

**BEFORE THE
BUREAU OF CONSUMER FINANCIAL PROTECTION**

**In the Matter of
Request for Information Regarding Bureau Civil
Investigative Demands and Associated Processes**

Docket No. CFPB-2018-0001

**Comments of the Staff of the Federal Trade
Commission's Bureau of Consumer Protection**

March 26, 2018

***These comments represent the views of the staff of the Bureau of Consumer Protection. They are not necessarily the views of the Commission or any individual Commissioner. The Commission, however, has voted to authorize the staff to submit these comments.**

I. INTRODUCTION

The Bureau of Consumer Protection (BCP) of the Federal Trade Commission¹ files this comment in response to the January 2018 Request for Information (RFI) of the Bureau of Consumer Financial Protection (Bureau) regarding the Bureau's Civil Investigative Demands (CIDs) and associated processes. The RFI indicates that the Bureau seeks information to help assess the efficiency and effectiveness of its CID processes and the potential for implementing appropriate changes. Specifically, the Bureau seeks comments "on how best to achieve meaningful burden reduction or other improvement to the CID processes while continuing to achieve the Bureau's statutory and regulatory objectives." The Bureau also states that it "is especially interested in better understanding ... how to align the Bureau's CID processes with those of other agencies with similar authorities." BCP staff applauds the Bureau for undertaking a critical assessment of its investigative processes, and BCP staff hopes this comment describing the BCP's experience with CIDs, including recent reforms, is valuable to the Bureau in making its investigative processes efficient and effective.

II. BCP INVESTIGATIONS AND REFORMS

The FTC is the nation's general consumer protection agency, and BCP is the office within the FTC responsible for consumer protection matters. BCP's mission is to protect consumers from deceptive and unfair practices, to educate consumers and provide guidance to businesses, and to accomplish those goals in an efficient, effective way. An essential element of this mission is investigating potential law violations and bringing enforcement actions to stop illegal conduct and provide relief to consumers who have been harmed. CIDs are a key tool in such investigations and are thus essential in BCP's fulfillment of its law enforcement function.²

Like the Bureau, the FTC has broad investigative authority, including the authority to issue CIDs to persons who may have information relevant to an investigation of possible violations of laws the agency enforces. 15 U.S.C. § 57b-1; *see also U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("law enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest."). A CID from either agency may seek written answers to interrogatories, documents, tangible things, oral testimony, or some combination of all of these. The FTC's processes for CIDs are set forth in Part 2 of its Rules of Practice, published in the Code of Federal Regulations at 16 C.F.R. Part 2, and available via this link: <https://www.ftc.gov/enforcement/rules>.

Because the investigatory power "is the power to get information from those who best can give it and who are most interested in not doing so," *Morton Salt*, 338 U.S. at 642, and the need for investigating allegations of unlawful activity is substantial, courts have been deferential

¹ This comment uses the initials "FTC" to refer to the agency and "Commission" to refer to the body of Commissioners.

² Although this comment focuses on BCP's use of CIDs, the FTC's Bureau of Competition is also authorized to use CIDs.

to agencies' requests for information. *See, e.g., FTC v. Invention Submission Corp.*, 965 F.2d 1086 (D.C. Cir. 1992). Moreover, the "Supreme Court has made it clear that the court's role in a proceeding to enforce an administrative subpoena is a strictly limited one." *FTC v. Texaco, Inc.*, 555 F.2d 862, 871-72 (D.C. Cir. 1977) (en banc). It is well established that a district court must enforce a federal agency's investigative subpoena if the information sought is "reasonably relevant," and "not plainly incompetent or irrelevant to any lawful purpose" of the agency or "unduly burdensome" to produce. *Id.* at 881-83.

It is exactly because courts are deferential to an agency's demand for information, that "good government" requires an agency to use the power that Congress has vested in it and the resources that it has been allocated to exercise restraint when deciding to issue compulsory process and in drafting the specific demands. This restraint should balance the need for the demanded information to determine whether any laws enforced by the agency have been, or are about to be, violated, with the burden on the party from whom the information is being demanded.³

Cognizant of the need to maintain such a balance, in April 2017, BCP formed an internal Working Group on Agency Reform and Efficiency. The purpose of the Working Group was to identify best practices to streamline information requests and improve transparency in investigations.⁴ In July 2017, BCP announced that it had implemented several reforms related to consumer protection CIDs, including: (1) adding more detail about the scope and purpose of investigations to give companies a better understanding of the information sought; (2) limiting the relevant time periods to minimize undue burden on companies and focus the Commission's finite resources on investigating harms that have an immediate impact on consumers;⁵ (3) shortening and simplifying the instructions for providing electronically stored data; and (4) increasing response times for CIDs, where appropriate.⁶

³ As the American Bar Association's Antitrust Section also opined in its January 2017 report entitled, "Presidential Transition Report: The State of Antitrust Enforcement," the Bureau's and the FTC's demands must be written broadly enough to ensure that documents and information necessary to carry out the investigation are produced, but the agencies must use this tool judiciously to avoid unnecessary costs to CID recipients. *See* https://www.americanbar.org/content/dam/aba/publications/antitrust_law/state_of_antitrust_enforcement.authcheckdam.pdf at *28 (emphasis added). The Antitrust Section's ambit includes both competition and consumer protection matters.

