. Date, if Person canceled their membership
 - o. The reason for the cancelation, if Person canceled their membership;
 - p. Date, if any chargebacks to the Person's account;
 - q. Dollar amount, if any chargebacks to the Person's account;
 - r. Date, if Person requested a refund;
 - s. Dollar amount, if Person requested a refund;
 - t. Date, if Company provided a refund to the Person;
 - u. Dollar amount, if Company provided a refund to the Person;
 - v. The number of activities the Person registered for through the Company;
 - w. The payment method used by the Person to pay fees (e.g., credit card, debit card);
 - x. The number of separate membership benefits obtained by the Person; and
 - y. The total dollar value of membership benefits obtained by the Person.

Requests for Documents and Tangible Things

1. The Company's audited financial statements, balance sheets, and profit and loss statements for each year of the Applicable Period. If audited statements do not exist, then unaudited documents may be submitted.
2. Documents sufficient to show the Company's systems and capabilities for collecting, handling, transmitting, or storing consumer payments, financial, or banking data.
3. Documents sufficient to show the volume and the data fields gathered for each type of consumer payments, banking, or financial data the Company collects, handles, transmits, or stores.
4. A representative copy of each Company advertisement or promotional material that was intended for those event organizers the Company would include in the Endurance category and that includes information about either payment or other financial data processing products or services, or financial or banking data storage products or services.
5. For each year of the Applicable Period, the three contracts (including any subsequent addendums or related agreements) executed with event organizers, which come within the Company's Endurance category, for the provision of registration and processing services that:
 - a. provided the most revenue obligated to the Company; and
 - b. provided the least revenue obligated to the Company.(*I.e.*, six contracts in total for each year)
6. Documents sufficient to show the Company's policies, procedures, and monthly statistics related to credit card chargebacks.
7. All correspondence between the Company and any payments company, network, financial services company, or any intermediary relating to deficiencies, cautions, warnings, or concern about the Company's chargeback levels.
8. Electronic communications, including, but not limited to, email and instant messages, to or from Darko Dejanovic, Dana Jones, Evan Davies, Nate Motyl, Andrea Facini, Scott Lowrie, and Micah Kropp concerning both ACTIVE Advantage and one of the following:
 - a. A/B testing; or
 - b. The volume or business risk of, or any concern about, consumer complaints, chargebacks, cancelations, or refunds.
9. All documents shown to, provided to, or received from the [REDACTED] [REDACTED] inquiry as referred to in Gordon Letter to Brenowitz, October 22, 2019, at 2 (R-016054-00000002).

10. The before-and-after versions of enrollment offer pages changed “[b]ased on [the ██████ inquiry” as referred to in Gordon Letter to Brenowitz, October 22, 2019, at 2 (R-016054-00000002).

II. Topics for Investigational Hearing(s)

1. The Company’s systems and capabilities for collecting, handling, transmitting, processing, or storing payments, financial, or banking data.
2. Consumer payments, financial, or banking data collected, handled, transmitted, processed, or stored by the Company as a result of registering event participants or processing payments for event registrations where the registration and payment process included a post-sell offer to enroll in ACTIVE Advantage.
3. The types, data fields, and volumes of consumer payments, financial, or banking data the Company collects, handles, transmits, processes, or stores.
4. Terms of agreements between the Company and event organizers, which come within the Company’s Endurance category, including without limitation, terms related to registrations, payments, storing data, and ACTIVE Advantage.
5. The benefits given to consumers enrolling in ACTIVE Advantage through the post-sell offer channel, including without limitation what the benefits are, how consumers obtain the benefits, the value of the benefits to the consumer, the relative proportion of benefits obtained by ACTIVE Advantage enrollees, and the cost of the benefits to the Company.
6. The Company’s policies, procedures, and practices for, and the levels and reasons for the levels of, complaints, cancellations, and refunds relating to ACTIVE Advantage, including, without limitation, the creation, categories, and content of spreadsheets. See, e.g., ACT0000039 through ACT0000080.
7. The Company’s policies, procedures, practices, audits, studies, and performance related to ACTIVE Advantage and chargebacks, including chargeback rates (by categories/codes), causes for the rates, and concerns raised, or actions taken, by card companies or networks and the Company’s responses.
8. Lawsuits, settlements, and governmental reviews, examinations, investigations, or inquiries active any time since January 1, 2014 relating to ACTIVE Advantage, including without limitation the subject matter, the communications between the Company, the result, and modifications made by the Company, including, without limitation, when “ACTIVE has made changes requested by these regulators.” Gordon Letter to Brenowitz, January 27, 2020, at 9 (R-018030-00000009); see also *id.* at 3; (R-018030-00000003) (“significant updates by the summer of 2014”).

9. The Company's A/B testing relating to ACTIVE Advantage, including, without limitation, who was involved in directing, planning, and conducting; what was directed; what were results and interpretation of results; who reviewed testing; what discussions occurred; what changes were made due to the results; and future discussed, proposed, or planned A/B testing. See, e.g., ACT0000885, 892, 900, 921, 932, 958.

III. Definitions

- A. **"ACTIVE Advantage"** means the Company's membership program, which enrolls consumers and purports to provide savings on events, gear, and travel.
- B. **"And"** and **"or"** must be construed both conjunctively and disjunctively.
- C. **"CID"** means the Civil Investigative Demand, including the Requests, Definitions, and Instructions.
- D. **"Complaints"** shall mean consumer, event or activity organizer, competitor, or other complaints provided by persons not employed by the Company, including complaints received from or on behalf of any government agency or private consumer protection entity (e.g., Better Business Bureau).
- E. **"Bureau"** means the Bureau of Consumer Financial Protection.
- F. **"Company"** or **"you"** or **"your"** means Active Network, LLC, and any predecessor or successor in interest.
- G. **"Deputy Enforcement Director"** refers to a Deputy Assistant Director of the Office of Enforcement.
- H. **"Document"** means any written matter of every type and description, including electronically stored information. "Document" includes any non-identical copy (such as a draft or annotated copy) of another document.
- I. **"Each"** includes **"every,"** and **"every"** includes **"each."**
- J. **"Electronically Stored Information,"** or **"ESI,"** means the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise) of any electronically created or stored information, including but not limited to e-mail, instant messaging, videoconferencing, SMS, MMS, or other text messaging, and other electronic correspondence (whether active, archived, unsent, or in a sent or deleted-items folder), word-processing files, spreadsheets, databases, unorganized data, document metadata, presentation files, and sound recordings, regardless of how or where the information is stored, including if it is on a mobile device.

K. **“Enforcement Director”** refers to the Assistant Director of the Office of Enforcement.

L. **“Person”** means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

IV. Instructions

A. **Sharing of Information:** This CID relates to a nonpublic, law-enforcement investigation being conducted by the Bureau. The Bureau may make its files available to other civil and criminal federal, state, or local law-enforcement agencies under 12 C.F.R. §§ 1070.43(b)(1) and 1070.45(a)(5). Information you provide may be used in any civil or criminal proceeding by the Bureau or other agencies. As stated in 12 C.F.R. § 1080.14, information you provide in response to this CID is subject to the requirements and procedures relating to the disclosure of records and information set forth in 12 C.F.R. pt. 1070.

B. **Meet and Confer:** As stated in 12 C.F.R. § 1080.6(c), you must contact Enforcement Attorney Casey R. Triggs at 202.435.7967 as soon as possible to schedule a meeting (telephonic or in person) to discuss your response to the CID. The meeting must be held within **10** calendar days after you receive this CID or before the deadline for filing a petition to modify or set aside the CID, whichever is earlier.

C. **Applicable Period for Responsive Materials:** Unless otherwise directed, the applicable period for the request is from January 1, 2017 until the date of full and complete compliance with this CID.

D. **Privilege Claims:** If any material responsive to this CID is withheld on the grounds of privilege, you must make the privilege claim no later than the date set for the production of the material. As stated in 12 C.F.R. § 1080.8(a), any such claim must include a schedule of the documents, information, or tangible things withheld that states, for each:

1. its type, specific subject matter, and date;
2. the names, addresses, positions, and organizations of all authors and direct or indirect recipients;
3. the specific grounds for claiming the privilege;
4. the request to which the privileged document, information, or thing is responsive; and
5. its Bates number or range.

In addition, the person who submits the schedule and the attorney stating the grounds

for the privilege must sign it. A person withholding material solely based on a claim of privilege must comply with the requirements of 12 C.F. R. § 1080.8 rather than file a petition for an order modifying or setting aside a demand under 12 C.F.R. § 1080.6(e). Please follow the enclosed Document Submission Standards for further instructions about producing redacted privileged documents.

E. **Document Retention:** Until you are notified otherwise, you are required to retain all documents and other tangible things that you used or relied on in responding to this CID. In addition, you must retain, and suspend any procedures that may result in the destruction of, documents, information, or tangible things that are in any way relevant to the investigation, as described in the CID's Notification of Purpose. You are required to prevent the destruction of relevant material irrespective of whether you believe such material is protected from future disclosure or discovery by privilege or otherwise. *See* 18 U.S.C. §§ 1505, 1519.

F. **Modification Requests:** If you believe that the scope of the search or response required by this CID can be narrowed consistent with the Bureau's need for documents or information, you are encouraged to discuss such possible modifications, including modifications of the requirements of these instructions, with Enforcement Attorney Casey R. Triggs at 202.435.7967. Modifications must be agreed to in writing by the Enforcement Director or a Deputy Enforcement Director. 12 C.F.R. § 1080.6(d).

G. **Petition for Order Modifying or Setting Aside Demand:** Under 12 U.S.C. § 5562(f) and 12 C.F.R. § 1080.6(e), you may petition the Bureau for an order modifying or setting aside this CID. To file a petition, you must send it by e-mail to the Bureau's Executive Secretary at ExecSec@cfpb.gov, copying the Enforcement Director at Enforcement@cfpb.gov, within 20 calendar days of service of the CID or, if the return date is less than 20 calendar days after service, before the return date. The subject line of the e-mail must say "Petition to Modify or Set Aside Civil Investigative Demand." If a request for confidential treatment is filed, you must file a redacted public petition in addition to the unredacted petition. All requests for confidential treatment must be supported by a showing of good cause in light of applicable statutes, rules, Bureau orders, court orders, or other relevant authority.

H. **Certification:** The person to whom the CID is directed or, if it is directed to an entity, any person having knowledge of the facts and circumstances relating to the production, must certify that the response to this CID is true and complete. This certification must be made on the form declaration included with this CID.

I. **Scope of Search:** This CID covers materials and information in your possession, custody, or control, including but not limited to documents in the possession, custody, or control of your attorneys, accountants, other agents or consultants, directors, officers, and employees.

J. **Document Production:** The Bureau encourages the electronic production of all material responsive to this CID; please follow the enclosed Document Submission Standards.

For all packages destined for Bureau offices, please contact Casey R. Triggs at casey.triggs@cfpb.gov or 202.435.7967 for the mailing or internet-protocol address.

Please provide any tracking numbers by e-mail or telephone to Enforcement Attorney Casey R. Triggs at casey.triggs@cfpb.gov or 202.435.7967.

K. Document Identification: Documents that may be responsive to more than one request of this CID need not be submitted more than once. All documents responsive to this CID must be accompanied by an index that identifies: (i) the name of each custodian of each responsive document; (ii) the corresponding Bates number or range used to identify that person's documents; and (iii) the request or requests to which each document responds.

L. Sensitive Personally Identifiable Information: If any material called for by these requests contains sensitive personally identifiable information, sensitive health information of any individual, or Suspicious Activities Reports, please contact Enforcement Attorney Casey R. Triggs at 202.435.7967 before sending those materials to discuss ways to protect the information during production. You must encrypt electronic copies of such materials with encryption software acceptable to the Bureau. When submitting encrypted material, you must provide the encryption key, certificate, or passcode in a separate communication.

For purposes of this CID, sensitive personally identifiable information includes an individual's Social Security number alone or an individual's name, address, or phone number *in combination with* one or more of the following: date of birth, Social Security number, driver's-license number or other state-identification number, or a foreign country equivalent, passport number, financial-account number, credit-card number, or debit-card number. Sensitive health information includes medical records and other individually identifiable health information relating to the past, present, or future physical or mental health or conditions of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual.

M. Information Identification: Each request for a written report or interrogatory in this CID must be answered separately and fully in writing under oath. All information submitted must clearly and precisely identify the request or requests to which it is responsive.

