ENFORCEMENT POLICIES AND PROCEDURES MANUAL

The Consumer Financial Protection Bureau ("CFPB") created this manual solely for the internal administrative use of its employees. It is not intended to nor should it be construed to: (1) restrict or limit in any way the CFPB's discretion in exercising its authorities; (2) constitute an interpretation of law; or (3) create or confer upon any person, including one who is the subject of a CFPB investigation or enforcement action, any substantive or procedural rights or defenses that are enforceable in any manner.

Any proposed updates to the policies and procedures included in this manual should be directed to the Enforcement Chief of Staff.

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(b)(7)(E)

Definitions

ALD – Assistant Litigation Deputy

AWS – Alternative Work Schedule

Bureau – Consumer Financial Protection Bureau

CID – Civil Investigative Demand

CMP – Civil Money Penalty

Dodd-Frank Act – Dodd-Frank Wall Street Reform and Consumer Protection Act

DSS – Document Submission Standards

ECPA – Electronic Communications Privacy Act

EAP – Enforcement Action Process

Enforcement Personnel – All Office of Enforcement employees

FOIA – Freedom of Information of Act

FTC – Federal Trade Commission

LD – Litigation Deputy

Legal – Legal Division

MMS – Matter Management System

MOU – Memorandum of Understanding

NORA – Notice and Opportunity to Respond and Advise

PIFI – Personally Identifiable Financial Information

RFPA – Right to Financial Privacy Act

RMR – Research, Markets, and Regulations Division

SAR – Suspicious Activity Report

SES – Supervision and Examination System

DEFINITIONS

Staff – Enforcement Attorneys

TRO – Temporary Restraining Order

OFFICE POLICIES

1. Document Maintenance and Retention Policies

Maintaining Matter Files

Revised 06.08.12

Maintaining uniform, complete and accurate matter files that document relevant developments throughout the course of Enforcement matters is critical for information sharing, continuity (following personnel turnover), effective litigation management (including the maintenance of litigation holds), Bureau compliance with FOIA and discovery obligations, and file sharing with other law enforcement agencies. Such files should be maintained electronically to the extent possible, and unless otherwise indicated should contain only final versions of documents.

Matter files should generally contain the following folders and specific documents:

- Internal documents folder
- External correspondence folder
- Agreements folder
- CIDs and Voluntary Requests for Information folder
- Information Informally Obtained from Outside the Bureau Folder
- Witness Statements, Declarations, and Transcripts Folder
- Written Discovery Folder
- Deposition Testimony Folder
- Experts Folder
- Case Pleadings Folder
- Proceeding Transcripts Folder
- Trial/Hearing Folder
- Settlement Folder
- Contact & Service Lists
- Case Calendar

A sample matter file is available here: (b)(7)(E) (b)(7)(E) The procedures for maintaining matter files should generally be followed, but staff may deviate from these procedures as appropriate and after consulting with the ALD assigned to the matter.

I. Matter Files

Procedures: As soon as an Investigation is opened (pursuant to the EAP), Staff should: (1) create on the Z Drive a unique file (a "Matter File") that will be used to preserve all documents obtained or created in connection with the Investigation and any subsequent enforcement action; (2) contact the Bureau's Help Desk to limit access to the Matter File to Staff working on that matter; and (3) move documents from the preliminary research stage into the Matter File.

Guidance: Some of the reasons to properly maintain Matter Files include:

- 12 C.F.R. § 1070.45 authorizes the Bureau to disclose confidential investigative information and other confidential information in certain circumstances, so the contents of Matter Files may be shared with other law enforcement agencies.

- Federal Rule of Civil Procedure 26(a)(1) requires the Bureau to make certain disclosures at the onset of litigation, including identifying individuals likely to have discoverable information the Bureau may use to support its claims or defenses. Failure to identify such individuals during discovery can result in sanctions, including an order precluding the Bureau from presenting testimony from those individuals.

- If an investigation results in administrative proceedings, 12 C.F.R. § 1081.206 places upon the Office of Enforcement an affirmative obligation to make available for inspection and copying certain documents it obtained prior to the institution of proceedings, including documents obtained from persons not employed by the Bureau (you should consult the rule and associated background discussion upon commencement of an administrative proceeding).

Guidance: Some of the folders that should be part of a Matter File may be maintained in the Matter Management System (MMS). In maintaining a Matter File, you should consult the policies and procedures for using the MMS when they are finalized.

When saving documents in a Matter File, you should to the extent possible use naming conventions that convey the following information (when applicable):

- Type of document (i.e. internal memo, transcript, motion, letter, opinion).
- Title/Subject of the document.
- Author of the document.
- Date of the document.
- The party filing or serving the document.
- Name of individual producing the document.

a. *Contact List*

Procedures: For every Matter File, Staff should create and thereafter keep updated a contact list consisting of contact information, including names, addresses, email addresses, and telephone numbers for all relevant persons or entities, including:

- Members of other divisions in the Bureau involved in the investigation or case.
- Co-counsel, including co-counsel at sister agencies participating in the investigation or prosecution of the matter.
- Opposing counsel.
- Expert witnesses and consulting experts.
- Fact witnesses, including counsel for fact witnesses.
- Any person not employed by the Bureau who provided documents or information in connection with the investigation.