⁴ *See* <https://www.ftc.gov/news-events/press-releases/2017/04/process-reform-initiatives-are-already-underway-federal-trade>.

⁵ When appropriate, any statute of limitations should be taken into consideration when drafting CID specifications.

⁶ *See* <https://www.ftc.gov/news-events/press-releases/2017/07/acting-ftc-chairman-ohlhausen-announces-internal-process-reforms>.

BCP also has developed and issued business education materials, using plain language descriptions, to help small businesses understand the CID process and how to comply with CIDs. BCP has published a set of FAQs for small businesses that receive CIDs related to consumer protection matters.⁷ The FAQs address questions BCP has received from CID recipients, shedding light on relevant procedures.

BCP believes that these recent process reforms have been quite successful in lessening burdens on recipients and improving transparency while continuing to allow the agency to obtain the information it needs to enforce the law. Even with these recent process changes and new business guidance, however, BCP remains committed to evaluating, on an ongoing basis, how to maximize the efficiency and effectiveness of its investigations, including its use of CIDs. We continue to consider how best to balance the need to obtain information in law enforcement investigations with the potential burden on companies asked to provide it. Indeed, in our careful review of every proposed CID that BCP recommends the Commission issue, we assess closely both the value of the requested information to the FTC and the avoidance of undue burden on the CID recipient.

III. THE FTC'S PROCESS AND RESPONSES TO SPECIFIC QUESTIONS

When the Bureau set up its own CID processes, it used the FTC's Rules of Practice and Procedure as one of its models. Although there is a similarity between the FTC's and Bureau's authority, mission, and goals, there exist differences in how each agency is organized that do affect how those processes and procedures are implemented and what protections are provided to CID recipients. To understand better these differences, we provide the anatomy of the FTC's CID process in consumer protection investigations and then respond to the Bureau's specific questions. We hope that the information below about BCP's investigative experience and recent reforms will be valuable to the Bureau as it assesses its CID and other investigative processes.

Anatomy of the FTC's CID Process in Consumer Protection Matters

The FTC is an independent administrative agency comprised of five Presidentially-appointed, Senate-confirmed members, with no more than three from any one political party, and one of the members appointed by the President as Chairman. The agency is divided into three Bureaus – Consumer Protection, Competition, and Economics. The first two Bureaus are responsible for investigating and civilly prosecuting possible violations of the laws enforced by the FTC, including Section 5 of the FTC Act's prohibition on unfair or deceptive acts or practices. The Bureau of Economics aids and advises the Commission concerning the economic aspects of all of its functions, including whether to initiate an enforcement action, and provides economic and statistical assistance to the enforcement bureaus in the investigation and trial of cases.

⁷ See https://www.ftc.gov/news-events/blogs/business-blog/2018/01/so-you-received-cid-faqs-small-businesses?utm_source=govdelivery.

BCP is headed by a Director, appointed by the Chairman, and further divided into five divisions that investigate and litigate cases and three supporting divisions. Each division is managed by a Career Senior Executive Service (SES)⁸ member (Associate Director) and two or three Assistant Directors. The BCP Director has two Deputy Directors and four or five senior attorneys who review matters and advise the BCP Director. The agency also has seven regional offices, each managed by a career, non-SES Regional Director and an Assistant Regional Director. Each regional office investigates and enforces consumer protection laws.

The Commission has delegated the authority to open investigations to the BCP Director, Deputy Directors, Associate Directors, and Regional Directors.⁹ The authority to issue CIDs, however, remains solely with the Commission.¹⁰ Section 20(i) of the FTC Act provides that the Commission's authority to issue CIDs exists only to the extent a Commissioner acting pursuant to a Commission resolution signs the CID and that the Commission cannot delegate its authority. 15 USC § 57b-1(i). In consumer protection investigations, the Commission typically issues omnibus resolutions that authorize the use of CIDs to investigate certain common practices that violate laws enforced by the Commission, although the Commission may also issue a resolution tailored to the specific investigation. For example, the Commission has issued an omnibus resolution in connection with unfair or deceptive debt collection practices and practices covered by the FDCPA and an omnibus resolution in connection with telemarketing practices covered by the Telemarketing Sales Rule.

BCP staff who want the Commission to issue a CID for either the target of an investigation or a non-target with information relevant to the investigation must draft a memorandum to the Commission attaching the appropriate authorizing Resolution and setting forth: (1) the potential violations under investigation; (2) the information the CID would demand and why it is needed; and (3) that the CID complies with the Right to Financial Privacy Act and Electronic Communications Privacy Act if applicable. BCP staff also drafts the proposed CID following guidance from the BCP front office including model definitions and instructions. After their Associate Director or Regional Director reviews this proposed CID "package," often in consultation with the Bureau of Economics, and approves it, BCP staff forwards the package to the BCP Director for review. The BCP Director (usually substantially assisted by his or her staff) reviews the package and makes appropriate changes, including making modifications to

⁸ Members of the SES serve in the key positions just below the top Presidential appointees and are the major link between these appointees and the rest of the Federal workforce. <https://www.opm.gov/policy-data-oversight/senior-executive-service/>.