N. Declaration Certifying Records of Regularly Conducted Business Activity: Attached is a Declaration Certifying Records of Regularly Conducted Business Activity, which may limit the need to subpoena you to testify at future proceedings to establish the admissibility of documents produced in response to this CID. Please execute this Declaration and provide it with your response.

O. All references to “**year**” or “**annual**” refer to the calendar year. Where information is requested “for each year,” provide it separately for each year; where yearly data is not available, provide responsive information for the calendar year to date, unless otherwise instructed.

P. **Duty to Estimate:** If you are unable to answer any interrogatory fully, supply such information as is available. Explain why such answer is incomplete, the efforts you made to obtain the information, and the source from which the complete answer may be obtained. If books and records that provide accurate answers are not available, enter best estimates and describe how the estimates were derived, including the sources or bases of such estimates. Estimated data should be followed by the notation “est.” If there is no reasonable way to make an estimate, provide an explanation.

CERTIFICATE OF COMPLIANCE

I, _____, pursuant to 28 U.S.C. § 1746, declare that:

1. I have confirmed that a diligent search has been made for all responsive documents and information in the possession, custody, or control of ACTIVE Network, LLC.
2. All of the documents and information identified through the search described in paragraph 1 above required by the Civil Investigative Demand dated July 20, 2020 that are within the possession, custody, or control of ACTIVE Network, LLC have been submitted to the Bureau custodian or deputy custodian identified in this Civil Investigative Demand.
3. If a document or tangible thing responsive to this Civil Investigative Demand has not been submitted, an interrogatory or a portion of an interrogatory has not been fully answered, or a report or a portion of a report has not been completed, a claim of privilege in compliance with 12 C.F.R. § 1080.8 has been submitted.
4. ACTIVE Network, LLC has reviewed all responsive answers, reports, other documents and tangible things (collectively “Responses”), and has designated as confidential all those Responses, and only those Responses, the disclosure of which would cause substantial harm to the competitive position of ACTIVE Network, LLC, as that term is used for purposes of the Freedom of Information Act.

I certify under penalty of perjury that the foregoing is true and correct. Executed on

_____.

Signature

DECLARATION CERTIFYING RECORDS OF
REGULARLY CONDUCTED BUSINESS ACTIVITY
Pursuant to 28 U.S.C. § 1746

I, _____, pursuant to 28 U.S.C. § 1746, declare that:

1. I am employed by _____ as _____
and by reason of my position am authorized and qualified to certify the authenticity of the records produced by ACTIVE Network, LLC and submitted with this Declaration.
2. The documents produced and submitted with this Declaration by ACTIVE Network, LLC are true copies of records of regularly conducted activity that were:
 - a. made at or near the time of the occurrence of the matters set forth, by, or from information transmitted by, a person with knowledge of those matters;
 - b. kept in the course of the regularly conducted business activity; and
 - c. made by the regularly conducted business activity as a regular practice.

I certify under penalty of perjury that the foregoing is true and correct. Executed on _____.

CERTIFICATE OF COMPLIANCE WITH RFPA

The Right to Financial Privacy Act of 1978 (RFPA) does not apply to the disclosure of financial records or information to the Bureau of Consumer Financial Protection “in the exercise of its authority with respect to a financial institution.” 12 U.S.C. § 3413(r). This civil investigative demand is also issued in connection with an investigation within the meaning of section 3413(h)(1)(A) of the RFPA. Therefore, in accordance with section 3403(b) of the RFPA, the undersigned certifies that, to the extent applicable, the provisions of the RFPA have been complied with as to the Civil Investigative Demand issued to ACTIVE Network, LLC, to which this Certificate is attached.

The information obtained will be used to determine whether the persons named or referred to in the attached Civil Investigative Demand are in compliance with laws administered by the Bureau of Consumer Financial Protection. The information may be transferred to another department or agency consistent with the RFPA.

Under the RFPA, good faith reliance on this certificate relieves the recipient and its employees and agents of any liability to customers in connection with the requested disclosures of financial records of these customers. *See* 12 U.S.C. § 3417(c).

John C. Wells
Consumer Financial Protection Bureau
Deputy Director, Office of Enforcement

Civil Investigative Demand Document Submission Standards

BCFP Office of Enforcement



CID Document Submission Standards

This describes the technical requirements for producing electronic document collections to the Bureau of Consumer Financial Protection (“the Bureau”)’s Office of Enforcement. All documents shall be produced in complete form, in color when necessary to interpret the document, unredacted unless privileged, and shall not be edited, cut, or expunged. These standards must be followed for all documents you submit in response to the CID. Any proposed file formats other than those described below must be discussed with the legal and technical staff of the Bureau’s Office of Enforcement prior to submission.

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A. Transmittal Instructions

- 1) A cover letter should be included with each production. The following information should be included in the letter:
 - a) Name of the party making the production and the date of the CID to which the submission is responsive.
 - b) List of each piece of media (hard drive, thumb drive, DVD or CD) included in the production (refer to the media by the unique number assigned to it, see ¶ 4)
 - c) List of custodians, identifying:
 - i) The Bates Range (and any gaps therein) for each custodian,
 - ii) Total number of images for each custodian, and
 - iii) Total number of native files for each custodian
 - d) List of fields in the order in which they are listed in the metadata load file.
 - e) The specification(s) or portions thereof of the CID to which the submission is responsive.
- 2) Documents created or stored electronically MUST be produced in their original electronic format, not converted to another format such as PDF.
- 3) Data may be produced on CD, DVD, USB thumb drive, or hard drive; use the media requiring the least number of deliverables.
 - a) Magnetic media shall be carefully packed to avoid damage and must be clearly marked on the outside of the shipping container:
 - i) "MAGNETIC MEDIA – DO NOT USE METAL DETECTOR"
 - ii) "MAY BE OPENED FOR POSTAL INSPECTION"
 - b) CD-R CD-ROMs should be formatted to ISO 9660 specifications;
 - c) DVD-ROMs for Windows-compatible personal computers are acceptable;
 - d) USB 2.0 thumb drives for Windows-compatible personal computers are acceptable;
 - e) USB 3.0 or USB 3.0/eSATA external hard disk drives, formatted in a Microsoft Windows-compatible file system (FAT32 or NTFS), uncompressed data are acceptable.
- 4) Label all media with the following:
 - a) Production date
 - b) Bates range
 - c) Disk number (1 of X), if applicable
 - d) Name of producing party
 - e) A unique production number identifying each production
- 5) All productions must be produced free of computer viruses. Infected productions may affect the timing of your compliance with the CID.

- 6) All produced media must be encrypted. Encryption format must be agreed upon prior to production.
 - a) Data deliveries should be encrypted at the disc level.
 - b) Decryption keys should be provided separately from the data delivery via email or phone.
- 7) Passwords for documents, files, and compressed archives should be provided separately either via email or in a separate cover letter from the data.

B. Delivery Formats

1) General ESI Standards

Before submitting any Electronically Stored Information (“ESI”) or any other documents submitted in electronic form that do not conform completely to the listed specifications, you must confirm with the Bureau that the proposed formats and media types that contain such ESI will be acceptable. You are encouraged to discuss your specific form of submission, and any related questions with the Bureau as soon as is practicable and not later than the Meet and Confer required pursuant to 12 C.F.R. § 1080.6(c).

All productions must follow the specifications outlined below:

De-duplication

De-duplication of documents should be applied across custodians (global); each custodian should be identified in the Custodian field in the metadata load file separated by semi-colon. The first name in the Custodian list should represent the original holder of the document.

Bates Numbering Documents

The Bates number must be a unique, sequential, consistently formatted identifier, i.e., an alpha prefix unique to each producing party along with a fixed length number, i.e., ABC0000001. This format must remain consistent across all productions. There should be no space in between the prefix and the number. The number of digits in the numeric portion of the format should not change in subsequent productions, nor should hyphens or other separators be added or deleted.

Document Retention / Preservation of Metadata

The recipient of this CID should use reasonable measures to maintain the original native source documents in a manner so as to preserve the metadata associated with these

electronic materials as it existed at the time of the original creation.

2) Native and Image Production

In general, and subject to the specific instructions below: (1) produce electronic documents in their complete native/original format along with corresponding bates-labeled single page TIFF images (with the exception of large spreadsheets and/or text files, those files should be processed and a placeholder TIFF image indicating that they were produced natively provided); (2) scan and process all paper documents into single page TIFF images, OCR the images, and apply bates numbers to each page of the image; (3) produce fully searchable document level text for every produced document; and (4) produce metadata for every produced document in a data file that conforms to the specific instructions below.

a) Metadata File

All produced documents, regardless of their original file format, must be produced with the below-described metadata fields in a data file (.DAT).

- i) The first line of the .DAT file must be a header row identifying the field names.
- ii) The .DAT file must use the following default delimiters:

TABLE 1: DAT FILE DELIMITERS

Comma	,	ASCII character (020)
Quote	"	ASCII character (254)
Newline	␣	ASCII character (174)

- iii) Date fields should be provided in the format: mm/dd/yyyy
- iv) All attachments should sequentially follow the parent document/email.
- v) All documents shall be produced in both their native/original form and as a corresponding bates-labeled single page TIFF image; provide the link to the original/native document in the NATIVELINK field.
- vi) Produce extracted metadata for each document in the form of a .DAT file, and include these fields (fields should be listed but left blank if not applicable):

TABLE 2: DAT FILE FIELDS

Field Name	Description
Required Fields	
BATES_BEGIN	First Bates number of native file document/email
BATES_END	Last Bates number of native file document/email **The BATES_END field should be populated for single page documents/emails
ATTACH_BEGIN	First Bates number of attachment/family range
ATTACH_END	Last Bates number of attachment/family range
ATTACH_NAME	Populates parent records with original filenames of all attached records, separated by semi-colons.
PRIV	Indicate "YES" if document has a Privilege claim
ROG_NUM	Indicate Interrogatory number(s) document is responsive to. (ROG ##) If multiple, separate by semi-colon
DR_NUM	Indicate Document Request document is responsive to. (DR ##) If multiple, separate by semi-colon
RECORDTYPE	<u>Email</u> : Populate field as "E-Mail" <u>Email Attachment</u> : Populate field as "Attachment (E-mail)" <u>Loose Native</u> : Populate field as "E-Document" <u>Other Attachment</u> : Populate field as "Attachment" <u>Scanned Paper</u> : Populate field as "Paper"
CUSTODIAN	Individual(s) or department(s) from which the record originated **semi-colon should be used to separate multiple entries
FILENAME	Email: Filename of loose email or subject of non-loose email Non-email: original file name
PGCOUNT	Number of pages in document/email
MD5HASH	The 32 digit value representing each unique document
SOURCE	Email: Path to email container and email container name Non-email: Original path to source archive folder or files
FOLDERPATH	Email: Folder path within email container Non-email: Folder path to file
DATE_CREATED	The date the electronic file was created
TIME_CREATED	The time the electronic file was created
DATE_MOD	Date an electronic file was last modified
TIME_MOD	Time an electronic file was last modified
PRINT_DATE	Date the document was last printed
PRINT_TIME	Time the document was last printed

FILE_SIZE	Size of native file document/email in KB
FILE_EXT	The file extension representing the email or native file document
AUTHOR	Email: (empty) Non-email: Author of the document
SUBJECT	Subject metadata from electronic files (non-email)
COMPANY	Company (organization) metadata from electronic files
NATIVELINK	Hyperlink to the email or native file document **The linked file must be named per the BATES_BEGIN Number
TEXTPATH	Contains path to OCR/Extracted text file that is titled after the document BATES_BEGIN
Additional Fields for Email Productions	
FROM	Sender of email
TO	Recipient(s) of email **semi-colon should be used to separate multiple entries
CC	Carbon copy recipient(s) **semi-colon should be used to separate multiple entries
BCC	Blind carbon copy recipient(s) **semi-colon should be used to separate multiple entries
EMAIL_SUBJECT	"Subject" line of the email
DATE_SENT	Date and time that the email message was sent.
DATE_RECVD	Date and time that the email message was received.
TIME_ZONE	Time Zone processed in
CONVERSATION_INDEX	Conversation thread ID/Index value
PARENT_ID	Populated only for email attachments, this field will display the Image Tag field value of the attachment record's parent.

b) Document Text

Searchable text of the entire document must be provided for every record, at the document level.

- i) Extracted text must be provided for all documents that originated in electronic format.

Note: Any document in which text cannot be extracted must be OCR'd.

- ii) For documents redacted on the basis of any privilege, provide the OCR text for unredacted/unprivileged portions.