The contact list should be maintained in the MMS system.

b. *Service List*

Procedures: To the extent service isn't effectuated through electronic filing, Staff should create a

service list identifying the parties that should receive administrative or case pleadings and the manner in which parties should be served.

c. *Internal Documents Folder*

Procedures: In every Matter File, Staff should create a unique folder titled "Internal Documents" to preserve all final drafts of documents created by the Office of Enforcement or other persons employed by the Bureau in connection with that matter. Within the Internal Documents folder, Staff should:

- Save the Investigation Opening Memorandum.
- Save Action Memoranda.
- Save internal research memoranda.
- Save all other internal memoranda.
- Save any final examination or inspection reports provided by Supervision.
- Save any written notes of significant internal and external meetings.

d. *External Correspondence Folder*

Procedures: In every Matter File, Staff should create a folder titled "Correspondence" to save correspondence (including emails) to and from opposing counsel, third parties, witnesses and other individuals with whom Staff correspond in relation to the matter.

e. *Agreements Folder*

Procedures: In every Matter File, Staff should create a folder titled "Agreements" to save tolling, confidentiality and other agreements with potential Defendants or other parties.

f. *CIDs and Voluntary Requests for Information Folder*

Procedures: In every Matter File, Staff should create a folder titled "CIDs and Voluntary Requests for Information." Within this folder, Staff should:

- Save all voluntary requests for information and CIDs *issued by* the Bureau in a subfolder titled "Bureau Requests."
- Save all correspondence responding to voluntary requests for information and CIDs in a subfolder titled "Responses to Requests."

See also the Civil Investigative Demands Policy on page 2-27

g. *Information Informally Obtained from Outside the Bureau Folder*

Procedures: In every Matter File, Staff should create a folder titled "Information Obtained Informally from Outside the Bureau." Staff should save any information and documents informally received from consumers and other third parties in the course of the investigation in this folder or appropriate subfolder.

h. *Witness Statements, Declarations, and Transcripts Folder*

Procedures: In every Matter File, Staff should create a folder titled "Witness Statements and Testimony" to preserve all witness statements, including emails, and testimony obtained during the course of an investigation. Within this folder, Staff should:

- Save any witness statements, including testimony transcripts or declarations and associated exhibits.
- Clearly label and store witness statements in accordance with any protective order or agreement restricting the dissemination of the material outside of the Bureau. Hardcopy materials should also be clearly labeled and stored according to the requirements of the protective order or agreement.

Guidance: In preserving materials related to witnesses, you should consult 12 C.F.R. § 1081.207 regarding the Bureau's obligation to produce statements of individuals it calls or intends to calls as witnesses. The Bureau is required to produce statements that would have to be produced pursuant to the Jencks Act, 18 U.S.C. § 3500.

You should consider creating subfolders for materials from each witness and for exhibits used during the taking of witness testimony.

i. *Case Calendar*

Procedures: When an investigation is opened, Staff should create and thereafter keep updated a "Case Calendar" in MMS when it becomes available. The Case Calendar should include all:

- Due dates for responses to CIDs and voluntary requests for information.
- Witness testimony scheduled.
- Case management deadlines, such as deadline to complete discovery, deadline to file expert reports, deadline to file summary judgment motion, and date set for trial.
- Due dates for responses to discovery served by the Bureau and by Defendant.
- Due dates for oppositions and replies to motions.
- Depositions and hearings scheduled.

Guidance: When calculating deadlines, you should consult 12 C.F.R. Part 1081, Fed. R. Civ. P. 6, the local rules for the District Court where the case is filed, as well as any standing orders of the judge or hearing officer before whom the action is pending.

j. *Written Discovery Folder*

Procedures: In every Matter File, Staff should create a folder titled "Written Discovery" when an action is commenced. Within this folder, Staff should:

- Save all Requests for Production, Requests for Admission, and Interrogatories *issued by* the Bureau to Defendants in a subfolder titled "Bureau's Discovery Requests."
- Save all Bureau responses to Requests for Production, Requests for Admissions, and

Interrogatories in a subfolder titled "Bureau's Discovery Responses."
- Save all Requests for Productions, Requests for Admission, and Interrogatories *issued to* the Bureau in a subfolder titled "Defendant's Discovery Requests."
- Save all Defendants' responses to Requests for Production, Requests for Admissions, and Interrogatories in a subfolder titled "Defendants' Discovery Responses."
- Save all subpoenas and subpoena responses in a subfolder titled "Third Party Discovery."
- Save all privilege logs.
- When multiple discovery requests of the same type are issued or received, number the requests and responses (for example, when the Bureau is served multiple Requests for Production in a case, save them as "First Request for Production" and "Second Request for Production").

Guidance: If a case involves multiple Defendants, you should consider creating separate discovery folders or subfolders for each Defendant.

k. *Deposition Testimony Folder*

Procedures: In every Matter File, Staff should create a folder titled "Deposition Testimony" when a civil action is commenced. Within this folder, Staff should:

- Save all deposition notices.
- Save all deposition transcripts.
- Save all deposition testimony outlines.

l. *Experts Folder*

Procedures: In every Matter File, Staff should create a folder titled "Experts." Within this folder, Staff should:

- Save all expert reports.
- Save all correspondence, documents, research, data, articles and other materials sent to, and received from, experts retained by the Bureau.
- Save all agreements between the Bureau and retained experts.
- Save all invoices from experts and records of payments made.

Guidance: In organizing and saving expert materials, you should consult 12 C.F.R. § 1081.210 and Fed. R. Civ. P. 26(a)(2) and (b)(4) regarding the disclosure of expert materials.

m. *Case Pleadings Folder*

Procedures: In every Matter File, once a case has been filed, Staff should create a folder titled "Case Pleadings." Within this folder, Staff should:

- Save file stamped versions of pleadings filed with the Court/Administrative Law Judge.
- Save file stamped versions of exhibits filed with pleadings.
- If a pleading contains redactions, save both a redacted and unredacted version of the

pleading.

- Save PDF and Word versions of pleadings filed on behalf of the Bureau.
- Save opinions issued by the Court/Administrative Law Judge.
- Save orders issued with opinion.

n. *Proceeding Transcripts Folder*

Procedures: In every Matter File, Staff should create a folder titled "Transcripts." Within this folder, Staff should save transcripts from all administrative or court proceedings, including preliminary hearings and arguments.

o. *Trial/Hearing Folder*

Procedures: In every Matter File, once a case has been filed, Staff should create a folder titled "Trial." In this folder, Staff should save all trial and administrative hearing related documents, including:

- Witness and exhibit lists.
- Witness examination outlines.
- Closing and opening argument outlines.

p. *Settlement Folder*

Procedures: In every Matter File, Staff should create a folder titled "Settlement" and save all settlement related documents therein.

q. *Subfolders*

Procedures: Within any of the required folders in each Matter File, Staff should create appropriate subfolders for purposes of improved organization. For example, in the Internal Documents Folder, subfolders might include internally created fact memos, research memos, notes of witness interviews, exam-related documents, press releases, reports, and legal research.