⁹ 16 C.F.R. § 2.1.

¹⁰ Prior to 1980, the FTC staff had the authority to issue administrative subpoenas without Commission review and approval. In 1980, Congress added Section 20 of the FTC Act as part of the FTC Improvements Act of 1980, Pub. L. 96-252, to authorize only the *Commission* to issue a CID, whenever *it* has reason to believe that any entity may be in possession of any documents or information relevant to an investigation. 15 U.S.C. §57-1b (c)(1) (emphasis added). Congress added the requirement to ensure that CIDs would be subject to greater oversight by the Commission.

decrease burden. After his or her review and approval, the BCP Director forwards the package to the Commission recommending that it issue the requested CID.¹¹

When the BCP Director forwards the CID package to the Commission, the package is assigned to one of the Commissioners for review and approval. The Commissioner (usually substantially assisted by his or her staff) reviews the package, including confirming that the CID is authorized under an appropriate process resolution, the CID seeks relevant information, and the CID is not unduly broad or burdensome. The assigned Commissioner frequently asks questions about the scope of the CID and occasionally revises the CID.

Once the assigned Commissioner approves and signs the CID, the Secretary's Office serves the CID on the entity. The FTC provides the recipient with a brief cover letter explaining the CID process and advising the recipient to reach out to the attorney identified on the CID as soon as possible to discuss any issues, including assertions of privilege, the ability to meet the CID's deadline, potential objections to the demand, etc.

During the mandatory "meet and confer," which should be within 14 days of the date of service, the recipient or its counsel discusses issues such as privilege, burdens, and deadlines with FTC investigating staff. The Commission has delegated to FTC staff the authority to make modifications to the terms of compliance, including agreeing to the production of only a subset of documents responsive to a specification,¹² the form or manner of production, allowing redactions, or even staggered production dates. However, the Commission has imposed two limitations on this delegated authority. First, the Commission has delegated this authority only to the BCP Director, Deputy Directors, Associate Directors, Regional Directors, and Assistant Regional Directors and not to other lower level managers and FTC investigating staff. Second, the delegated officials can grant an extension of time only if the recipient has demonstrated satisfactory progress towards compliance with the CID.

If the recipient believes that a CID (with or without modifications) is objectionable, the recipient can file with the Commission a petition to limit or quash the CID. If the recipient chooses to file a petition to limit or quash, it must do so within 20 days of service of the CID – or, if the return date is less than 20 days after service, prior to the return date – and set forth the grounds for objecting to the CID. The petition must include a signed separate statement representing that counsel for the petitioner has conferred with Commission staff in an effort in good faith to resolve by agreement the issues raised by the petition and has been unable to reach such an agreement. The petition is assigned to one of the Commissioners, designated by the

¹¹ Because of the use of model language and the extensive involvement of staff in the BCP Director's office, the BCP Director's review and approval often occurs very expeditiously, especially for CIDs that would be sent to a "friendly" non-target (*e.g.* seeking a target's bank or telephone records to determine the size of the target, who the principals are, what is the possible extent of consumer injury, etc.). The BCP Director generally reviews and approves friendly, non-target CIDs within a day or day after receiving the CID package from BCP staff.

¹² Of course, the delegated official reserves, in writing, the right to demand the full set of documents responsive to the specification.

Chairman as the Compulsory Process Commissioner, to whom the Commission has delegated the authority to draft a Commission Order disposing of the petition. Pursuant to 16 C.F.R. § 2.10(a)(4), FTC staff may provide, without serving the petitioner, the Compulsory Process Commissioner with a draft Commission Order setting forth any factual and legal response to the petition. The Compulsory Process Commissioner will then move that the Commission approve and issue the final version of the Commission Order ruling on the petition to limit or quash. Once the vote has closed, the Commission Order is placed on the public record, including the public Commission Website, along with the petition.

If a CID recipient fails to comply with a CID and does not file a petition to limit or quash, BCP staff generally refers the matter to the Office of General Counsel for judicial enforcement. Similarly, a failure to comply with a Commission ruling compelling responses to the CID in whole or in part may also be grounds for a referral by BCP staff to the Office of General Counsel for judicial enforcement.

Responses to Specific Requests for Information

1. The Bureau's processes for initiating investigations, including 12 CFR 1080.4's delegation of authority to initiate investigations to the Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement

Since at least 1983, the Commission has relied on Rule 2.1 of its Rules of Practice and Procedure, 16 C.F.R. § 2.1, to delegate the authority to open and close consumer protection investigations to certain BCP managers, including the Director, Deputy Directors, and Associate Directors, and to the managers of the regional offices. Given the substantial number of consumer protection investigations undertaken at the FTC, with hundreds of matters open at any given time, such a delegation is efficient because it allows BCP to investigate and prosecute matters quickly.