- iii) The text should be delivered in the following method: As multi-page ASCII text files with the files named the same as the Bates_Begin field. Text files can be placed in a separate folder or included with the .TIFF files.
- c) Linked Native Files

Copies of original email and native file documents/attachments must be included for all electronic productions.

 - i) Native file documents must be named per the BATES_BEGIN number (the original file name should be preserved and produced in the FILENAME metadata field).
 - ii) The full path of the native file must be provided in the .DAT file in the NATIVELINK field.
- d) Images
 - i) Images should be single-page, Group IV TIFF files, scanned at 300 dpi.
 - ii) File names should be titled per endorsed bates number.
 - iii) Color should be preserved when necessary to interpret the document.
 - iv) Bates numbers should be endorsed on the lower right corner of all images.
 - v) For documents partially redacted on the basis of any privilege, ensure the redaction box is clearly labeled "REDACTED".
- e) Image Cross Reference File
 - i) The image cross-reference file is needed to link the images to the database. It is a comma-delimited file consisting of seven fields per line. There must be a line in the cross-reference file for every image in the database.

TABLE 3: IMAGE CROSS REFERENCE FILE FIELDS

Field Title	Description
ImageID	The unique designation use to identify an image.
	Note: This imageID key must be a unique and fixed length number. This number will be used in the .DAT file as the ImageID field that links the database to the images. The format of this image key must be consistent across all productions. We recommend that the format be an eight digit number to allow for the possible increase in the size of a production.
VolumeLabel	Optional
ImageFilePath	The full path to the image file.
DocumentBreak	The letter "Y" denotes the first page of a document. If this field is blank, then the page is not the first page of a document.
FolderBreak	Leave empty
BoxBreak	Leave empty
PageCount	Optional

	<i>*This file should not contain a header row.</i>
--	--

SAMPLE:

```

IMG0000001,OPTIONALVOLUMENAME,E:\001\IMG0000001.TIF,Y,,,3
IMG0000002,OPTIONALVOLUMENAME,E:\001\IMG0000002.TIF,,,,
IMG0000003,OPTIONALVOLUMENAME,E:\001\IMG0000003.TIF,,,,
IMG0000004,OPTIONALVOLUMENAME,E:\001\IMG0000004.TIF,Y,,,1
IMG0000005,OPTIONALVOLUMENAME,E:\001\IMG0000005.TIF,Y,,,2
IMG0000006,OPTIONALVOLUMENAME,E:\001\IMG0000006.TIF,,,,

```

3) PDF File Production

When approved, Adobe PDF files may be produced in lieu of TIFF images for scanned paper productions (metadata must also be produced in accordance with the instructions above):

- a) PDF files should be produced in separate folders named by the Custodian.
- b) All PDFs must be unitized at the document level, i.e. each PDF should represent a discrete document; a single PDF cannot contain multiple documents.
- c) All attachments should sequentially follow the parent document.
- d) All PDF files must contain embedded text that includes all discernible words within the document, not selected text only. This requires all layers of the PDF to be flattened first.
- e) If PDF files are Bates endorsed, the PDF files must be named by the Bates range
- f) The metadata load file listed in 2.a. should be included.

4) Transactional Data

If transactional data must be produced, further discussion must be had to ensure the intended export is properly composed. If available, a data dictionary should accompany the production, if unavailable; a description of fields should accompany transactional data productions. The following formats are acceptable:

- MS Access
- XML
- CSV
- TSV
- Excel (with prior approval)

5) Audio/Video/Electronic Phone Records

- a) Audio files must be produced in a format that is playable using Microsoft Windows Media Player. Types of audio files that will be accepted include:
 - Nice Systems audio files (.aud). AUD files offer efficient compression and would be

preferred over both NMF and WAV files.

- Nice Systems audio files (.nmf).
- WAV Files
- MP3, MP4
- WMA
- AIF

Produced audio files must be in a separate folder compared to other data in the production.

Additionally, the call information (metadata) related to each audio recording must be produced if it exists. The metadata file must be produced in delimited text format (DAT, CSV, or TXT), using a tab or pipe delimiter. Field names must be included in the first row of the metadata file. Please note that the field names are case sensitive and should be created as listed below. The metadata must include, if available, the following fields:

TABLE 4: AUDIO METADATA FIELDS

AgentName	Name of agent/employee
AgentId	Unique identifier of agent/employee
Group	Name for a collection of agents
Supervisor	Name of the Agent's supervisor
Site	Location of call facility
DNIS	Dialed Number Identification Service, identifies the number that was originally called
Extension	Extension where call was routed
CallDirection	Identifies whether the call was inbound, outbound, or internal
CallType	Purpose of the call
DURATION	Duration of call
CustomerId	Customer's identification number
CustomerCity	Customer's city of residence
CustomerState	Customer's state of residence
CallDateTime	Date and start time of call (MM/DD/YYYY HH:MM:SS)
CUSTOMERNAME	Name of person called
FileName	Filename of audio file
BATES_BEGIN	Unique number of the audio file

CALLEDPARTYNUMBER	The call center or phone number called
CALLSIZE	File size of audio file
CALLSERVICE	Call service code
MD5HASH	The 32 digit value representing each unique document
DOC_REQ	Document request number to which the file is responsive
CUSTODIAN	Individual(s) or department(s) from which the recording originated
FOLDERPATH	Folder path of the audio file in the original source
SOURCE	Original path to where the source file resided
TIMEZONE	The time zone of the original call
GROUPID	A unique group identifier for grouping multiple calls
CODEC	Encoding/decoding of the audio digital stream
BITRATE	The number of bits that are conveyed or processed per unit of time

Supported Date Format	Example
mm/dd/yyyy hh:mm:ss am/pm	01/25/1996 10:45:15 am

The filename is used to link the metadata to the produced audio file. The file name in the metadata and the file name used to identify the corresponding audio file must match exactly.

- b) Video files must be produced in a format that is playable using Microsoft Windows Media Player along with any available metadata. If it is known that the video files do not contain associated audio, indicate this in the accompanying transmittal letter.

Types of video files accepted include:

- MPG
- AVI
- WMV
- MOV
- FLV

C. Production of Partially Privileged Documents

If a portion of any material called for by this CID is withheld based on a claim of privilege, those portions may be redacted from the responsive material as long as the following conditions are met.

- a) If originally stored as native electronic files, the image(s) of the unredacted portions are submitted in a way that preserves the same appearance as the original without the redacted material (i.e., in a way that depicts the size and location of the redactions). The OCR text will be produced from the redacted image(s). Any redacted, privileged material should be clearly labeled to show the redactions on the tiff image(s). Any metadata not being withheld for privilege should be produced in the DAT file; any content (e.g., PowerPoint speaker notes, Word comments, Excel hidden rows, sheets or columns) contained within the native and not being withheld for privilege should be tiffed and included in the production.
- b) If originally in hard copy form, the unredacted portions are submitted in a way that depicts the size and location of the redactions; for example, if all of the content on a particular page is privileged, a blank, sequentially numbered page should be included in the production where the responsive material, had it not been privileged, would have been located.

What is the CFPB Extranet?

The Consumer Financial Protection Bureau (CFPB) Extranet enables organizations to securely upload files and receive a file transfer receipt.

How does it work?

1. If you would like to send your productions to the Bureau via the Extranet, you will need to notify the paralegal or other deputy custodian assigned to your matter in advance. The paralegal will request contact information for any individuals in your organization that require access to the Extranet. This information is needed in order to set up your Extranet accounts.
2. Once the Extranet Support team sets up the account, they will send an e-mail with instructions to activate the account.
3. Once activated, files may be uploaded at <https://extranet.cfpb.gov>.
4. Choose the folder relevant to your Matter. Files cannot be uploaded to the root folder.
5. Be sure to choose the correct files to upload. Once you upload files, you won't be able to view, modify, or remove them.
6. Choose files to upload by selecting the "Upload" button or by using drag-and-drop functionality.
7. Uploaded files are transferred to another CFPB server every 20 minutes. After this happens, you will receive a file transmission receipt e-mail and the files will be removed from the Extranet.
8. If there is a problem receiving a file, it will be noted in the file transmission receipt.



What else do I need to know?

Account expiration

Accounts expire 6 months after the creation date per CFPB's cybersecurity regulations. Accounts can be re-created quickly by the CFPB's Paralegal or other point of contact.

Multi-factor authentication

Extranet access requires the use of a one-time passcode for each login. Passcodes can be sent via e-mail, voice message, or text.

Upload policies

Size: Maximum 2 GB per file

Quantity: There is no limit to how many files can be uploaded simultaneously

File types: A list of prohibited file types is available on the 'CFPB Help' page (find the link at the top right of the page)

Directories: The system does not support uploading directories (folders). To upload a directory, please compress (or zip) the directory and upload the compressed file. Please do not encrypt the zip files, as the pipe is already encrypted.

Automatic log-out

Your account will be logged out after 10 minutes of inactivity.

Password policies

Length: 12 or more characters

Complexity: must contain a digit, a symbol, an uppercase letter and a lowercase letter

Supported browsers

Microsoft Internet Explorer 8 through 11
(Compatibility View is not supported)

Google Chrome 33.x and above

Apple Safari 5.x and 6.x running on OS X only

Mozilla Firefox 24.x and above

Having trouble?

Please contact your Deputy Custodian or point of contact if you have any problems accessing the system. If necessary, he or she will coordinate assistance with the CFPB's technical support team.

Helpful links

Add, edit or remove delivery methods for receiving one-time passcodes:

<https://login.extranet.cfpb.gov/updateprofile>

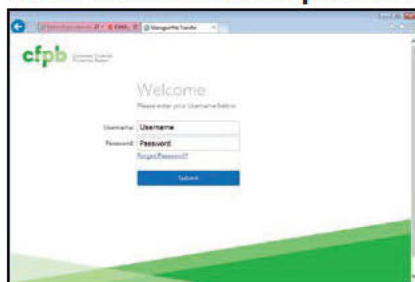
Change your password:

<https://login.extranet.cfpb.gov/changepassword>

Login and upload flow

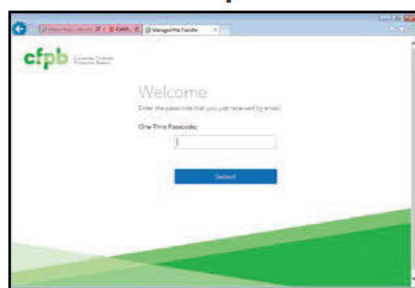
1 Login screen

Enter username and password



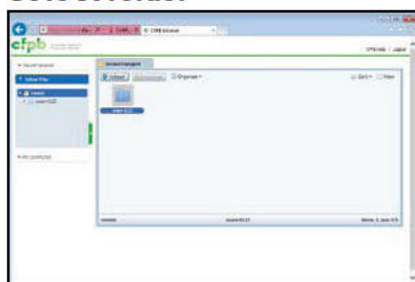
2 Login screen

Enter one-time passcode



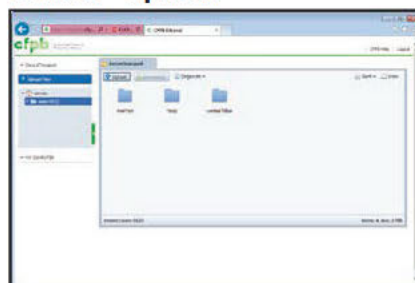
3 Root folder

Select folder



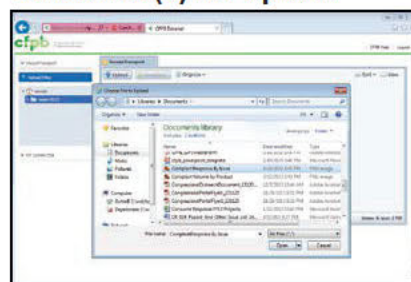
4 Selected folder

Select "Upload"



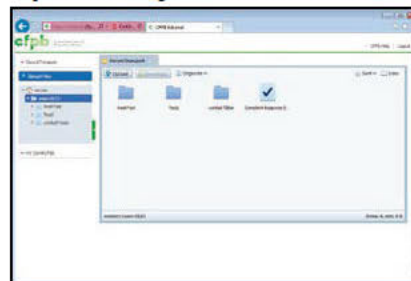
5 File browser

Select file(s) for upload



6 Selected folder

Upload any additional files



7 Wait for files to transfer to CFPB internal servers



8 Transfer receipt

Review transfer receipt



Note: After your files have been transferred to the CFPB's internal servers, they are no longer viewable on the Extranet website.

§ 1081.405 Decision of the Director.