II. Maintenance of Documents Collected During an Investigation or Discovery

a. *Electronic Productions*

Procedures: Staff should ensure that electronic productions received during the course of an investigation or discovery are loaded into an e-document review tool such as Clearwell according to the procedures for electronic discovery when they are finalized.

b. *Paper Productions*

Procedures: In general, Staff should scan and OCR paper productions obtained during an Investigation or through discovery so they can be loaded into a document management system such as Clearwell.

Guidance: In most situations, paper productions should be scanned and OCRed. However, if the size of a production is minimal or an Investigation is not likely to lead to enforcement action, you may opt to avoid the expense.

c. *Documents Subject to a Protective Order or other Agreements*

Procedures: If, during the course of an investigation or discovery, materials are obtained pursuant to agreements restricting the dissemination of such materials outside of the Bureau (for example, from a state attorney general pursuant to an MOU), Staff should clearly label and store the materials according to the requirements of the protective order or agreement.

III. Litigation Holds

Procedures: Staff should preserve all documents in accordance with any litigation hold that may be in place with the respect to the Matter. The litigation hold policies and procedures should be referred to once they are finalized.

IV. Document Index

Guidance: You should considering creating in the Matter File a chronological document index. The document index should list all documents, electronically stored information, and tangible items obtained by Staff during an Investigation or through discovery and provide at least the following when available:

- Date and description of each Voluntary Request for Documents, CID, Subpoena, and Request for Production (collectively "Document Request") issued by the Bureau during the course of the investigation or discovery.
- Date and description (including Bates range) of documents produced to the Bureau in response to each specific Document Request, and where the documents are stored.
- Date and description of each Subpoena, FOIA request, and Request for Production issued to the Bureau.
- Date and description (including bates range) of documents produced by the Bureau in response to each Subpoena, FOIA request, and Request for Production.
- Date and description of any documents received from a law enforcement partner (including Bates range).
- An indication of whether the documents are confidential, privileged, or subject to some prohibition on disclosure and the nature of the privilege.
- Date and description of each deposition transcript and transcript of testimony taken pursuant to CID.
- Date and description of all documents made available for inspection and copying pursuant to 12 C.F.R. § 1081.206.
- A description of documents reviewed in anticipation of production, and a description of those documents withheld from production on the basis of privilege or non-responsiveness.

Federal Rule of Civil Procedure Rule 34 requires the Bureau to conduct a reasonable search of

documents within its possession, custody, or control in order to respond to discovery requests. Failure to produce documents during discovery can result in sanctions, including an order precluding the Bureau from using those documents as evidence. It is important to index the documents produced and received during the discovery process in the event that any disputes arise over the completeness of a production or documents withheld from production.

V. External Telephone Communications

Guidance: You should consider memorializing important phone conversations with parties outside the Bureau in a matter log containing the following information:

- Date of conversation.
- Participants.
- Notes sufficient to document content of conversation.

You should follow up any substantive phone conversation with opposing counsel with an email or letter memorializing the substance of the conversation.

VI. Maintenance of Original Documents

Procedures: Staff should only use original documents when necessary to present evidence in court or at a hearing. With the exception of large scale paper document productions, to maintain the integrity of original documents and data, Staff should:

- Scan and save paper documents received in the course of a matter into the appropriate folder in the Matter File.
- To the extent necessitated by the receipt of paper documents, create a paper Matter File with the same folders as in the electronic Matter File. Paper copies of documents received electronically should not be created and stored in the paper Matter File.
- Maintain original paper documents in pristine condition without marking or altering them from the state in which they were originally produced.
- Maintain original hardcopy documents in the appropriate folder within the paper Matter File.
- Segregate original documents from the Staff's personal notes, copies of Staff's emails, or any other documents.
- Load onto the Z drive or Clearwell, or print out, electronic data received as part of your investigation.
- Keep and clearly label original electronic data production (i.e., the CD, DVD, or other storage device on which the production was made) that will not be used for investigative purposes.

Maintaining Exam Support Files

Revised 05.21.13

This policy pertains to documents and information that Staff may create, obtain, or utilize in connection with supporting Supervision examination activity ("Exam Support Documents"). Exam Support Documents typically fall into two categories:

1. Bureau documents, such as notes, memoranda, examiner work papers, exam reports, and other work product; and

2. Non-Bureau documents, such as documents provided by supervised entities ("Supervised Entity Documents") and documents from third parties.

Exam Support Documents may contain confidential supervisory information[1] that Staff should treat as confidential and privileged. *See* 12 C.F.R. § 1070.41. However, in certain circumstances disclosure of Exam Support Documents may be required or appropriate. See, for example, the Office of Enforcement's Affirmative Disclosure and Other Disclosure Obligations for Adjudication Proceedings policy. Accordingly, Staff should properly maintain Exam Support Documents in order to protect their confidentiality and enable required or appropriate disclosures.

I. Exam Support File

Procedures: When conducting exam support work, Staff should: (1) create a unique file on the Z Drive ("Exam Support File") to maintain Exam Support Documents created, obtained, or utilized in connection with their examination support activity; (2) contact the Bureau's Service Desk to limit access to the Exam Support File to Staff assigned to the examination; and (3) create the following three folders within the Exam Support File:

- Bureau Documents (*e.g.*, notes, memoranda, exam work papers, exam reports, and other work product);

- Supervised Entity Documents (*i.e.*, documents and information obtained from the supervised entity); and

- Third Party Documents (*i.e.*, documents and information obtained from third parties).[2]

Staff should protect Exam Support Documents as per the Office of Enforcement's guidance regarding Confidentiality, Access, and Privileges, such as:

- transfer Exam Support Documents only when necessary and through secure methods;

- not leave Exam Support Documents (or a laptop/device that contains it) unattended or use them in public view; and

[1] *See* 12 C.F.R. § 1070.2(i) (defining "confidential supervisory information").
[2] Staff may create subfolders, as necessary, within the three primary folders.