BCP managers exercise this delegated authority subject to important constraints. At any time, the Commission may use its inherent authority to direct BCP to open and close any investigation. Such Commission direction, however, is usually unnecessary because BCP managers understand that in exercising delegated authority, they are expected to open and close investigations consistent with the enforcement priorities and objectives of the Commission.

The BCP Director is responsible for implementing the Commission's enforcement agenda. The BCP Director meets regularly with the Chairman and the other Commissioners to obtain views about investigations and possible investigations to accomplish that agenda. On a day-to-day basis, the BCP Director is responsible for ensuring that other BCP managers make opening and closing decisions in conformity with the Commission's enforcement priorities and objectives. To make sure that this occurs, the BCP Director has regular and frequent communications with other managers in BCP. These communications include regular discussions about specific divisional or regional office work, including matters currently under investigation and those as to which an investigation is contemplated. Further, other managers check with the BCP Director before opening, continuing, or closing an investigation that might not be in line with Commission priorities and objectives or that might present other challenging or sensitive issues.

Such oversight, combined with the delegations discussed above, has worked very well over the years. The Bureau may wish to consider applying a similar approach to its opening and closing of investigations, consistent with its structure, management, workload, and other relevant considerations.

2. The Bureau's processes for the issuance of CIDs, including the non-delegable authority of the Director, Assistant Director of the Office of Enforcement, and the Deputy Assistant Directors of the Office of Enforcement to issue CIDs

If BCP staff believes that compulsory process is appropriate, it drafts a CID along with a supporting recommendation to the Commission. Where appropriate, they also request the views of the Bureau of Economics on the particular specifications in CIDs, *e.g.*, information that assists in the assessment of injury. Many of the provisions in a CID are standardized, although some specifications are tailored to individual investigations. If their managers approve, BCP staff send the CID and the detailed recommendation memorandum to the BCP Director for further review, modification, and approval. If the BCP Director approves the CID and the detailed recommendation memo, he or she sends it to the Commission.

As explained above, pursuant to Rule 2.7 of the FTC's Rules of Practice, 16 C.F.R. § 2.7, the Commission or any Commissioner may issue a CID relating to any matter under investigation. A single Commissioner generally reviews the proposed CID and recommendation memorandum in determining whether to approve, modify, or reject a proposed CID. The assigned Commissioner often solicits more information from FTC staff about the investigation and the costs and benefits of the information the CID recipient would be required to produce.

Given the hundreds of proposed CIDs that BCP forwards for approval each year, it is more efficient and less burdensome to have a single Commissioner rather than the full Commission review each CID. Having a Commissioner, not BCP, approve the issuance of a CID also ensures that a very senior official at the agency is making a decision that may impose significant burdens and costs on recipients and that, if the recipient refuses to comply, may be subject to judicial review. Finally, Commissioner-approval ensures that there will be an independent assessment of the costs and benefits of the CID by someone who is not conducting the investigation.¹³

The FTC's procedures for CID issuance appear to be significantly different from those of the Bureau. At the Bureau, not only the Director but also the Assistant Director and the Deputy Assistant Directors of the Office of Enforcement have authority to issue CIDs, 12 C.F.R. § 1080.6(a), and it is our understanding that generally the Deputy Assistant Directors authorize the issuance of a CID. These Bureau managers may well be involved in direct oversight of investigations in a way that an FTC Commissioner is not. Because the FTC's approach has been successful for the Commission in balancing the need to obtain necessary information without imposing unnecessary or undue burdens, the Bureau may wish to consider the FTC's experience,

¹³ As noted in footnote 10, Congress imposed this requirement as part of the FTC Improvements Act of 1980 to ensure that CIDs would be subject to greater oversight by the Commission.

including revising its delegation of authority to a more senior official or officials who are not directly involved in the investigation.

3. Specific steps that the Bureau could take to improve CID recipients' understanding of investigations, whether through the notification of purpose included in each CID or through other avenues, including facilitating a better understanding of the specific types of information sought by the CID

An agency's articulation of the purpose of an investigation is an important bulwark against the misuse of compulsory process. Courts will not enforce a CID if the information sought is not within the agency's authority, the information sought is too indefinite, or the information is not reasonably relevant to the agency's inquiry. *U.S. v. Morton Salt Co.*, 338 U.S. at 652. An agency's articulation of the purpose of its investigation informs recipients and courts of the fundamental reason an agency is seeking information, thereby allowing recipients to raise objections and courts to rule on those objections.

Historically, CIDs issued by the Commission identified the investigation's purpose only by referring to the relevant resolution. Because CIDs issued in consumer protection cases typically rely on one or more omnibus resolutions, the resolutions provide only general information about the types of violations the Commission is investigating (*e.g.*, violations of a particular rule or unfair or deceptive conduct prevalent in an industry). As part of its reforms last year, the Commission changed its practices so that its CIDs in consumer protection investigations now include a specific description of the investigation that links the information the CID demands to the conduct BCP is investigating. The Commission made this change to make the purpose of its investigations more transparent to CID recipients and courts. The change is consistent with the court decision in *CFPB v. Accrediting Council for Indep. Colls. and Sch.*, 854 F.3d 683 (D.C. Cir. 2017). Articulating a more specific purpose for investigations in which CIDs are issued has imposed little cost on the FTC, but has minimized confusion and facilitated the ability of CID recipients to raise concerns about their compliance obligations. It is our understanding the Bureau staff informally has implemented similar changes in its practices. The Bureau may wish to "ratify" the staff's modifications as part of a published response to the RFI.