(a) Upon appeal from or upon further review of a recommended decision, the Director will consider such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition, will, to the extent necessary or desirable, exercise all powers which he or she could have exercised if he or she had made the recommended decision. In proceedings before the Director, the record shall consist of all items part of the record below in accordance with § 1081.306; any notices of appeal or order directing review; all briefs, motions, submissions, and other papers filed on appeal or review; and the transcript of any oral argument held. Review by the Director of a recommended decision may be limited to the issues specified in the notice(s) of appeal or the issues, if any, specified in the order directing further briefing. On notice to all parties, however, the Director may, at any time prior to issuance of his or her decision, raise and determine any other matters that he or she deems material, with opportunity for oral or written argument thereon by the parties.

(b) Decisional employees may advise and assist the Director in the consideration and disposition of the case.

(c) In rendering his or her decision, the Director will affirm, adopt, reverse, modify, set aside, or remand for further proceedings the recommended decision and will include in the decision a statement of the reasons or basis for his or her actions and the findings of fact upon which the decision is predicated.

(d) At the expiration of the time permitted for the filing of reply briefs with the Director, the Office of Administrative Adjudication will notify the parties that the case has been submitted for final Bureau decision. The Director will issue and the Office of Administrative Adjudication will serve the Director's final decision and order within 90 days after such notice, unless within that time the Director orders that the adjudication proceeding or any aspect thereof be remanded to the hearing officer for further proceedings.

(e) Copies of the final decision and order of the Director shall be served upon each party to the proceeding, upon other persons required by statute, and, if directed by the Director or required by statute, upon any appropriate State or Federal supervisory authority. The final decision and order will also be published on the Bureau's Web site or as otherwise deemed appropriate by the Bureau.

§ 1081.406 Reconsideration.

Within 14 days after service of the Director's final decision and order, any party may file with the Director a petition for reconsideration, briefly and specifically setting forth the relief desired and the grounds in support thereof. Any petition filed under this section must be confined to new questions raised by the final decision or final order and upon which the petitioner had no opportunity to argue, in writing or orally, before the Director. No response to a petition for reconsideration shall be filed unless requested by the Director, who will request such response before granting any petition for reconsideration. The filing of a petition for reconsideration shall not operate to stay the effective date of the final decision or order or to toll the running of any statutory period affecting such decision or order unless specifically so ordered by the Director.

§ 1081.407 Effective date; stays pending judicial review.

(a) Other than consent orders, which shall become effective at the time specified therein, an order to cease and desist or for other affirmative action under section 1053(b) of the Dodd-Frank Act becomes effective at the expiration of 30 days after the date of service pursuant to § 1081.113(d)(2), unless the Director agrees to stay the effectiveness of the order pursuant to this section.

(b) Any party subject to a final decision and order, other than a consent order, may apply to the Director for a stay of all or part of that order pending judicial review.

(c) A motion for stay shall state the reasons a stay is warranted and the facts relied upon, and shall include supporting affidavits or other sworn statements, and a copy of the relevant portions of the record. The motion shall address the likelihood of the movant's success on appeal, whether the movant will suffer irreparable harm if a stay is not granted, the degree of injury to other parties if a stay is granted, and why the stay is in the public interest.

(d) A motion for stay shall be filed within 30 days of service of the order on the party. Any party opposing the motion may file a response within five days after receipt of the motion. The movant may file a reply brief, limited to new matters raised by the response, within three days after receipt of the response.

(e) The commencement of proceedings for judicial review of a final decision and order of the Director does not, unless specifically ordered by the Director or a reviewing court, operate as a stay of any order issued by the

Director. The Director may, in his or her discretion, and on such terms as he or she finds just, stay the effectiveness of all or any part of an order pending a final decision on a petition for judicial review of that order.

Dated: June 4, 2012.

Richard Cordray,
Director, Bureau of Consumer Financial Protection.

[FR Doc. 2012-14061 Filed 6-28-12; 8:45 am]

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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1080

[Docket No.: CFPB-2011-0007]

RIN 3170-AA03

Rules Relating to Investigations

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule.

SUMMARY: After considering the public comments on its interim final rule for the Rules Relating to Investigations, the Bureau of Consumer Financial Protection (Bureau), pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act), is making revisions to its procedures for investigations under section 1052 of the Dodd-Frank Act.

DATES: The final rule is effective June 29, 2012.

FOR FURTHER INFORMATION CONTACT: Peter G. Wilson, Office of the General Counsel, Consumer Financial Protection Bureau, 1700 G Street NW., Washington, DC 20552, (202) 435-7585.

SUPPLEMENTARY INFORMATION:

I. Background

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) was signed into law on July 21, 2010. Title X of the Dodd-Frank Act established the Bureau of Consumer Financial Protection (Bureau) to regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws. The Dodd-Frank Act transferred to the Bureau the consumer financial protection functions formerly carried out by the Federal banking agencies, as well as certain authorities formerly carried out by the Department of Housing and Urban Development (HUD) and the Federal Trade Commission (FTC). As required by section 1062 of the Dodd-Frank Act, 12 U.S.C. 5582, the Secretary of the Treasury selected a

designated transfer date and the Federal banking agencies' functions and authorities transferred to the Bureau on July 21, 2011.

The Dodd-Frank Act authorizes the Bureau to conduct investigations to ascertain whether any person is or has been engaged in conduct that, if proved, would constitute a violation of any provision of Federal consumer financial law. Section 1052 of the Dodd-Frank Act sets forth the parameters that govern these investigations. 12 U.S.C. 5562. Section 1052 became effective immediately upon transfer on July 21, 2011 and did not require rules to implement its provisions. On July 28, 2011, the Bureau issued the interim final rule for the Rules Relating to Investigations (Interim Final Rule) to provide parties involved in Bureau investigations with clarification on how to comply with the statutory requirements relating to Bureau investigations.

II. Summary of the Final Rule

Consistent with section 1052 of the Dodd-Frank Act, the final rule for the Rules Relating to Investigations (Final Rule) describes a number of Bureau policies and procedures that apply in an investigational, nonadjudicative setting. Among other things, the Final Rule sets forth (1) the Bureau's authority to conduct investigations, and (2) the rights of persons from whom the Bureau seeks to compel information in investigations.

Like the Interim Final Rule, the Final Rule is modeled on investigative procedures of other law enforcement agencies. For guidance, the Bureau reviewed the procedures currently used by the FTC, the Securities and Exchange Commission (SEC), and the prudential regulators, as well as the FTC's recently proposed amendments to its nonadjudicative procedures. In light of the similarities between section 1052 of the Dodd-Frank Act and section 20 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq.*, the Bureau drew most heavily from the FTC's nonadjudicative procedures in constructing the rules.

The Final Rule lays out the Bureau's authority to conduct investigations before instituting judicial or administrative adjudicatory proceedings under Federal consumer financial law. The Final Rule authorizes the Director, the Assistant Director of the Office of Enforcement, and the Deputy Assistant Directors of the Office of Enforcement to issue civil investigative demands (CIDs) for documentary material, tangible things, written reports, answers to questions, or oral testimony. The

demands may be enforced in district court by the Director, the General Counsel, or the Assistant Director of the Office of Enforcement. The Final Rule also details the authority of the Bureau's investigators to conduct investigations and hold investigational hearings pursuant to civil investigative demands for oral testimony.

Furthermore, the Final Rule sets forth the rights of persons from whom the Bureau seeks to compel information in an investigation. Specifically, the Final Rule describes how such persons should be notified of the purpose of the Bureau's investigation. It also details the procedures for filing a petition for an order modifying or setting aside a CID, which the Director is authorized to rule upon. And it describes the process by which persons may obtain copies of or access to documents or testimony they have provided in response to a civil investigative demand. In addition, the Final Rule describes a person's right to counsel at investigational hearings.

III. Legal Authority

As noted above, section 1052 of the Dodd-Frank Act outlines how the Bureau will conduct investigations and describes the rights of persons from whom the Bureau seeks information in investigations. This section became effective immediately upon the designated transfer date, July 21, 2011, without any requirement that the Bureau first issue procedural rules. Nevertheless, the Bureau believes that the legislative purpose of section 1052 will be furthered by the issuance of rules that specify the manner in which persons can comply with its provisions.

Section 1022 of the Dodd-Frank Act authorizes the Director to prescribe rules as may be necessary or appropriate for the Bureau to administer and carry out the purposes and objectives of Federal consumer financial laws and to prevent evasion of those laws. 12 U.S.C. 5512. The Bureau believes that the Final Rule will effectuate the purpose of section 1052 and facilitate compliance with Bureau investigations.

IV. Overview of Public Comments on the Interim Final Rule

After publication of the Interim Final Rule on July 28, 2011, the Bureau accepted public comments until September 26, 2011. During the comment period, the Bureau received seven comments. Two of the comments were submitted by individual consumers. Four trade associations and a mortgage company also submitted comments. The trade associations represent credit unions, banks, consumer credit companies, members of

the real estate finance industry, and other financial institutions.

The commenters generally support the Interim Final Rule. Most sections of the Interim Final Rule received no comment and are being finalized without change. The comments did, however, contain questions and recommendations for the Bureau.

Several of the commenters expressed concern that the Interim Final Rule appeared to provide staff-level Bureau employees with unchecked authority to initiate investigations and issue CIDs, or that the Interim Final Rule otherwise did not provide sufficient oversight for particular actions.

A number of commenters expressed concern about sections of the Interim Final Rule that relate to CIDs. One trade association recommended that a statement of "the purpose and scope" of a Bureau investigation—in addition to a notification of the nature of the conduct constituting the alleged violation under investigation and the applicable provisions of law—be included in CIDs. A commenter suggested that the Bureau require a conference between CID recipients and the Assistant Director of the Office of Enforcement to negotiate the terms of compliance with the demand. Three of the trade associations noted concern with the statement that extensions of time are disfavored for petitions to modify or set aside CIDs. Two commenters questioned who would rule on such petitions without a confirmed Director. One trade association commented that witnesses should be permitted to object to questions demanding information outside of the scope of the investigation during an investigational hearing pursuant to a CID for oral testimony.

A number of commenters expressed concern about maintaining the confidentiality of demand material, sharing information with other State and Federal agencies, and the duties of the custodians of those materials. For example, one trade association and the mortgage company recommended that investigations should remain confidential in all circumstances. Another trade association asserted that the Bureau is not permitted to engage in joint investigations with State attorneys general.

The Bureau reviewed all of the comments on its Interim Final Rule thoroughly and addresses the significant issues they raise herein. Although most sections of the Interim Final Rule received no comment and are being finalized without change, the Bureau has made several changes to the Interim Final Rule based on the comments it received. The comments and these

changes are discussed in more detail in parts V and VI of the **SUPPLEMENTARY INFORMATION**.

V. General Comments

Some comments on the Interim Final Rule were not directed at a specific section but rather concerned issues of general applicability. The Bureau addresses those comments in this section and addresses comments related to specific sections of the Interim Final Rule in part VI.

One commenter asked the Bureau to specify who would rule on petitions to set aside or modify CIDs while the Bureau lacked a Director. This commenter also asked who would review requests to the Attorney General under § 1080.12 for authority to immunize witnesses and to order them to testify or provide other information. The President appointed a Director of the Bureau on January 4, 2012. Therefore, both questions posed by this commenter are moot. The Director or any official to whom the Director has delegated his authority pursuant to 12 U.S.C. 5492(b) will rule on petitions to set aside or modify CIDs. Furthermore, the Bureau has revised § 1080.12 to clarify that only the Director has the authority to request approval from the Attorney General for the issuance of an order immunizing witnesses.

A commenter asserted that section 1052(c)(1) of the Dodd-Frank Act prohibits the Bureau from issuing CIDs after the institution of any proceedings under Federal consumer financial laws, including proceedings initiated by a State or a private party. The commenter argued that a CID should be accompanied by a certification that the demand will have no bearing on any ongoing proceeding. Section 1052(c)(1) provides, in relevant part, that “the Bureau may, before the institution of any proceedings under the Federal consumer financial law, issue in writing, and cause to be served upon such person, a civil investigative demand.” The language “before the institution of any proceeding under Federal consumer financial law” refers to the institution of proceedings by the Bureau. It does not limit the Bureau’s authority to issue CIDs based upon the commencement of a proceeding by other parties.

Another commenter requested that the Bureau exempt all credit unions from Bureau investigations. The Bureau believes that granting an exemption from the Bureau’s enforcement authority through the Final Rule would be inappropriate and that there is an insufficient record to support such an exemption.