- immediately alert managers if Staff know or suspect that Exam Support Documents (or a laptop/device that contains them) have been lost, stolen, or compromised.

Procedures: Because Supervision personnel will maintain and preserve confidential supervisory information pursuant to Supervision's policies and procedures (*e.g.*, uploading Supervised Entity Documents into the Supervision & Examination System (SES)), Staff should not maintain any original confidential supervisory information (other than documents created by Staff) in the Exam Support File or any other location. Instead, Staff should: (1) store ***copies*** of confidential supervisory information obtained or utilized during examination support activity in the Exam Support File; and (2) place such confidential supervisory information in the above-described appropriate folders (Internal Bureau Documents, Supervised Entity Documents, Third Party Documents).

Guidance: In order to facilitate coordination between Enforcement and Supervision during examination activity, Supervision often provides Staff with access to exam-related information stored in its files in the Z Drive, the SES system, or other database or computer systems. Only certain confidential supervisory information in Supervision's systems may be relevant to Staff's examination support activity. Staff should, therefore, copy only that information that they obtain or utilize in connection with their examination support activity (*i.e.*, Exam Support Documents) to the Exam Support File. Staff should maintain such Exam Support Documents because the Bureau has an affirmative obligation to disclose documents obtained from persons not employed by the Bureau (*i.e.*, supervised entities and third parties) in certain situations. Examples of confidential supervisory information that should be copied into the Exam Support File include:

- information that Staff obtain by hand delivery, mail, electronic mail, or fax in the course of exam-support activities;

- information that Staff use or rely upon to conduct legal analysis or formulate a legal opinion, reach factual conclusions, or provide legal or policy advice in connection with the exam;

- information that may form the factual basis of a potential enforcement action or otherwise may underlie Staff's decision to recommend commencement of a potential enforcement action arising out of an exam; and

- other information relevant to Staff's support of the examination process.

Conversely, Staff should not maintain information that is irrelevant to Staff's examination support activity in the Exam Support File (*e.g.*, Supervision documents that Staff reviews but concludes are irrelevant).

II. Transfer to Matter File if an Investigation Is Opened

Procedures: If an examination leads to an enforcement matter (pursuant to the Action Review Committee), Staff should (i) create a Matter File as outlined in the Maintaining Matter Files policy; (ii) create a folder within the Matter File labeled "Examination-related Documents;" and (iii) copy the existing Exam Support File (along with the Internal Bureau Documents, Supervised Entity Documents, Third Party Documents subfolders) into the newly created Examination-related

Documents folder. The Examination-related Documents folder will help Staff keep track of the documents relating to the examination and make necessary disclosures.

Freedom of Information Act

Revised 06.29.12

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, requires federal agencies that receive a request for records under FOIA to:

- Conduct a reasonable records search;
- Appropriately identify exempted and privileged information contained within records; and
- Preserve and produce the responsive records.

While the Bureau's FOIA Office holds the primary responsibility for FOIA compliance, the Office of Enforcement should take certain actions to assist in this compliance, specifically: facilitate a reasonable records search; identify sensitive, confidential and privileged information within Enforcement records; and preserve and produce records responsive to a FOIA request.

I. Facilitating a Reasonable Records Search

Procedures: Staff, paralegals, administrative, professional, and support staff, interns, contractors, and managers ("Enforcement personnel") should take the following actions to comply with the Bureau's records policy:

- Identify all materials created or received in the course of official duties and dispose of them only in compliance with the Bureau's records disposition schedule;
- Segregate federal records from non-federal records (*i.e.* separate personal email and other records from work-related material); and
- Organize federal records in such a manner as to enable the FOIA office to effectively identify records that may be responsive to a FOIA request.

Enforcement personnel should be familiar with and periodically review the Bureau's records management program. Enforcement personnel should organize electronic and paper files in such a way as to enable a third-party to find the employee's federal records that are related to particular matters, projects, policies, decisions, or procedures. For guidance on how to do this for matter-related documents, see the Office of Enforcement's Policy on Maintaining a Matter File (page 1-3).

Guidance: FOIA requires federal agencies to search all places that are reasonably likely to contain responsive records, including the files of all agency employees who may have such records. By organizing your files, you reduce the number of files that must be searched in response to a FOIA request, and you minimize the potential for inadvertent inclusion of non-relevant and sensitive materials. Your leave status or change in duty station will not relieve the Bureau of its search obligations, so it is important for you to consistently organize your records so as to avoid disrupting the FOIA search process during your absence from the office.

II. Identifying Sensitive, Confidential, and Privileged Information Contained Within Records

If the Bureau's FOIA Office determines that a Bureau employee would likely possess records that are responsive to a FOIA request, it will conduct an electronic search of the employee's

emails and other electronic documents and will ask the employee to provide any responsive hard-copy documents. The FOIA Office will then review these records to determine if any information may be withheld from public disclosure. Appropriately marking and filing all records you create or receive aids the accuracy of this review.

Procedures: Before engaging in any matter or project, project leaders and lead attorneys should consider the potential FOIA disclosure obligations with regard to the project and, when appropriate, consult training materials, the Office of Enforcement's FOIA Point of Contact (FOIA POC), and/or the Bureau's FOIA Office to determine the applicability of any exclusions or privileges. Project leaders/lead attorneys should give direction to team members as appropriate.