In addition to the formal notice provided on the CID itself, the Commission requires CID recipients and BCP staff to engage in a meet-and-confer process shortly after the CID is served. This process provides an informal opportunity for the recipients to gain a better understanding of the purpose of the Commission's investigation and the specific types of information the agency needs. This process is required by FTC Rule 2.7(i), 16 C.F.R. § 2.7(i), and follows from the FTC's general investigational policy, which invites "meaningful discussions with staff to prevent confusion or misunderstandings regarding the nature and scope of the information and material being sought, in light of the inherent value of genuinely cooperative discovery." 16 C.F.R. § 2.4.

The Bureau has a meet-and-confer requirement under 12 C.F.R. § 1080.6(c) that appears to be comparable to that in the FTC's Rules of Practice. Based on its own experience, BCP knows that through active and constructive engagement, the meet-and-confer process can be a critical technique that benefits both the agency and recipients of CIDs.

4. The nature and scope of requests included in Bureau CIDs, including whether topics, questions, or requests for written reports effectively achieve the Bureau's statutory and regulatory objectives, while minimizing burdens, consistent with applicable law, and the extent to which the meet and confer process helps achieve these objectives

For any proposed CID, the FTC considers carefully how to get the information it needs while excluding demands for information that will not assist staff in deciding whether to send an enforcement recommendation to the Commission. The FTC does not want irrelevant information because it is costly to review and maintain unnecessary information and because it can delay the production and review of relevant information.

The FTC has incentives to limit the burdens on CID recipients. A CID that imposes a heavy burden on the recipient is more likely to be challenged by a petition to limit or quash, or lead to CID enforcement proceedings, each of which can substantially delay a law enforcement investigation and impose burdens on the Commission and BCP staff.

Notwithstanding these incentives not to issue overly broad CIDs, BCP staff often must draft CIDs in the absence of any knowledge about the CID recipient's systems for maintaining information, the identities of relevant custodians, the recipient's ability to review and produce responsive documents in the time period demanded, or, at base, the types of substantive information the recipient maintains. Because of this lack of information, some CIDs can be facially broad.

To address this concern, several years ago the Commission amended its Rules of Practice to require a formal meet-and-confer process. The meet-and-confer process provides CID recipients with a valuable opportunity to discuss compliance issues with BCP staff so that the BCP staff can consider possible modifications that would reduce costs and burden while still providing BCP staff with needed information. For example, after a productive meet-and-confer process, BCP staff in many cases has been able to modify a CID so that documents are produced on a rolling basis, with the most critical documents produced first, accepting limits on custodians with directly relevant experience or accepting narrower date ranges for responsive materials.

The FTC's meet-and-confer process has increased efficiency and eliminated unnecessary burdens for both recipients and BCP staff by ensuring that it receives the information it needs to tailor the CID to the responsive information a recipient has and how the recipient maintains that information. It also provides a valuable opportunity for BCP staff and counsel for CID recipients to work together to resolve or narrow significantly their differences. Thus, in many instances the meet-and-confer process has avoided petitions to quash and CID enforcement litigation that would have imposed costs and delay during investigations. BCP staff has been able to respond efficiently to such modification requests because the Commission has delegated to certain BCP managers the authority to modify the terms of compliance with a CID under the conditions described above.

5. The timeframes associated with each step of the Bureau's CID process, including return dates, and the specific timeframes for meeting and conferring, and petitioning to modify or set aside a CID

As part of the process reforms BCP implemented in 2017, we have extended the default return date for CIDs in consumer protection matters from 14 to 21 days for third parties and from 21 to 30 days for targets. These changes addressed concerns that short return dates pose undue burden on CID recipients and the reality that, in many cases, after discussions with recipients and demonstration of substantial compliance, BCP managers with delegated authority have modified the times for compliance. Moreover, the 30 day response time for targets is consistent with Federal Rule of Civil Procedure 34(b)(2), requiring a party to whom a discovery request is directed to respond in writing within 30 days after the party is served. Thus, BCP staff believes this simple reform tracking federal court practice has had the salutary effect of not only reducing potential burdens on CID recipients, but also reducing inefficiency caused by needless discussion of extending production deadlines.

CID respondents are required to meet and confer with staff within 14 days after receipt of process or before the deadline for filing a petition to limit or quash, whichever is earlier. 16 C.F.R. § 2.7(k). The meet-and-confer deadline can be excused in writing or extended by no more than 30 days. As discussed above, the meet-and-confer process has been beneficial for both CID recipients and BCP staff.