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

VI. Section-by-Section Summary

Section 1080.1 Scope

This section describes the scope of the Interim Final Rule. It makes clear that these rules only apply to investigations under section 1052 of the Dodd-Frank Act. The Bureau received no comment on § 1080.1 of the Interim Final Rule and is adopting it as the Final Rule without change.

Section 1080.2 Definitions

This section of the Interim Final Rule defines several terms used throughout the rules. Many of these definitions also may be found in section 1051 of the Dodd-Frank Act.

A commenter questioned the breadth of the definition of the term “Assistant Director of the Division of Enforcement.” The commenter argued that because that term was defined to include “any Bureau employee to whom the Assistant Director of the Division of Enforcement has delegated authority to act under this part,” the Interim Final Rule could give Bureau employees inappropriately broad authority to take certain actions, such as issuing CIDs.

The Bureau has revised the Final Rule in response to these comments. The Final Rule identifies those with authority to take particular actions under each section of the Final Rule. Sections 1080.4 (initiating and conducting investigations) and 1080.6 (civil investigative demands) of the Final Rule clarify that the authority to initiate investigations and issue CIDs cannot be delegated by the identified officials. The Final Rule also changes the defined term “Division of Enforcement” to “Office of Enforcement” to reflect the Bureau’s current organizational structure.

Section 1080.3 Policy as to Private Controversies

This section of the Interim Final Rule states the Bureau’s policy of pursuing investigations that are in the public

interest. Section 1080.3 is consistent with the Bureau’s mission to protect consumers by investigating potential violations of Federal consumer financial law. The Bureau received no comments on § 1080.3 of the Interim Final Rule and is adopting it as the Final Rule without change.

Section 1080.4 Initiating and Conducting Investigations

This section of the Interim Final Rule explains that Bureau investigators are authorized to conduct investigations pursuant to section 1052 of the Dodd-Frank Act.

A commenter observed that this section of the Interim Final Rule did not explicitly provide a procedure for senior agency officials to authorize the opening of an investigation. The commenter argued that only senior agency officials should decide whether to initiate investigations. The commenter questioned whether staff-level employees could open investigations and issue CIDs without sufficient supervision, and noted that the FTC’s analogous rule specifically lists the senior officials to whom the Commission has delegated, without power of redelegation, the authority to initiate investigations.

A commenter also expressed concern that the FTC’s analogous rule explicitly provides that FTC investigators must comply with the laws of the United States and FTC regulations. According to the commenter, such language is necessary to ensure that the Bureau complies with the Right to Financial Privacy Act (RFPA) to the extent that statute applies to the Bureau. The commenter also believes that this language is needed to guard against investigations undertaken for what the commenter characterized as the impermissible purpose of aiding State attorneys general or State regulators. The commenter suggested that the Bureau add a statement to this section of the Interim Final Rule similar to the FTC’s rule requiring compliance with Federal law and agency regulations.

The Final Rule clarifies that only the Assistant Director or any Deputy Assistant Director of the Office of Enforcement has the authority to initiate investigations. The Bureau has significant discretion to determine whether and when to open an investigation, and the public benefits from a process whereby the Bureau can open and close investigations efficiently. But the Bureau did not intend its rules to be interpreted so broadly as to suggest that any staff-level employee could unilaterally open an investigation or issue a CID. The Final

Rule also provides that Bureau investigators will perform their duties in accordance with Federal law and Bureau regulations.

Section 1080.5 Notification of Purpose

This section of the Interim Final Rule specifies that a person compelled to provide information to the Bureau or to testify in an investigational hearing must be advised of the nature of the conduct constituting the alleged violation under investigation and the applicable provisions of law. This section of the Interim Final Rule implements the requirements for CIDs described in section 1052(c)(2) of the Dodd-Frank Act.

Commenters noted that although the Dodd-Frank Act and the FTC Act both require CIDs to state “the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation,” the two agencies’ implementing regulations on this topic differ. Both agencies’ regulations require a statement of the nature of the conduct at issue and the relevant provisions of law, but the FTC rule also requires that the recipient of the CID be advised of “the purpose and scope” of the investigation. Commenters argued that the Bureau should add this phrase to its rule because excluding it would lead to requests for materials outside the scope of an investigation. One commenter argued that only senior agency officials should authorize investigations to ensure that CIDs are relevant to the purpose and scope of the Bureau’s investigations.

The language in § 1080.5 of the Interim Final Rule mirrors the language of the Dodd-Frank Act, which provides that “[e]ach civil investigative demand shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.” The Bureau believes that the information covered by this statutory language provides sufficient notice to recipients of CIDs. As discussed above, § 1080.4 (initiating and conducting investigations) of the Final Rule limits the authority to open investigations to the Assistant Director or any Deputy Assistant Director of the Office of Enforcement. Similarly, § 1080.6 of the Final Rule (civil investigative demands) limits the authority to issue CIDs to the Director of the Bureau, the Assistant Director of the Office of Enforcement, and the Deputy Assistant Directors of the Office of Enforcement. Thus, one of these identified officials will review and approve the initiation of all investigations and the issuance of all

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

The Bureau therefore adopts this section of the Interim Final Rule as the Final Rule without change.

Section 1080.6 Civil Investigative Demands

This section of the Interim Final Rule lays out the Bureau’s procedures for issuing CIDs. It authorizes the Assistant Director of the Office of Enforcement to issue CIDs for documentary material, tangible things, written reports, answers to questions, and oral testimony. This section of the Interim Final Rule details the information that must be included in CIDs and the requirement that responses be made under a sworn certificate. Section 1080.6 of the Interim Final Rule also authorizes the Assistant Director of the Office of Enforcement to negotiate and approve the terms of compliance with CIDs and grant extensions for good cause. Finally, this section of the Interim Final Rule describes the procedures for seeking an order to modify or set aside a CID, which the Director is authorized to rule upon.

One commenter argued that § 1080.6(a) permits almost any Bureau employee to issue CIDs without sufficient supervision. The commenter stated that this lack of oversight is problematic and does not reflect Congress’ intent when it enacted the Act.

Section 1080.6(a) of the Final Rule limits the authority to issue CIDs to the Director, the Assistant Director of the Office of Enforcement, and the Deputy Assistant Directors of the Office of Enforcement. This change to the Final Rule balances the efficiency of the Bureau’s investigative process with appropriate supervision and oversight.

A commenter suggested that the Bureau require a conference between the CID recipient and the Assistant Director of the Office of Enforcement within ten days of service of the CID to negotiate and approve the terms of compliance. The commenter envisioned a conference analogous to a discovery planning conference under the Federal Rules of Civil Procedure, during which the parties could discuss requests for information, appropriate limitations on

the scope of requests, issues related to electronically stored information (ESI), issues related to privilege and confidential information, and a reasonable time for compliance. The commenter stated that this type of conference would better ensure prompt and efficient production of material and information related to the investigation.

The Bureau agrees that a conference between the parties within ten calendar days of serving a CID is likely to improve the efficiency of investigations, and § 1080.6(c) of the Final Rule provides for such a conference. The Final Rule does not, however, adopt the suggestion that the Assistant Director of the Office of Enforcement preside over all such conferences.

Several commenters also noted concern with the statement in § 1080.6(d) of the Interim Final Rule disfavoring extensions of time for petitioning for an order modifying or setting aside CIDs. One commenter argued that the 20-day period to file petitions, for which extensions of time are disfavored, is inconsistent with the “reasonable” period of time for compliance with the CID set forth in § 1080.6(a). The commenter also argued that this timeframe leaves a short period for the CID recipient to decide which documents are privileged or otherwise protected and to file a petition articulating privilege and scope objections. Another commenter noted that the analogous FTC rules do not include a provision disfavoring extensions for petitions to modify or set aside a CID. These commenters recommended that the Bureau delete the sentence related to disfavoring extensions. One commenter recommended that the rules be corrected to provide an independent review if a covered person believes a CID is without merit.

Like the Interim Final Rule, the Final Rule includes a provision disfavoring extensions of time for petitions to modify or set aside a CID. The Bureau believes its policy of disfavoring extensions is appropriate in light of its significant interest in promoting an efficient process for seeking materials through CIDs. By disfavoring extensions, the Bureau means to prompt recipients to decide within 20 days whether they intend to comply with the CID. The Final Rule also clarifies that this 20-day period should be computed with calendar days.

The Bureau notes that § 1080.6(d) of the Interim Final Rule (now § 1080.6(e) of the Final Rule) only provides the due date for a petition for an order modifying or setting aside a CID. It does not require recipients to comply fully

with CIDs within 20 days. In addition, the Final Rule provides several options to recipients of CIDs that need additional time to respond. For example, the recipient may negotiate for a reasonable extension of time for compliance or a rolling document production schedule pursuant to § 1080.6(c) of the Interim Final Rule (now § 1080.6(d) of the Final Rule).

Section 1080.6(e) of the Final Rule clarifies that recipients of CIDs should not assert claims of privilege through a petition for an order modifying or setting aside a CID. Instead, when privilege is the only basis for withholding particular materials, they should utilize the procedures set forth in § 1080.8 (withholding requested material) of the Final Rule. Section 1080.6(e) of the Final Rule also lays out the authority of Bureau investigators to provide to the Director a reply to a petition seeking an order modifying or setting aside a CID. Specifically, the Final Rule states that Bureau investigators may provide the Director with a statement setting forth any factual and legal responses to a petition. The Bureau will not make these statements or any other internal deliberations part of the Bureau's public records. Section 1080.6(g) of the Final Rule clarifies that the Bureau, however, will make publicly available both the petition and the Director's order in response. Section 1080.6(g) of the Final Rule also clarifies that if a CID recipient wants to prevent the Director from making the petition public, any showing of good cause must be made no later than the time the petition is filed. The Final Rule also adds a provision clarifying how the Bureau will serve the petitioner with the Director's order.

Finally, the Bureau believes the procedures for petitions to modify or set aside a CID set forth in the Final Rule adequately protect a covered person who believes a CID is without merit, and that an additional independent review is unnecessary.

Section 1080.7 Investigational Hearings

This section of the Interim Final Rule describes the procedures for investigational hearings initiated pursuant to a CID for oral testimony. It also lays out the roles and responsibilities of the Bureau investigator conducting the investigational hearing, which include excluding unauthorized persons from the hearing room and ensuring that the investigational hearing is transcribed, the witness is duly sworn, the transcript is a true record of the testimony, and the

transcript is provided to the designated custodian.

A commenter argued that the Bureau is not authorized to conduct joint investigations with State attorneys general under the Dodd-Frank Act and, correspondingly, State attorneys general cannot attend an investigational hearing as a representative of an agency with whom the Bureau is conducting a joint investigation. The commenter argued that Congress distinguished between State attorneys general and State regulatory agencies in section 1042 of the Dodd-Frank Act and that State attorneys general are therefore not "agencies" with whom the Bureau can partner. The commenter also asserted that the Bureau cannot share a copy of the transcript of an investigational hearing with another agency without the consent of the witness.

Another commenter argued that representatives of agencies with which the Bureau is conducting a joint investigation may be present at an investigational hearing only with the witness's consent. This commenter stated that the Bureau should recognize in the rules that a witness who does not consent to the presence of a representative of another agency at an investigational hearing should not be presumed guilty.

The Dodd-Frank Act states that the Bureau "may engage in joint investigations and requests for information, as authorized under this title." This statutory language permits the Bureau to engage in joint investigations with State or Federal law enforcement agencies, including State attorneys general, with jurisdiction that overlaps with the Bureau's. The Bureau's disclosure rules also permit the Bureau to share certain confidential information, including investigational hearing transcripts, with Federal or State agencies to the extent the disclosure is relevant to the exercise of an agency's statutory or regulatory authority. See 12 CFR 1070.43(b). In addition, neither the Dodd-Frank Act nor the rules require the consent of the witness to permit a representative of an agency with which the Bureau is conducting a joint investigation to be present at the hearing. Consent is required only when people other than those listed in the rule are included.

Thus, the Bureau adopts § 1080.7 of the Interim Final Rule as the Final Rule without change.

Section 1080.8 Withholding Requested Material

This section of the Interim Final Rule describes the procedures that apply when persons withhold material

responsive to a CID. It requires the recipient of the CID to assert a privilege by the production date and, if so directed in the CID, also to submit a detailed schedule of the items withheld. Section 1080.8 also sets forth the procedures for handling the disclosure of privileged or protected information or communications.

The Bureau received no comment on § 1080.8 of the Interim Final Rule and is adopting it as the Final Rule without substantive change.