In addition, when creating or receiving a Bureau record, Enforcement personnel should add the following markings as appropriate:

- "**Draft**" – when a document is subject to review and revision (note that the policy or decision itself may be undecided, interim, or final);
- "**Recommendation**" – on all documents that recommend a course of action, policy, procedure, or any decision from a working group, manager, or project leader;
- "**Law Enforcement Privileged**" – on all documents that are created or compiled in connection with an open and active law enforcement matter (*i.e.*, after the project gets added to Enforcement Matter Management System);
- "**Attorney Work Product**" – on all confidential documents that are created by lawyers, or at the request of lawyers, in anticipation of litigation;
- "**Attorney-Client Privileged**" – on all confidential communications between an attorney and client related to a legal matter for which the client has sought professional legal advice;
- "**Confidential Informant/Whistleblower**" – on all materials identifying informants who provided information to the Bureau under express assurances of confidentiality; and
- "**Supervision Information**" – on all documents related to examination, operating, or condition reports prepared by, on behalf of, or for the use of the Bureau in its supervision of financial institutions.

Enforcement personnel should add other appropriate markings to indicate sensitivity or other privileges, as appropriate (*e.g.* confidential law enforcement technique, mental process privilege, PII, confidential commercial & financial information, *etc.*).

The applicability of the exemptions and privileges above are dictated by the FOIA statute and/or extensively-developed case law. If Enforcement personnel are uncertain about whether any of the above markings are appropriate, they should consult the project lead, supervising ALD, FOIA POC, FOIA Office, or Dept. of Justice Office of Information Policy reference materials.

Guidance: You should have a general understanding about the FOIA exemptions and exclusions that apply to your work so that you understand what may or may not be made public and mark your documents accordingly.

III. Preserving and Producing Responsive Records

The Bureau's FOIA Office is the only office within the Bureau authorized to respond to FOIA requests. Generally, the Bureau must respond to FOIA requests within **20 business days** of receipt, with some exceptions.

Procedures: Requests from the FOIA Office should be given high priority. When the Bureau receives a FOIA request that pertains to any information in Staff's custody or control, these steps should be followed in sequential order:

A FOIA request received by the FOIA Office is forwarded to the FOIA POC, who will inform the Office of Enforcement Chief of Staff of the request.

The FOIA POC consults the Enforcement Matter Management System, Enforcement records (*e.g.* Enforcement Action Process opening memos), and Office of Enforcement personnel necessary to identify to the FOIA Office all potential custodians of responsive records, their job title(s) at the times relevant to the request, and all lead attorneys and managers on any matter relevant to the request.

- The FOIA Office emails the standardized FOIA Questionnaire to all potential custodians of responsive records.

- Each custodian receiving the FOIA Questionnaire should complete the questionnaire and return it to the FOIA Office by the due date noted in the email (normally within 2 business days).
    - If the FOIA Office determines that a custodian has any potentially responsive electronic records, it will retrieve all responsive records directly from the custodian's email and/or shared network drive without interruption to the custodian
    - If the FOIA Office determines that a custodian has any potentially responsive hard copy records, it will schedule a time with the custodian to collect and copy the records.
    - If the FOIA Office determines that potentially responsive electronic records exist beyond the grasp of the network (usually, on a remotely-located custodian's laptop), it sends the custodian an encrypted USB drive via overnight mail service; the custodian saves all responsive records to the USB drive and returns it to the FOIA Office via overnight mail service.

- The FOIA Office conducts its review of the potentially responsive records.

- The FOIA Office sends the proposed release to the following Enforcement contacts for consultation prior to releasing records to the requestor:
    - FOIA POC;
    - Project leader or lead attorney on the matter(s) involved; and
    - Office of Enforcement Chief of Staff.

- The POC, project leader or lead attorney, and Chief of Staff determine whether notice to and/or additional consultation by other Enforcement personnel is appropriate.

- The Enforcement contacts conclude their consultation within 2 business days of receiving the proposed release.

- Once this consultation has occurred, the FOIA Office concludes its processes and responds to the requestor.

- The FOIA Office provides the FOIA POC a copy of the released records (including any transmittal letters) or saves them in the following location: Z:\Enforcement\Resources\Released records under FOIA.

Guidance: When the FOIA Office asks Enforcement personnel to identify responsive records, it is important to closely follow the Bureau's FOIA procedures and to ask for guidance from the FOIA Office before making any deviations from the procedures described above. Because FOIA is a highly-litigated area, the FOIA Office establishes policies and procedures that meet the latest standards for federal agencies. Also, the FOIA Office may occasionally update policies and procedures to meet recent guidance from courts.

2. Investigative Policies

Enforcement Action Process *Revised 02.01.12*

DECISION MEMORANDUM FOR THE SPECIAL ADVISOR TO THE SECRETARY OF THE TREASURY ON THE CONSUMER FINANCIAL PROTECTION BUREAU

FROM: Richard Cordray, Assistant Director for Enforcement

SUBJECT: Policies and Procedures for Review, Comment, and Approval of CFPB Enforcement Actions

Recommendation

That you approve the proposed notification, consultation, and approval policies and procedures that Consumer Financial Protection Bureau's (CFPB's) Enforcement (ENF) will follow when taking critical action throughout the various stages of the enforcement process.

_____ Approve _____ Disapprove _____ Let's Discuss

Background

These procedures have been formulated to (1) facilitate a robust decision-making process that will protect the interests of the CFPB as a whole, (2) provide appropriate oversight of the ENF staff, (3) ensure that before ENF takes any critical action, and at various other key management stages of an ENF matter, other "Interested Divisions" (CFPB units that were the source of an investigation, or whose work could be impacted by an ENF investigation/case) are aware of the contemplated action, have structured procedures for discussing its implications with ENF's senior management, and have an opportunity to present any unresolved disagreements to the CFPB's Director (the Director); and (4) clarify whether particular matters are handled by ENF or the Legal Division. An Enforcement Matters Review & Comment Process – Decision Points Chart outlining these procedures is attached to this memorandum for quick reference.