Any petition to limit or quash compulsory process must be filed within 20 days of service, or, if the return date is less than 20 days, prior to the return date. Absent extraordinary circumstances, the Commission will not consider a petition to limit or quash from a CID recipient that has not met and conferred with BCP staff, and the Commission will consider only issues raised during the meet-and-confer process. *Id.* BCP staff believes that this procedure, which appears similar to that set out for the Bureau at 12 C.F.R. § 1080.6(e), provides sufficient time for CID recipients to file such petitions and reinforces the importance of resolving as many issues as possible in discussions between BCP staff and CID recipients during the meet-and-confer process. Further, a CID recipient can request an extension of the period for filing a petition to limit or quash. Staff, in conjunction with BCP managers, who have delegated authority to rule on such requests pursuant to 16 C.F.R. § 2.10(a)(5), will consider this on a case-by-case basis, taking into account the needs of the investigation and the extent to which the requester is engaging in good faith in productive meet-and-confer discussions.

6. The Bureau's taking of testimony from an entity, including whether 12 CFR 1080.6(a)(4)(ii), and/or the Bureau's processes should be modified to make expressly clear that the standards applicable to Federal Rule of Civil Procedure 30(b)(6) also apply to the Bureau's taking of testimony from an entity

If the Commission issues a CID for oral testimony from an entity, the CID must “describe with reasonable particularity the matters for examination and the entity must designate” one or more persons in advance to testify about the designated topics. 16 C.F.R. § 2.7(h). This language closely tracks Fed. R. Civ. P. 30(b)(6), but also incorporates well-established case law regarding

30(b)(6) depositions by adding that the testimony provided “shall be binding upon the entity.” The comparable Bureau regulation, 12 C.F.R. § 1080.6(a)(4)(ii), contains the same language.

We recommend that the Bureau continue to track the language in Fed. R. Civ. P. 30(b)(6) regarding oral testimony from an entity and publicly acknowledge the Bureau’s intent to follow Fed. R. Civ. Pro. 30(b)(6) and case law applying the Rule, but not to incorporate Rule 30(b)(6) by reference. The FTC disfavors incorporating other rules by reference to avoid any ambiguity of its rules’ applicability.

7. The Bureau’s processes for handling the inadvertent production of privileged information, including whether 12 CFR 1080.8(c) and/or the Bureau’s processes should be modified in order to make expressly clear that the standards applicable to Federal Rule of Evidence 502 also apply to documents inadvertently produced in response to a CID.

Rule 2.11 of the FTC’s Rules of Practice describes the procedures applicable to privileged material. *See* 16 C.F.R. § 2.11. The requirements of Rule 2.11 are derived from earlier adopted provisions in the Commission’s adjudicative rules as well as the Federal Rules of Evidence. *See* 16 C.F.R. § 3.31(g); Fed. R. Evid. 502. Rule 2.11 provides that the production of privileged material does not waive privilege if (a) production was inadvertent; (b) the holder of the privilege took reasonable steps to prevent disclosure; and (c) the holder of the privilege took reasonable steps to rectify the error, including by notifying Commission staff. *See* 16 C.F.R. § 2.11(d)(1)(i); *see also* Fed. R. Evid. 502(b), 12 C.F.R. § 1080.8(c). These provisions also require BCP staff to respond promptly to an assertion that information has been inadvertently produced by either returning the material, destroying it, or sequestering it pending judicial review of any privilege claims.

More generally, the FTC’s approach incorporates the protections afforded by Fed. R. Evid. 502, which was developed in response to concerns raised about the increasing costs of privilege review. That provision limits waiver of a privilege or protection attached to communications that are disclosed inadvertently or disclosed in judicial proceedings. We recommend that the Bureau continue to track the language in Fed. R. Evid. 502 as appropriate and publicly acknowledge the Bureau’s intent to follow Fed. R. Evid. 502, but not to incorporate Rule 502 by reference. The FTC disfavors incorporating other rules by reference to avoid any ambiguity of its rules’ applicability.

8. The rights afforded to witnesses by 12 CFR 1080.9, including limitations on the role of counsel described in 12 CFR 1080.9(b) in light of the statutory delineation of objections set forth in 12 U.S.C. 5562(c)(13)(D)(iii)

The rights the Bureau has granted to witnesses in the context of Bureau investigational hearings appear to be consistent with the rights the FTC has granted to witnesses in FTC investigational hearings, which are set forth in Rule 2.9 of the FTC’s Rules of Practice. *See* 16 C.F.R. § 2.9. These rights are generally consistent with those granted witnesses in depositions under the Federal Rules of Civil Procedure.

FTC investigational hearings are a tool used in matters before the Commission issues or files a complaint. Subject to certain limits, the rights afforded witnesses in FTC investigational hearings include a right to counsel and the right to review the hearing transcript and clarify responses. For good cause, FTC staff may need to limit these rights, such as a need to protect confidential or commercially-sensitive information disclosed in the course of an investigational hearing.