Section 1080.9 Rights of Witnesses in Investigations

This section of the Interim Final Rule describes the rights of persons compelled to submit information or provide testimony in an investigation. It details the procedures for obtaining a copy of submitted documents or a copy of or access to a transcript of the person's testimony. This section of the Interim Final Rule also describes a witness's right to make changes to his or her transcript and the rules for signing the transcript.

Section 1080.9 of the Interim Final Rule lays out a person's right to counsel at an investigational hearing and describes his or her counsel's right to advise the witness as to any question posed for which an objection may properly be made. It also describes the witness's or counsel's rights to object to questions or requests that the witness is privileged to refuse to answer. This section of the Interim Final Rule states that counsel for the witness may not otherwise object to questions or interrupt the examination to make statements on the record but may request that the witness have an opportunity to clarify any of his or her answers. Finally, this section of the Interim Final Rule authorizes the Bureau investigator to take all necessary action during the course of the hearing to avoid delay and to prevent or restrain disorderly, dilatory, obstructionist, or contemptuous conduct, or contemptuous language.

A commenter noted that under the Interim Final Rule witnesses could not object during an investigational hearing on the ground that a question was outside the scope of the investigation. The commenter argued that a covered person's inability to raise such objections might allow "a fishing expedition." The commenter recommended amending § 1080.9(b) to allow objections based on scope.

Section 1052(c)(13)(D)(iii) of the Dodd-Frank Act states, in relevant part:

[a]n objection may properly be made, received, and entered upon the record when it is claimed that such person is entitled to

refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination, but the person shall not otherwise object to or refuse to answer any question, and such person or attorney shall not otherwise interrupt the oral examination.

Thus, to the extent the scope objection was grounded in a witness's constitutional or other legal right, it would be a proper objection.

The Final Rule clarifies that counsel may confer with a witness while a question is pending or instruct a witness not to answer a question only if an objection based on privilege or work product may properly be made. The Final Rule also describes counsel's limited ability to make additional objections based on other constitutional or legal rights. The Final Rule provides that if an attorney has refused to comply with his or her obligations in the rules of this part, or has allegedly engaged in disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language during an investigational hearing, the Bureau may take further action, including action to suspend or disbar the attorney from further participation in the investigation or further practice before the Bureau pursuant to 12 CFR 1081.107(c). The Final Rule also includes other nonsubstantive changes, including clarifying that the 30-day period that the witness has to sign and submit his or her transcript should be computed using calendar days.

Section 1080.10 Noncompliance With Civil Investigative Demands

This section of the Interim Final Rule authorizes the Director, the Assistant Director of the Office of Enforcement, and the General Counsel to initiate an action to enforce a CID in connection with the failure or refusal of a person to comply with, or to obey, a CID. In addition, they are authorized to seek civil contempt or other appropriate relief in cases where a court order enforcing a CID has been violated.

The Bureau received no comment on § 1080.10 of the Interim Final Rule and is adopting it as the Final Rule without substantive change.

Section 1080.11 Disposition

This section of the Interim Final Rule explains that an enforcement action may be instituted in Federal or State court or through administrative proceedings when warranted by the facts disclosed by an investigation. It further provides that the Bureau may refer investigations to appropriate Federal, State, or foreign government agencies as appropriate. This section of the Interim Final Rule

also authorizes the Assistant Director of the Office of Enforcement to close the investigation when the facts of an investigation indicate an enforcement action is not necessary or warranted in the public interest.

One commenter indicated that the Bureau's authority to refer investigations to other law enforcement agencies should be limited to circumstances when it is expressly authorized to do so by the Dodd-Frank Act, an enumerated consumer financial law, or other Federal law, because of potential risks to the confidentiality of the investigatory files.

The Bureau's ability to refer matters to appropriate law enforcement agencies is inherent in the Bureau's authority and is a corollary to the Bureau's statutorily recognized ability to conduct joint investigations. The documentary materials and tangible things obtained by the Bureau pursuant to a CID are subject to the requirements and procedures relating to disclosure of records and information in part 1070 of this title. These procedures for sharing information with law enforcement agencies provide significant and sufficient protections for these materials.

The Bureau has amended § 1080.11 to clarify that the Assistant Director and any Deputy Assistant Director of the Office of Enforcement are authorized to close investigations.

The Bureau adopts § 1080.11 of the Interim Final Rule with the changes discussed above.

Section 1080.12 Orders Requiring Witnesses To Testify or Provide Other Information and Granting Immunity

This section of the Interim Final Rule authorizes the Assistant Director of the Office of Enforcement to request approval from the Attorney General for the issuance of an order requiring a witness to testify or provide other information and granting immunity under 18 U.S.C. 6004. The Interim Final Rule also sets forth the Bureau's right to review the exercise of these functions and states that the Bureau will entertain an appeal from an order requiring a witness to testify or provide other information only upon a showing that a substantial question is involved, the determination of which is essential to serve the interests of justice. Finally, this section of the Interim Final Rule describes the applicable rules and time limits for such appeals.

A commenter questioned whether this section of the Interim Final Rule would permit any Bureau employee to request that the Attorney General approve the issuance of an order granting immunity

under 18 U.S.C. 6004 and requiring a witness to testify or provide information. The commenter noted that the Dodd-Frank Act authorizes the Bureau, with the Attorney General's permission, to compel a witness to testify under 18 U.S.C. 6004 if the witness invokes his or her privilege against self-incrimination. The commenter argued that this section should delegate the authority to seek permission to compel testimony to a specific individual to provide accountability and ensure that information is not disclosed to the Attorney General in a manner that violates the Right to Financial Privacy Act. The commenter noted that the FTC's analogous rule specifically lists the senior agency officials who are authorized to make such requests to the Attorney General, and identifies a liaison officer through whom such requests must be made. The commenter also suggested that § 1080.12(b) of the Interim Final Rule, which provides that the Assistant Director's exercise of this authority is subject to review by "the Bureau," specify who will conduct this review.

The Final Rule provides that only the Director of the Bureau has the authority to request approval from the Attorney General for the issuance of an order requiring a witness to testify or provide other information and granting immunity under 18 U.S.C. 6004. This change addresses the concern that requests for witness immunity would be made without oversight. Limiting this authority to the Director provides sufficient accountability.

Section 1080.13 Custodians

This section of the Interim Final Rule describes the procedures for designating a custodian and deputy custodian for material produced pursuant to a CID in an investigation. It also states that these materials are for the official use of the Bureau, but, upon notice to the custodian, must be made available for examination during regular office hours by the person who produced them.

A commenter suggested that the Bureau should detail the particular duties of custodians designated under this section and that, without an enumerated list of duties, the custodian would not have any responsibilities regarding CID materials. The commenter noted that the FTC Act requires the custodian to take specific actions, while the Dodd-Frank Act does not. The commenter suggested specifying a series of custodial duties, including (1) taking and maintaining custody of all materials submitted pursuant to CIDs or subpoenas that the Bureau issues,

including transcripts of oral testimony taken by the Bureau; (2) maintaining confidentiality of those materials as required by applicable law; (3) providing the materials to either House of Congress upon request, after ten days notice to the party that owns or submitted the materials; (4) producing any materials as required by a court of competent jurisdiction; and (5) complying at all times with the Trade Secrets Act.

Section 1052 of the Dodd-Frank Act sets forth the duties of the Bureau's custodian. Sections 1052(c)(3) through (c)(6) of the Dodd-Frank Act give the custodian responsibility for receiving documentary material, tangible things, written reports, answers to questions, and transcripts of oral testimony given by any person in compliance with any CID. Section 1052(d) of the Dodd-Frank Act, as well as the Bureau's Rules for Disclosure of Records and Information in part 1070 of this title, outline the requirements for the confidential treatment of demand material. Section 1052(g) addresses custodial control and provides that a person may file, in the district court of the United States for the judicial district within which the office of the custodian is situated, a petition for an order of such court requiring the performance by the custodian of any duty imposed upon him by section 1052 of the Dodd-Frank Act or by Bureau rule. These duties and obligations do not require additional clarification by rule.

The Final Rule clarifies that the custodian has the powers and duties of both section 1052 of the Dodd-Frank Act and 12 CFR 1070.3.

The Bureau adopts § 1080.13 of the Interim Final Rule with the changes discussed above.

Section 1080.14 Confidential Treatment of Demand Material and Non-Public Nature of Investigations

Section 1080.14 of the Interim Final Rule explains that documentary materials, written reports, answers to questions, tangible things, or transcripts of oral testimony received by the Bureau in any form or format pursuant to a CID are subject to the requirements and procedures relating to disclosure of records and information in part 1070 of this title. This section of the Interim Final Rule also states that investigations generally are non-public. A Bureau investigator may disclose the existence of an investigation to the extent necessary to advance the investigation.

A commenter recommended that the Bureau revise this section to mandate that Bureau investigations remain confidential. The commenter noted the

potential reputation risk to an entity if an investigation is disclosed to the public. In addition, the commenter argued that failing to conduct investigations confidentially will increase litigation risk. One commenter recommended that the Bureau issue a public absolution of a company if the Bureau does not maintain the confidentiality of an investigation.

Section 1080.14 of the Interim Final Rule provides that investigations generally will not be disclosed to the public, but permits Bureau investigators to disclose the existence of an investigation when necessary to advance the investigation. The Interim Final Rule does not contemplate publicizing an investigation, but rather disclosing the existence of the investigation to, for example, a potential witness or third party with potentially relevant information when doing so is necessary to advance the investigation. This limited exception sufficiently balances the concerns expressed by the commenter with the Bureau's need to obtain information efficiently.

Thus, the Bureau adopts § 1080.14 of the Interim Final Rule as the Final Rule without change.

VII. Section 1022(b)(2) Provisions

In developing the Final Rule, the Bureau has considered the potential benefits, costs, and impacts, and has consulted or offered to consult with the prudential regulators, HUD, the SEC, the Department of Justice, and the FTC, including with regard to consistency with any prudential, market, or systemic objectives administered by such agencies.¹

The Final Rule neither imposes any obligations on consumers nor is expected to have any appreciable impact on their access to consumer financial products or services. Rather, the Final Rule provides a clear, efficient mechanism for investigating compliance with the Federal consumer financial laws, which benefits consumers by creating a systematic process to protect them from unlawful behavior.

¹ Section 1022(b)(2)(A) of the Dodd-Frank Act addresses the consideration of the potential benefits and costs of regulation to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services; the impact on depository institutions and credit unions with \$10 billion or less in total assets as described in section 1026 of the Dodd-Frank Act; and the impact on consumers in rural areas. Section 1022(b)(2)(B) addresses consultation between the Bureau and other Federal agencies during the rulemaking process. The manner and extent to which these provisions apply to procedural rules and benefits, costs and impacts that are compelled by statutory changes rather than discretionary Bureau action is unclear. Nevertheless, to inform this rulemaking more fully, the Bureau performed the described analyses and consultations.

The Final Rule imposes certain obligations on covered persons who receive CIDs in Bureau investigations. Specifically, as described above, the Final Rule sets forth the process for complying with or objecting to CIDs for documentary material, tangible things, written reports or answers to questions, and oral testimony. Most obligations in the Final Rule stem from express language in the Dodd-Frank Act and do not impose additional burdens on covered persons.

To the extent that the Final Rule includes provisions not expressly required by statute, these provisions benefit covered persons by providing clarity and certainty. In addition, the Final Rule vests the Bureau with discretion to modify CIDs or extend the time for compliance for good cause. This flexibility benefits covered persons by enabling the Bureau to assess the cost of compliance with a civil investigative demand in a particular circumstance and take appropriate steps to mitigate any unreasonable compliance burden.

Moreover, because the Final Rule is largely based on section 20 of the FTC Act and its corresponding regulations, it should present an existing, stable model of investigatory procedures to covered persons. This likely familiarity to covered persons should further reduce the compliance costs for covered persons.

The Final Rule provides that requests for extensions of time to file petitions to modify or set aside CIDs are disfavored. This may impose a burden on covered entities in some cases, but it may also lead to a more expeditious resolution of matters, reducing uncertainty. Furthermore, the Final Rule has no unique impact on insured depository institutions or insured credit unions with less than \$10 billion in assets as described in section 1026(a) of the Dodd-Frank Act. Nor does the Final Rule have a unique impact on rural consumers.