Particular attention has been paid to assuring Interested Divisions a sufficient opportunity for comment prior to ENF (1) opening an investigation that could involve communication with potential targets and/or non-victim witnesses, (2) sending to the Director a recommendation for filing an administrative action or complaint (lawsuit), and proposing parameters for any settlement negotiations, and (3) sending to the Director a recommendation to settle a matter. In other words, these procedures seek to assure Interested Divisions an appropriate opportunity for comment at the "beginning, middle, and end stages" of every investigation.

Central to these objectives is the creation of an ENF Matter Management System (EMMS) that will allow various interested CFPB units/divisions (*e.g.*, Supervision, Fair Lending, RMR, Legal, etc.) to monitor and provide advice regarding ENF actions that might impact their work, and weekly meetings at which senior representatives from ENF, Supervision (SPV), Fair Lending (FL), Research, Markets, and Regulation (RMR), and Legal will discuss proposed ENF actions.[3]

[3] Although the procurement process is being advanced energetically by ENF staff, the system may not be operational for

I. Opening Investigations (Beginning Stage)

The ENF legal staff is currently organized into investigation/litigation units, each of which is supervised by an Enforcement Deputy (ED) who reports to the Assistant Director for Enforcement and the Deputy Assistant Director for Enforcement. ENF attorneys, under the supervision of their EDs, will conduct pre-investigation reviews to determine whether investigations are warranted. During these preliminary inquiries, ENF staff may contact other law enforcement agencies or victims, but they will avoid any intentional interaction with potential law-breakers or third party witnesses. The Assistant Director for Enforcement will be notified of any ongoing pre-investigation reviews.

The opening of any new ENF investigation (which may involve contact with potential law-breakers or third party witnesses) must be approved by the Assistant Director for Enforcement. Three business days prior to officially opening the investigation, ENF will enter the information contained in the investigation's opening memorandum (see below) into EMMS, and EMMS will then notify the Director, SPV, FL, RMR, Legal, and any other Interested Divisions.[4] During this three day period, ENF's senior management will consider and address any concerns raised by the Interested Divisions, and may decide to delay or revise ENF's plan for proceeding with the matter.[5] All appropriate efforts will be undertaken to resolve such concerns prior to opening the investigation (see Section 3, below, regarding the resolution of disputes between divisions).

For each new investigation, ENF will issue to the investigation's file a brief memorandum describing:

a. The source of the investigation
b. The conduct under investigation
c. The provisions of law applicable to potential violation(s)
d. The ENF staff assigned to the investigation
e. Any other agency or Interested Division and their relevant contact persons (if appropriate) to be notified via EMMS prior to selected critical ENF actions/stages (see Notification and Consultation, below), and
f. Any additional narrative, facts, or issues the ED believes to be relevant or useful.

II. Notification to Other CFPB Divisions and the Director

As described above, prior to officially opening an investigation, ENF will enter into EMMS information identifying the investigation and any alternate entities or names that might reasonably have been used to identify the investigation, as well as the information in the investigation's opening memorandum (and a copy of this memorandum).

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several months. Until that time, the EMMS functions described in this memorandum will be executed manually by ENF staff.

[4] In any fair lending case, FL will be collaborating with ENF throughout the process, and would therefore be an interested division for the matter.

[5] Exigent circumstances may require deviation from this procedure. See the "Exigent Circumstances" section of this memorandum.

Each investigation file in EMMS will contain a checklist of critical ENF actions and investigation stages that require notifications to other Interested Divisions, and if appropriate, other agencies. As the investigation progresses, ENF will, in addition to its ongoing collaboration with other groups within CFPB (*e.g.*, SPV, FL), ensure that EMMS is timely updated to reflect any new information or subsequent developments that might require additional notification, coordination, or consultation with Interested Divisions and/or other agencies.

It is anticipated that all CFPB employees will, at a minimum, be able to access EMMS for purposes of identifying the names and entities associated with ENF matters, and to identify the ENF contact person for each matter.[6] CFPB employees may get in touch with ENF contact persons to inquire about the nature of any ENF matter. CFPB employees in potentially Interested Divisions are encouraged to regularly search EMMS for the names of individuals and entities related to matters they are working on for purposes of ensuring that ENF is aware of their interest, and that such interest (including specific notification instructions) is reflected in EMMS. If appropriate, a CFPB employee who does not have full EMMS access to a matter may request such access.

Finally, Consumer Engagement will be notified of all significant public enforcement actions so that it might take advantages of such opportunities to devise consumer education or outreach initiatives.

III. Consultation and Resolution of Disputes between Enforcement and other CFPB Divisions

The aforementioned EMMS procedures are designed to ensure that Interested Divisions receive meaningful advance notification of specified ENF actions that could affect their work. In addition to these automated (email) notifications, senior representatives of ENF, SUPV, FL, RMR, Legal, and any other Interested Divisions will meet weekly to discuss certain proposed ENF action recommendations before they are sent to the Director. Prior to these meetings, attendees will be provided with materials necessary for full and informed discussion of the proposed ENF recommendations, such as a draft of the Action Memorandum and complaint. During the Weekly Meetings (or at other stages in the enforcement process), there may arise between the divisions disagreements about whether or how to proceed (*i.e.,* whether to open an investigation, what tools to use, and when to use them). Every effort will be made to resolve these disagreements at the meetings, but if consensus cannot be reached the Interested Divisions may present their concerns (if appropriate, supported by research and legal or other materials) to the Director[7] at the same time that ENF presents the Director with its recommendations.

Unless the participants in a "Weekly Meeting" unanimously agree otherwise, ENF will wait at least two weeks following the scheduled meeting before sending the proposed recommendation, which will include a summary of any participant's unresolved difference of opinion regarding the recommended action, to the Director. These two week waiting periods are designed to allow the

[6] Policies will be developed regarding which CFPB employees will have partial or full access to EMMS information about ENF matters.

[7] Absent a Director, such presentations will be made to, and authority granted by, the Treasury Secretary's delegate.

Interested Divisions time to research relevant issues, consult with ENF, and prepare any legal or other materials to present to the Director regarding the proposed ENF actions.