Although Rule 2.9 does grant witnesses the right to be accompanied, represented, and advised by counsel, Rule 2.9(b) limits the role of counsel during the investigational hearing. The FTC's Rule provides that counsel may not consult with a witness while a question is pending except with respect to issues involving a privilege, and neither counsel nor the witness may object to or refuse to answer a question unless answering the question would waive a privilege. Further, any objections must be stated concisely and in a non-argumentative manner. These provisions are consistent with federal court practice and are appropriate given that the investigational hearing is part of the agency's non-public investigation to determine whether a violation may have occurred and whether a law enforcement action would be in the public interest.

It is important to note that, unlike federal court discovery that is limited to obtaining information that is relevant to the claims and defenses asserted in the complaint and answer, the FTC is granted broad authority to obtain information to determine whether a violation has occurred and whether an action would be in the public interest. *See FTC v. Texaco, Inc.*, 555 F.2d at 871-72 (court must enforce a federal agency's investigative subpoena if the information sought is "reasonably relevant," and not "not plainly incompetent or irrelevant to any lawful purpose" of the agency or "unduly burdensome" to produce.) Thus, the scope of an FTC investigation is not limited in the same way as federal court discovery.

We therefore recommend that the Bureau continue to provide the rights afforded to witnesses by 12 C.F.R. § 1080.9, including limitations on the role of counsel described in 12 C.F.R. § 1080.9(b).

9. The Bureau's processes concerning meeting and conferring with recipients of CIDs, including, for example, negotiations regarding modifications and the delegation of authority to the Assistant Director of the Office of Enforcement and Deputy Assistant Directors of the Office of Enforcement to negotiate and approve the terms of satisfactory compliance with civil investigative demands and extending the time for compliance

As noted above, the meet-and-confer process is mandatory unless a BCP manager with the requisite delegated authority grants a written exception to this requirement. It has provided a valuable opportunity to resolve issues, in most cases eliminating the need for a recipient to petition to limit or quash the CID or for the Commission to initiate CID enforcement proceedings. To ensure that the process is productive, the Commission requires CID recipients to make available persons who are familiar with the recipient's information management system and the requested materials. BCP staff conducts the meet-and-confer sessions, which are usually held telephonically. After having the meet-and-confer, the appropriate BCP manager with the delegated authority can extend the compliance date if the CID recipient "has demonstrated satisfactory progress toward compliance," and can also modify the terms of compliance with the

CID, 16 C.F.R. § 2.7(l). The combination of the meet-and-confer requirement and the delegated authority to modify the time and manner upon a demonstration of satisfactory progress toward compliance allows the FTC to reduce unnecessary and undue burden while at the same time advancing the purposes of the investigation. The Bureau may want to consider adopting similar requirements for processing requests for extending the dates and manner of compliance of Bureau CIDs.

10. The Bureau's requirements for responding to CIDs, including certification requirements, and the Bureau's CID document submission standards

The Commission requires CID recipients to certify that all of the requested documents, information and tangible things in the possession, custody, control, or knowledge of the person to whom the CID is directed have been submitted, and that if any responsive document, information, or tangible thing has not been provided, the CID recipient has supplied relevant objections and reasons for such omissions. Among other things, this certification has helped BCP staff determine whether a follow-up CID is unnecessary.

In addition, CIDs issued in consumer protection cases regularly request (but do not require) that a recipient producing business records complete a certification of records of regularly conducted business activity consistent with Fed. R. Evid. 803(6). Completion of such a certification generally obviates the need for the custodian to testify in a hearing or trial arising from the investigation, thus reducing unnecessary burden on the custodian and the courts.

CIDs in consumer protection cases specify the production standards for submission of electronically stored information (ESI). BCP streamlined these standards as part of its 2017 reforms. In addition to being significantly shorter (two pages instead of six), the new production requirements are less complex, require the processing and production of fewer fields and no longer require that each field meet exacting requirements for specialized eDiscovery applications. Instead, consumer protection cases now accept standard Concordance or Relativity load files that can be created out of almost any eDiscovery application. While native data must still be TIFF'd and processed, to adhere to litigation requirements, these shorter requirements (as evidenced by eliminating several pages of instructions and specifications) are less complicated than the pages of technical specifications that many government agencies send to defendants. By providing ESI in the newly streamlined format, data can be used in any subsequent proceedings, obviating the need for the recipient to reproduce the data at a later time.

BCP's current guidelines for submission of ESI appear to be significantly shorter and less complex than the most recently available Bureau production requirements. The Bureau may wish to consider whether it can similarly streamline its own requirements while ensuring that the data is received in a format that meets its own processing and litigation needs.

The FTC's CID for documents, tangible things, or information requires the recipient to certify that **all** of the documents, tangible things, or information required by the CID that are in the possession, custody, or control of the CID recipient have been submitted to the FTC. The certification tracks Section 20 of the FTC Act, 15 U.S.C. § 57b-1(c) (11-13). It does not track Fed. R. Civ. Pro. 26(g), however, which requires a similar certification *after reasonable inquiry*

for responsive information or materials. BCP is not aware of any situation in which the FTC has alleged a recipient filed a false certification if the recipient did a reasonable search before it submitted its response and certification, yet later uncovered additional responsive documents.