A commenter suggested that the Bureau conduct a nonpublic study of the impact of complying with a CID on the entities who have been subjected to them by other agencies, with specific focus on those that were found not to have violated the law. As the commenter implicitly recognizes, such data does not currently exist and thus was not reasonably available to the Bureau in finalizing the Interim Final Rule. Moreover, as explained above, most of the costs associated with complying with a CID result from the Dodd-Frank Act, which authorizes the Bureau to issue such demands.

A commenter asserted that disfavoring extensions of petitions to

modify or set aside CIDs will require the recipient to conduct a full review of the demanded material within the normal 20-day period in order to comply with the deadline for filing a petition. Under the Final Rule, recipients of a CID are not required to comply fully within twenty days; rather, they are required simply to decide whether they will comply with the demand at all. The Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement have the discretion to negotiate and approve the terms of satisfactory compliance with CIDs and, for good cause shown, may extend the time prescribed for compliance. Thus, the Final Rule provides reasonable steps to mitigate compliance burden while simultaneously protecting the Bureau's law enforcement interests.

Another commenter stated that the four interim final rules that the Bureau promulgated together on July 28, 2011 failed to satisfy the rulemaking requirements under section 1022 of the Dodd-Frank Act. Specifically, the commenter stated that "the CFPB's analysis of the costs and benefits of its rules does not recognize the significant costs the CFPB imposes on covered persons." The Bureau believes that it appropriately considered the benefits, costs, and impacts of the Interim Final Rule pursuant to section 1022. Notably, the commenter did not identify any specific costs to covered persons that are not discussed in Part C of the SUPPLEMENTARY INFORMATION to the Interim Final Rule.

VIII. Procedural Requirements

As noted in publishing the Interim Final Rule, under the Administrative Procedure Act, 5 U.S.C. 553(b), notice and comment is not required for rules of agency organization, procedure, or practice. As discussed in the preamble to the Interim Final Rule, the Bureau confirms its finding that this is a procedural rule for which notice and comment is not required. In addition, because the Final Rule relates solely to agency procedure and practice, it is not subject to the 30-day delayed effective date for substantive rules under section 553(d) of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* Because no notice of proposed rulemaking is required, the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601(2) do not apply. Finally, the Bureau has determined that this Final Rule does not impose any new recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of

information requiring approval under 44 U.S.C. 3501. *et seq.*

List of Subjects in 12 CFR Part 1080

Administrative practice and procedure, Banking, Banks, Consumer protection, Credit, Credit unions, Investigations, Law enforcement, National banks, Savings associations, Trade practices.

For the reasons set forth in the preamble, the Bureau of Consumer Financial Protection revises part 1080 to Chapter X in Title 12 of the Code of Federal Regulations to read as follows:

PART 1080—RULES RELATING TO INVESTIGATIONS

Sec.

- 1080.1 Scope.
- 1080.2 Definitions.
- 1080.3 Policy as to private controversies.
- 1080.4 Initiating and conducting investigations.
- 1080.5 Notification of purpose.
- 1080.6 Civil investigative demands.
- 1080.7 Investigational hearings.
- 1080.8 Withholding requested material.
- 1080.9 Rights of witnesses in investigations.
- 1080.10 Noncompliance with civil investigative demands.
- 1080.11 Disposition.
- 1080.12 Orders requiring witnesses to testify or provide other information and granting immunity.
- 1080.13 Custodians.
- 1080.14 Confidential treatment of demand material and non-public nature of investigations.

Authority: Pub. L. 111–203, Title X, 12 U.S.C. 5481 *et seq.*

§ 1080.1 Scope.

The rules of this part apply to Bureau investigations conducted pursuant to section 1052 of the Dodd-Frank Act, 12 U.S.C. 5562.

§ 1080.2 Definitions.

For the purposes of this part, unless explicitly stated to the contrary:

Bureau means the Bureau of Consumer Financial Protection.

Bureau investigation means any inquiry conducted by a Bureau investigator for the purpose of ascertaining whether any person is or has been engaged in any conduct that is a violation.

Bureau investigator means any attorney or investigator employed by the Bureau who is charged with the duty of enforcing or carrying into effect any Federal consumer financial law.

Custodian means the custodian or any deputy custodian designated by the Bureau for the purpose of maintaining custody of information produced pursuant to this part.

Director means the Director of the Bureau or a person authorized to

perform the functions of the Director in accordance with the law.

Documentary material means the original or any copy of any book, document, record, report, memorandum, paper, communication, tabulation, chart, log, electronic file, or other data or data compilation stored in any medium, including electronically stored information.

Dodd-Frank Act means the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010, as amended, Public Law 111–203 (July 21, 2010), Title X, codified at 12 U.S.C. 5481 *et seq.*

Electronically stored information (ESI) means any information stored in any electronic medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.

Office of Enforcement means the office of the Bureau responsible for enforcement of Federal consumer financial law.

Person means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

Violation means any act or omission that, if proved, would constitute a violation of any provision of Federal consumer financial law.

§ 1080.3 Policy as to private controversies.

The Bureau shall act only in the public interest and will not initiate an investigation or take other enforcement action when the alleged violation is merely a matter of private controversy and does not tend to affect adversely the public interest.

§ 1080.4 Initiating and conducting investigations.

The Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement have the nondelegable authority to initiate investigations. Bureau investigations are conducted by Bureau investigators designated and duly authorized under section 1052 of the Dodd-Frank Act, 12 U.S.C. 5562, to conduct such investigations. Bureau investigators are authorized to exercise and perform their duties in accordance with the laws of the United States and the regulations of the Bureau.

§ 1080.5 Notification of purpose.

Any person compelled to furnish documentary material, tangible things, written reports or answers to questions, oral testimony, or any combination of

such material, answers, or testimony to the Bureau 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.

§ 1080.6 Civil investigative demands.

(a) *In general.* In accordance with section 1052(c) of the Act, the Director of the Bureau, the Assistant Director of the Office of Enforcement, and the Deputy Assistant Directors of the Office of Enforcement, have the nondelegable authority to issue a civil investigative demand in any Bureau investigation directing the person named therein to produce documentary material for inspection and copying or reproduction in the form or medium requested by the Bureau; to submit tangible things; to provide a written report or answers to questions; to appear before a designated representative at a designated time and place to testify about documentary material, tangible things, or other information; and to furnish any combination of such material, things, answers, or testimony.

(1) *Documentary material.* (i) Civil investigative demands for the production of documentary material shall describe each class of material to be produced with such definiteness and certainty as to permit such material to be fairly identified, prescribe a return date or dates that will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction, and identify the custodian to whom such material shall be made available. Documentary material for which a civil investigative demand has been issued shall be made available as prescribed in the civil investigative demand.

(ii) Production of documentary material in response to a civil investigative demand shall be made under a sworn certificate, in such form as the demand designates, by the person to whom the demand is directed or, if not a natural person, by any person having knowledge of the facts and circumstances relating to such production, to the effect that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.

(2) *Tangible things.* (i) Civil investigative demands for tangible things shall describe each class of tangible things to be produced with such definiteness and certainty as to permit such things to be fairly identified, prescribe a return date or

dates which will provide a reasonable period of time within which the things so demanded may be assembled and submitted, and identify the custodian to whom such things shall be submitted.

(ii) Submissions of tangible things in response to a civil investigative demand shall be made under a sworn certificate, in such form as the demand designates, by the person to whom the demand is directed or, if not a natural person, by any person having knowledge of the facts and circumstances relating to such production, to the effect that all of the tangible things required by the demand and in the possession, custody, or control of the person to whom the demand is directed have been submitted to the custodian.

(3) *Written reports or answers to questions.* (i) Civil investigative demands for written reports or answers to questions shall propound with definiteness and certainty the reports to be produced or the questions to be answered, prescribe a date or dates at which time written reports or answers to questions shall be submitted, and identify the custodian to whom such reports or answers shall be submitted.

(ii) Each reporting requirement or question in a civil investigative demand shall be answered separately and fully in writing under oath. Responses to a civil investigative demand for a written report or answers to questions shall be made under a sworn certificate, in such form as the demand designates, by the person to whom the demand is directed or, if not a natural person, by any person responsible for answering each reporting requirement or question, to the effect that all of the information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted to the custodian.

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

(ii) Where a civil investigative demand requires oral testimony from an entity, the civil investigative demand shall describe with reasonable particularity the matters for examination and the entity must designate one or more officers, directors, or managing

agents, or designate other persons who consent to testify on its behalf. Unless a single individual is designated by the entity, the entity must designate the matters on which each designee will testify. The individuals designated must testify about information known or reasonably available to the entity and their testimony shall be binding on the entity.

(b) *Manner and form of production of ESI.* When a civil investigative demand requires the production of ESI, it shall be produced in accordance with the instructions provided by the Bureau regarding the manner and form of production. Absent any instructions as to the form for producing ESI, ESI must be produced in the form in which it is ordinarily maintained or in a reasonably usable form.

(c) *Meet and confer.* The recipient of a civil investigative demand shall meet and confer with a Bureau investigator within 10 calendar days after receipt of the demand or before the deadline for filing a petition to modify or set aside the demand, whichever is earlier, to discuss and attempt to resolve all issues regarding compliance with the civil investigative demand. The Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement may authorize the waiver of this requirement for routine third-party civil investigative demands or in other circumstances where he or she determines that a meeting is unnecessary. The meeting may be in person or by telephone.

(1) *Personnel.* The recipient must make available at the meeting personnel with the knowledge necessary to resolve any issues relevant to compliance with the demand. Such personnel could include individuals knowledgeable about the recipient's information or records management systems and/or the recipient's organizational structure.

(2) *ESI.* If the civil investigative demand seeks ESI, the recipient shall ensure that a person familiar with its ESI systems and methods of retrieval participates in the meeting.

(3) *Petitions.* The Bureau will not consider petitions to set aside or modify a civil investigative demand unless the recipient has meaningfully engaged in the meet and confer process described in this subsection and will consider only issues raised during the meet and confer process.

(d) *Compliance.* The Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement are authorized to negotiate and approve the terms of satisfactory compliance with civil investigative demands and, for good

cause shown, may extend the time prescribed for compliance.

(e) *Petition for order modifying or setting aside demand—in general.* Any petition for an order modifying or setting aside a civil investigative demand shall be filed with the Executive Secretary of the Bureau with a copy to the Assistant Director of the Office of Enforcement within 20 calendar days after service of the civil investigative demand, or, if the return date is less than 20 calendar days after service, prior to the return date. Such petition shall set forth all factual and legal objections to the civil investigative demand, including all appropriate arguments, affidavits, and other supporting documentation. The attorney who objects to a demand must sign any objections.

(1) *Statement.* Each petition shall be accompanied by a signed statement representing that counsel for the petitioner has conferred with counsel for the Bureau pursuant to section 1080.6(c) in a good-faith effort to resolve by agreement the issues raised by the petition and has been unable to reach such an agreement. If some of the matters in controversy have been resolved by agreement, the statement shall specify the matters so resolved and the matters remaining unresolved. The statement shall recite the date, time, and place of each such meeting between counsel, and the names of all parties participating in each such meeting.

(2) *Extensions of time.* The Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement are authorized to rule upon requests for extensions of time within which to file such petitions. Requests for extensions of time are disfavored.

(3) *Bureau investigator response.* Bureau investigators may, without serving the petitioner, provide the Director with a statement setting forth any factual and legal response to a petition for an order modifying or setting aside the demand.

(4) *Disposition.* The Director has the authority to rule upon a petition for an order modifying or setting aside a civil investigative demand. The order may be served on the petitioner via email, facsimile, or any other method reasonably calculated to provide notice of the order to the petitioner.

(f) *Stay of compliance period.* The timely filing of a petition for an order modifying or setting aside a civil investigative demand shall stay the time permitted for compliance with the portion challenged. If the petition is denied in whole or in part, the ruling will specify a new return date.

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

§ 1080.7 Investigational hearings.

(a) Investigational hearings, as distinguished from hearings in adjudicative proceedings, may be conducted pursuant to a civil investigative demand for 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.

(b) Investigational hearings shall be conducted by any Bureau investigator for the purpose of hearing the testimony of witnesses and receiving documentary material, tangible things, or other information relating to any subject under investigation. Such hearings shall be under oath or affirmation and stenographically reported, and a transcript thereof shall be made a part of the record of the investigation. The Bureau investigator conducting the investigational hearing also may direct that the testimony be recorded by audio, audiovisual, or other means, in which case the recording shall be made a part of the record of the investigation as well.