IV. Issuance of Civil Investigative Demands

Per standing delegation from the Director, Civil Investigative Demands (CIDs) must be approved by the Assistant Director for Enforcement. SPV, FL, RMR, and Legal will be given notice whenever CIDs have been issued.

V. Enforcement Recommendations to the Director Seeking Authority to File Administrative Actions and Lawsuits and Proposing Parameters for Settlement (Middle Stage)

If, toward the conclusion of an ENF investigation, ENF is considering recommending legal action, the target of such action will be offered an opportunity to present any additional information, documents, or other evidence it would like ENF to review.

Once the Assistant Director for Enforcement has concluded, based on ENF's investigation, that legal action is appropriate, he or she will inform SPV, FL, RMR, Legal, and other Interested Divisions at a Weekly Meeting of ENF's intention to send a memorandum to the Director seeking authority to file an administrative action or complaint (lawsuit), and proposing parameters for any settlement negotiations. The two week waiting period and dispute resolution procedures described in Section 3, above, including providing the proposed memorandum and other materials necessary for a full and informed discussion of the recommendations prior to the Weekly Meeting, will be followed to allow Interested Divisions sufficient opportunity to comment on ENF's recommendation. The Legal Division's Office will be notified whenever ENF sends such recommendations to the Director.

VI. Filing Administrative Actions and Lawsuits

After reviewing ENF's memorandum seeking authority to file an administrative action or complaint and proposing parameters for any settlement negotiations, as well as any submissions by other CFPB divisions, the Director shall decide whether to authorize such actions, and whether to approve ENF's recommended parameters for negotiating a settlement. ENF shall take such action, and may enter into such negotiations, as authorized by the Director.[4]

VII. Enforcement Recommendations to the Director Seeking Authority to Settle Administrative Actions and Lawsuits (End Stage)

If the Assistant Director for Enforcement concludes that ENF has negotiated an appropriate settlement of an administrative action, lawsuit, or other ENF matter, ENF will inform SPV, FL, RMR, Legal, and other Interested Divisions at a Weekly Meeting of ENF's intention to send a memorandum to the Director seeking authority to enter into the settlement. The two week waiting period and dispute resolution procedures described in Section 3, above, will then be followed to allow Interested Divisions sufficient opportunity to weigh in on ENF's recommendation.

VIII. Settling Administrative Actions and Lawsuits

After reviewing ENF's memorandum seeking authority to settle an administrative action or complaint, as well as any submissions by other CFPB divisions, the Director shall decide whether to authorize the settlement. ENF shall take such settlement action as authorized by the Director.

IX. Closing Matters

The ED supervising any investigation must approve the closing of an investigation or other ENF matter without Bureau action. Prior to closing an investigation, ENF will issue to the investigation's file a brief memorandum describing the reason for closing the investigation. The Assistant Director for Enforcement, SPV, FL, RMR, and Legal will be notified when matters have been closed.

X. Response to Petition to Quash CID

After a CID is issued, the subject may petition the Bureau for an order modifying or setting aside the CID. ENF will submit a response for consideration by the Director in ruling on the petition to quash.

XI. Ruling on Petition to Quash CID

When a subject petitions the Bureau for an order modifying or setting aside a CID, the Director (or the Director's designee) will have the authority to rule on the petition. In executing this role, the Director will receive counsel from Legal.

XII. Filing Petition to Enforce CID in District Court

Where a CID has been upheld by the Director, or where a CID has not been challenged, and the subject fails to comply, ENF will file any necessary petition to enforce the CID in District Court. ENF will provide notice to Legal.

XIII. Response to Motions to ALJ to Quash Subpoena

When a subpoena is issued in connection with an administrative hearing, the party subpoenaed may petition the ALJ to quash the subpoena. ENF will draft a response for consideration by the ALJ in ruling on the petition to quash.

XIV. Filing Petition to Enforce Enforcement Subpoenas

Where ENF has issued a subpoena and the party subpoenaed fails to comply, the Assistant Director for Enforcement will authorize any filing of a petition to enforce the subpoena, and ENF will file that petition.

XV. Filing Petition to Enforce Third Party Subpoenas

Where a subpoena has been issued on behalf of a non-Bureau party in administrative proceeding, the Legal Division will authorize any filing of a petition to enforce the subpoena, and Legal will file that petition.

XVI. Authorize and File Appeal of ALJ Decision to Bureau

Where the ALJ rules against the position of ENF in an administrative proceeding, the Assistant Director for Enforcement will authorize any appeal of the ALJ decision to the Bureau. If such appeal is filed, ENF will file and handle the appeal before the Director.

XVII. Represent Bureau in Judicial Appeal of Administrative Decision

Where a non-Bureau party pursues an appeal of the Bureau's final decision in an administrative hearing, the Legal Division will have the authority to represent the Bureau in that appeal. Legal will notify ENF, and may request the assistance of ENF in handling the appeal.

XVIII. Bureau Filing Appeal from Final District Court Decision

Where a District Court enters an adverse final decision, the Director will authorize any appeal to the Court of Appeals. It is contemplated that Legal will manage a process whereby the different Bureau components will provide input and recommendations as to whether to appeal a final decision. The Director will consider that input in making the final decision whether to appeal. If an appeal is filed, Legal will be responsible for handling the appeal, but may request the assistance of ENF.

XIX. Initiating Contempt Proceedings re: Enforcement of Final Orders

Where a party fails to comply with a final order, the Assistant Director of Enforcement will authorize any action to initiate contempt proceedings, and the contempt proceedings will be handled by ENF. Legal will be notified of the action.

XX. Referrals for Criminal Proceedings

During the course of examination or investigations, facts may be discovered that appear to constitute criminal violations. ENF will coordinate a process whereby the different Bureau components forward possible criminal violations to ENF. The Assistant Director for Enforcement will make a recommendation to the Director as to whether a referral should be made to the Department of Justice. The Director will authorize any such referral.