11. The Bureau's processes concerning CID recipients' petitions to modify or set aside Bureau CIDs, including:

a. Whether it is appropriate for Bureau investigators to provide the Director with a statement setting out a response to the petition without serving that response on the petitioner;

b. Whether petitions and the Director's orders should be made public, consistent with applicable laws; and

c. The costs and benefits of the petition to modify or set aside process, vis-à-vis direct adjudication in Federal court, in light of the statutory requirement for the petition process and the fact that CIDs are not self-enforcing.

The FTC's Rules of Practice grant CID recipients the right to file an administrative petition to limit or quash a CID. *See* 16 C.F.R. § 2.10. Generally, these procedures provide for review by the Commission, with review completed within 40 days of the date a petition is filed with the Commission's Secretary. *See* 16 C.F.R. § 2.10(c). The Commission delegates to one of the Commissioners the responsibility for preparing an opinion.

Under Rule 2.10, BCP staff, without serving the petitioner, may prepare a reply for the Commission. This allows staff to share with the Commission pertinent nonpublic and privileged information and attorney work product as part of the deliberative process that is directly relevant to an appropriate and sound disposition by the Commission of the petition.

It is appropriate for the petitions to quash and any resulting Commission rulings to remain public, except for any commercially sensitive financial information or trade secrets. By making these materials available to the public, subject to appropriate deletions to protect commercially sensitive materials and trade secrets, the Commission improves transparency for the public as well as businesses and the private bar. It also provides useful guidance for the private bar as to the kinds of materials the Commission considers important in conducting investigations, thus avoiding unnecessary and prolonged disputes with BCP staff.

Courts have acknowledged the efficiencies to be obtained from requiring the recipients of administrative process to exhaust administrative remedies. Requiring petitioners to exhaust their administrative remedies before enlisting the aid of the courts ensures that the district courts are not burdened by premature and prolonged disputes about the Commission's investigational needs that in many or most cases cannot be aired frankly in a public setting. The Commission, by contrast, is able to review a petition and respond to the issues raised quickly, thus sharpening the issues for the district court in the event it is necessary for the Commission to bring an enforcement action.

BCP has heard two criticisms of the agency's petition to limit or quash process. One criticism is that recipients who file a petition to limit or quash a CID do not receive the reply that BCP staff provides to the assigned Commissioner in response to their petitions. Recipients argue that having this reply is necessary for them to rebut BCP staff's arguments. The FTC does not provide this response to CID recipients for several reasons. First, the recipient already is in a position to assert what burden responding to the CID would impose, including what costs and resources would be spent, as well as what privileges it is asserting. Second, BCP staff's responses often contain information concerning the investigative techniques being used; information obtained from other sources that is protected from disclosure pursuant to Section 21 of the FTC Act, 15 U.S.C. § 57b-2, and 16 C.F.R. § 4.10; the status and progress of related or similar non-public investigations; and information protected by attorney-client, work-product, deliberative process, and other governmental privileges. While such information could be redacted, the burdens imposed on the FTC in doing so outweigh what very little benefit the recipient would obtain from such a heavily redacted document. Third, the Commission's Rules require that a recipient may only file a petition to limit or quash on issues that it raised in a meet-and-confer process and was unable to resolve with BCP staff. *See* 16 C.F.R. § 2.10(a)(2). Thus, a recipient filing a petition to limit or quash a CID should have already received from BCP staff sufficient information regarding why the information sought is necessary and why BCP staff is unable to accommodate the recipient's concerns.

Another criticism BCP has heard concerning the Commission's petition to limit or quash process is that the Commission Order ruling on the petition is placed (with the petition) on the public record, which reveals the existence of an otherwise non-public investigation. 16 C.F.R. §§ 2.10(d), 4.9(b)(4)(i). The Commission is acting in its adjudicatory role when it issues an Order ruling on the petition. Accordingly, the Commission makes the petition and its ruling public (redacting confidential information protected by the FTC Act), consistent with the overriding interest in ensuring that the "workings" of the government, including the adjudicative proceedings, are subject to the "watchful eye" of the public. *Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978); *see also FCC v. Schreiber*, 381 U.S. 279, 293 (1965) ("general policy favoring disclosure of administrative agency proceedings"); *John Doe Co. No. 1 v. CFPB*, 195 F. Supp. 3d 9, 17 (D.D.C. 2016). Although the FTC places the petition and the opinion on the public record, BCP staff's reply is treated as non-public for the same reasons the reply is not provided to the petitioner. Redacting confidential and privileged portions would be burdensome to the FTC and would provide very little information to the public.

IV. CONCLUSION

BCP supports the Bureau's effort to assess its CID and other investigative processes and hopes the information in this comment proves useful to the Bureau in its assessment. BCP looks forward to a continued partnership with the Bureau on this and other issues in pursuing our shared goal of protecting American consumers. If any other information would be useful regarding these matters, please contact Thomas B. Pahl, Acting Director, BCP, at tpahl@ftc.gov or 202-326-3202, or Reilly Dolan, Acting Deputy Director, BCP, at jdolan@ftc.gov or (202) 326-3292.