(c) In investigational hearings, the Bureau investigators shall exclude from the hearing room all persons except the person being examined, his or her counsel, the officer before whom the testimony is to be taken, any investigator or representative of an agency with which the Bureau is engaged in a joint investigation, and any individual transcribing or recording such testimony. At the discretion of the Bureau investigator, and with the consent of the person being examined, persons other than those listed in this paragraph may be present in the hearing room. The Bureau investigator shall certify or direct the individual transcribing the testimony to certify on the transcript that the witness was duly sworn and that the transcript is a true record of the testimony given by the witness. A copy of the transcript shall be forwarded promptly by the Bureau investigator to the custodian designated in section 1080.13.

§ 1080.8 Withholding requested material.

(a) Any person withholding material responsive to a civil investigative demand or any other request for

production of material shall assert a claim of privilege not later than the date set for the production of material. Such person shall, if so directed in the civil investigative demand or other request for production, submit, together with such claim, a schedule of the items withheld which states, as to each such item, the type, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific grounds for claiming that the item is privileged. The person who submits the schedule and the attorney stating the grounds for a claim that any item is privileged must sign it.

(b) A person withholding material solely for reasons described in this subsection shall comply with the requirements of this subsection in lieu of filing a petition for an order modifying or setting aside a civil investigative demand pursuant to section 1080.6(e).

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

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

(i) The disclosure was inadvertent;

(ii) The holder of the privilege or protection took reasonable steps to prevent disclosure; and

(iii) The holder promptly took reasonable steps to rectify the error, including notifying a Bureau investigator of the claim of privilege or protection and the basis for it.

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

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

(i) The waiver is intentional;

(ii) The disclosed and undisclosed information or communications concern the same subject matter; and

(iii) They ought in fairness to be considered together.

§ 1080.9 Rights of witnesses in investigations.

(a) Any person compelled to submit documentary material, tangible things, or written reports or answers to questions to the Bureau, or to testify in an investigational hearing, shall be entitled to retain a copy or, on payment of lawfully prescribed costs, request a copy of the materials, things, reports, or written answers submitted, or a transcript of his or her testimony. The Bureau, however, may for good cause deny such a request and limit the witness to inspection of the official transcript of the testimony. Upon completion of transcription of the testimony of the witness, the witness shall be offered an opportunity to read the transcript of his or her testimony. Any changes by the witness shall be entered and identified upon the transcript by the Bureau investigator with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness and submitted to the Bureau unless the witness cannot be found, is ill, waives in writing his or her right to signature, or refuses to sign. If the signed transcript is not submitted to the Bureau within 30 calendar days of the witness being afforded a reasonable opportunity to review it, the Bureau investigator, or the individual transcribing the testimony acting at the Bureau investigator's direction, shall sign the transcript and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with any reasons given for the failure to sign.

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

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

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

and the testimony shall be taken, except for testimony requiring the witness to divulge information protected by the claim of privilege or work product.

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

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

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

§ 1080.10 Noncompliance with civil investigative demands.

(a) In cases of failure to comply in whole or in part with Bureau civil investigative demands, appropriate action may be initiated by the Bureau, including actions for enforcement.

(b) The Director, the Assistant Director of the Office of Enforcement,

and the General Counsel of the Bureau are authorized to:

(1) Institute, on behalf of the Bureau, an enforcement proceeding in the district court of the United States for any judicial district in which a person resides, is found, or transacts business, in connection with the failure or refusal of such person to comply with, or to obey, a civil investigative demand in whole or in part if the return date or any extension thereof has passed; and

(2) Seek civil contempt or other appropriate relief in cases where a court order enforcing a civil investigative demand has been violated.

§ 1080.11 Disposition.

(a) When the facts disclosed by an investigation indicate that an enforcement action is warranted, further proceedings may be instituted in Federal or State court or pursuant to the Bureau's administrative adjudicatory process. Where appropriate, the Bureau also may refer investigations to appropriate Federal, State, or foreign governmental agencies.

(b) When the facts disclosed by an investigation indicate that an enforcement action is not necessary or would not be in the public interest, the investigational file will be closed. The matter may be further investigated, at any time, if circumstances so warrant.

(c) The Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement are authorized to close Bureau investigations.

§ 1080.12 Orders requiring witnesses to testify or provide other information and granting immunity.

The Director has the nondelegable authority to request approval from the Attorney General of the United States for the issuance of an order requiring a witness to testify or provide other information and granting immunity under 18 U.S.C. 6004.

§ 1080.13 Custodians.

(a) The Bureau shall designate a custodian and one or more deputy custodians for material to be delivered pursuant to a civil investigative demand in an investigation. The custodian shall have the powers and duties prescribed by 12 CFR 1070.3 and section 1052 of the Act, 12 U.S.C. 5562. Deputy custodians may perform all of the duties assigned to custodians.

(b) Material produced pursuant to a civil investigative demand, while in the custody of the custodian, shall be for the official use of the Bureau in accordance with the Act; but such material shall upon reasonable notice to the custodian

be made available for examination by the person who produced such material, or his or her duly authorized representative, during regular office hours established for the Bureau.

§ 1080.14 Confidential treatment of demand material and non-public nature of investigations.

(a) Documentary materials, written reports, answers to questions, tangible things or transcripts of oral testimony the Bureau receives in any form or format pursuant to a civil investigative demand are subject to the requirements and procedures relating to the disclosure of records and information set forth in part 1070 of this title.

(b) Bureau investigations generally are non-public. Bureau investigators may disclose the existence of an investigation to potential witnesses or third parties to the extent necessary to advance the investigation.

Dated: June 4, 2012.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

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BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1082

[Docket No. CFPB-2011-0005]

RIN 3170-AA02

State Official Notification Rule

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule.

SUMMARY: The Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010 (Dodd-Frank Act) requires the Bureau of Consumer Financial Protection (Bureau) to prescribe rules establishing procedures that govern the process by which State Officials notify the Bureau of actions undertaken pursuant to the authority granted to the States to enforce the Dodd-Frank Act or regulations prescribed thereunder. This final State Official Notification Rule (Final Rule) sets forth the procedures to govern this process.

DATES: The Final Rule is effective June 29, 2012.

FOR FURTHER INFORMATION CONTACT:

Veronica Spicer, Office of Enforcement, Consumer Financial Protection Bureau, 1700 G Street NW., Washington, DC 20552, at (202) 435-7545.

SUPPLEMENTARY INFORMATION:

I. Background

The Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010 (Dodd-Frank Act) was signed into law on July 21, 2010. Title X of the Dodd-Frank Act established the Bureau to regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws. Section 1042 of the Dodd-Frank Act, 12 U.S.C. 5552, governs the enforcement powers of the States under the Dodd-Frank Act. Under section 1042(a), a State attorney general or regulator (State Official) may bring an action to enforce Title X of the Dodd-Frank Act and regulations issued thereunder. Prior to initiating any such action, the State Official is required to provide notice of the action to the Bureau and the prudential regulator, if any, pursuant to section 1042(b) of the Dodd-Frank Act. Section 1042(b) further authorizes the Bureau to intervene in the State Official's action as a party, remove the action to a Federal district court, and appeal any order or judgment.

Pursuant to section 1042(c) of the Dodd-Frank Act, the Bureau is required to issue regulations implementing the requirements of section 1042. On July 28, 2011, the Bureau promulgated the State Official Notification Rule (Interim Final Rule) with a request for comment. The comment period for the Interim Final Rule ended on September 26, 2011. After reviewing and considering the issues raised by the comments, the Bureau now promulgates the Final Rule establishing a procedure for the timing and content of the notice required to be provided by State Officials pursuant to section 1042(b) of the Dodd-Frank Act, 12 U.S.C. 5552(b).

II. Summary of the Final Rule

Like the Interim Final Rule, the Final Rule implements a procedure for the timing and content of the notice required by section 1042(b), sets forth the responsibilities of the recipients of the notice, and specifies the rights of the Bureau to participate in actions brought by State Officials under section 1042(a) of the Dodd-Frank Act. In drafting the Final Rule, the Bureau endeavored to create a process that would provide both the Bureau and, where applicable, the prudential regulators with timely notice of pending actions and account for the investigation and litigation needs of State regulators and law enforcement agencies. In keeping with this approach, the Final Rule provides for a default notice period of at least ten calendar days, with exceptions for emergencies and other extenuating circumstances,

and requires substantive notice that is both straightforward and comprehensive. The Final Rule further makes clear that the Bureau can intervene as a party in an action brought by a State Official under Title X of the Dodd-Frank Act or a regulation prescribed thereunder, provides for the confidential treatment of non-public information contained in the notice if a State so requests, and provides that provision of notice shall not be deemed a waiver of any applicable privilege. In addition, the Final Rule specifies that the notice provisions do not create any procedural or substantive rights for parties in litigation against the United States or against a State that brings an action under Title X of the Dodd-Frank Act or a regulation prescribed thereunder.

III. Legal Authority

Section 1042(c) of the Dodd-Frank Act authorizes the Bureau to prescribe regulations implementing the requirements of section 1042(b). In addition, the Bureau has general rulemaking authority pursuant to section 1022(b)(1) of the Dodd-Frank Act to prescribe rules to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws and to prevent evasions thereof.

IV. Overview of Comments Received

In response to the Interim Final Rule, the Bureau received several comments. Four letters were received from associations representing the financial industry, two letters were received from financial industry regulators and supervisors, and one letter was received from an individual consumer. The Bureau also received a comment letter from a financial industry regulator in response to its **Federal Register** notification of November 21, 2011, regarding the information collection requirements associated with the Interim Final Rule pursuant to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. All of the comments are available for review on www.regulations.gov.

The financial industry associations' comments fell into several general categories. Several comments expressed concerns about the Bureau's ability to maintain confidentiality for notification materials received by the Bureau. Other commenters requested clarity as to the type of actions for which the Bureau requires notification. One commenter requested that the Bureau require uniform interpretation by States of all Federal law within the Bureau's jurisdiction.

BUREAU OF CONSUMER FINANCIAL PROTECTION
Washington, D.C. 20552

Notice to Persons Supplying Information

You have been asked to supply information or speak voluntarily, or directed to provide sworn testimony, documents, or answers to questions in response to a civil investigative demand (CID) from the Bureau of Consumer Financial Protection (Bureau). This notice discusses certain legal rights and responsibilities. Unless stated otherwise, the information below applies whether you are providing information voluntarily or in response to a CID.

A. False Statements; Perjury

False Statements. Section 1001 of Title 18 of the United States Code provides as follows:

[W]hoever, in any matter within the jurisdiction of the executive ... branch of the Government of the United States, knowingly and willfully-- **(1)** falsifies, conceals, or covers up by any trick, scheme, or device a material fact; **(2)** makes any materially false, fictitious, or fraudulent statement or representation; or **(3)** makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title ...[or] imprisoned not more than 5 years ..., or both.

Perjury. Section 1621 of Title 18 of the United States Code provides as follows:

Whoever ... having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly or that any written testimony, declaration, deposition, or certificate by him subscribed, is true willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true ... is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

B. The Fifth Amendment; Your Right to Counsel

Fifth Amendment. Information you provide may be used against you in any federal, state, local or foreign administrative, civil or criminal proceeding brought by the Bureau or any other agency. If you are an individual, you may refuse, in accordance with the rights guaranteed to you by the Fifth Amendment to the Constitution of the United States, to give any information that may tend to incriminate you or subject you to criminal liability, including fine, penalty or forfeiture.

Counsel. You have the right to be accompanied, represented and advised by counsel of your choice. For further information, you should consult Bureau regulations at 12 C.F.R. § 1080.9(b).

C. Effect of Not Supplying Information

Persons Directed to Supply Information Pursuant to CID. If you fail to comply with the CID, the Bureau may seek a court order requiring you to do so. If such an order is obtained and you still fail to supply the information, you may be subject to civil and criminal sanctions for contempt of court.

Persons Requested to Supply Information Voluntarily. There are no sanctions for failing to provide all or any part of the requested information. If you do not provide the requested information, the Bureau may choose to send you a CID or subpoena.

D. Privacy Act Statement

The information you provide will assist the Bureau in its determinations regarding violations of Federal consumer financial laws. The information will be used by and disclosed to Bureau personnel and contractors or other agents who need the information to assist in activities related to enforcement of Federal consumer financial laws. The information may also be disclosed for statutory or regulatory purposes, or pursuant to the Bureau's published Privacy Act system of records notice, to:

- a court, magistrate, administrative tribunal, or a party in litigation;
- another federal or state agency or regulatory authority;
- a member of Congress; and
- others as authorized by the Bureau to receive this information.

This collection of information is authorized by 12 U.S.C. §§ 5511, 5562.