XXI. Filing Amicus Briefs

Situations may arise where an important issue is pending in litigation in which the Bureau is not a party. In those situations, the Legal Division will have the authority to file amicus briefs on behalf of the Bureau. It is contemplated that Legal will manage a process whereby the different Bureau components will be consulted regarding amicus briefs. Preparation and filing of the brief will

be the responsibility of Legal, which may request assistance from ENF.

XXII. Exigent Circumstances

Exigent circumstances may make it impractical for ENF to follow the aforementioned notice and comment procedures.[8] It is anticipated that such circumstances will be rare, and that normal procedures will only be suspended upon approval of the Assistant Director for Enforcement. In such situations, ENF will make every effort to personally contact and discuss the proposed action with a senior leader in each interested division, alert them to the exigent circumstances, and explain the necessity for accelerated action. If possible, Interested Divisions will be given the same, albeit accelerated, opportunities to consult and elevate to the Director any concerns regarding contemplated ENF actions.

Recommendation

I recommend approval of ENF's proposed notification, consultation, and approval policies and procedures for CFPB enforcement actions, as described herein.

Attachment

Enforcement Matters Review & Comment Process – Decision Points Chart

	A	B	C	D	E
	Proposed Action[9]	**Notice (no hold or delay)**	**Notice with Hold/Delay (except in exigent circumstances)[10]; Hold Process**	**Highest level of prior approval required**	**Action Taken**
1	**Pre-investigation review (*i.e.*, no engagement of potential legal violators; no engagement with potential 3rd party witnesses; possible engagement with other law enforcement entities; possible engagement with potential victims)**	Enforcement Director		Supervising Enforcement Deputy	Enforcement
2	**Open Investigation (*i.e.*, investigation which may, and**	Consumer Engagement	Director's Office Supervision, FL,	Enforcement Director[12]	Enforcement

[8] Exigent circumstances may include temporary cease and desist proceedings and temporary restraining orders.
[9] In any fair lending case, the Office of Fair Lending (FL) will be collaborating with Enforcement throughout the process.
[10] These would be rare and unusual (*e.g.*, a TRO), and would still trigger a highly abbreviated notice/discussion opportunity.

	will likely, involve engagement with potential legal violators and potential 3rd party witnesses)	(CE)	RMR, Legal **3 BUSINESS DAY HOLD AFTER NOTICE; DISCUSSION**[11]		
3	**Issuance of CID**	Supervision, FL, RMR, Legal		Enforcement Director[4]	Enforcement
4	**Enforcement Send Director Recommendation Memo Seeking Authority to File Administrative Action or Complaint (lawsuit[13]), and Proposing Parameters for any Settlement Negotiations**	Legal (to advise Director), CE	**Supervision, FL, RMR, Legal, Notified via Regular Weekly Meeting; Maximum Hold 2 Weeks**[3]	Enforcement Director	Enforcement
5	**File Administrative Action or Complaint (lawsuit)**			Director (with Legal's counsel)	Enforcement
6	**Enforcement Send to Director Recommendation To Settle Matter Pursued in Litigation**	CE	**Supervision, FL, RMR, Legal Notified via Regular Weekly Meeting; Maximum Hold 2 Weeks**[3]	Enforcement Director	Enforcement
7	**Settle Matter**			Director (with Legal's counsel)	Enforcement
8	**Close Matter**	Enf. Chief Supv., FL, RMR, Legal, CE		Supervising Enf. Deputy	Enforcement
CIDs					
9	Enforcement response to petition to quash CIDs			Enforcement Director	Enforcement
10	Ruling on petition to quash CIDs			Director (or designee)	Director (with Legal's counsel)
11	Filing petition to enforce CIDs in district court		Legal (Consultation)	Enforcement Director[4]	Enforcement, in coordination with Legal
Administrative Actions					
12	Response to motions to ALJ to			Enforcement	Enforcement

[12] This authority would be exercised per standing delegation from the Director.

[11] In an effort to reach Bureau consensus, disagreements about whether or how to proceed (*i.e.*, what tool to use when, release of documents, etc.) will be discussed by representatives from Enforcement, Supervision, FL, RMR, and Legal at regular weekly meetings. Disputes that remain unresolved following these meetings may be referred to the Director (or, absent a Director, the Treasury Secretary's delegate).

[13] For purposes of this process, an intervention is equivalent to filing a complaint.

	quash subpoenas			Director	
13	Filing petition to enforce Enforcement subpoenas			Enforcement Director	Enforcement
14	Filing petition to enforce 3rd party subpoenas			Legal	Legal
15	Authorize and file appeal of ALJ decision to Bureau			Enforcement Director	Enforcement
16	Represent Bureau in judicial appeal of administrative decision	Enf./Legal		Legal	Legal, coordinating with Enforcement
	District Court Actions				
17	Bureau filing appeal from final district court decision			Director	Legal[14], coordinating with Enforcement
18	Initiating contempt proceedings re: enforcement of final orders	Legal		Enforcement Director	Enforcement
	Other				
19	Referrals for criminal proceedings	Legal		Director	Enforcement Director[15] (recommend-ation)
20	Filing amicus briefs			Legal[16]	Legal

[14] It is contemplated that the Legal Division will manage a process whereby the different Bureau components provide input and recommendations as to whether to appeal a final decision.
[15] Enforcement will coordinate a process whereby the different Bureau components forward possible criminal violations to Enforcement. The Enforcement Director will make a recommendation to the Director as to whether referral should occur.
[16] It is contemplated that the Legal Division will manage a process whereby the different Bureau components provide input and recommendations as to whether to file amicus briefs.

Opening an Enforcement Matter

Revised 07.09.12

This policy governs the opening of a matter by the Office of Enforcement based on information that a covered person may have committed or may commit a violation of Federal consumer financial law. The triggers for a matter can come about from a number of sources, including informants, news media, market observation, supervisory examinations, and law enforcement partners. Matters are divided into two categories: (1) the "Research Matter" and (2) the formal "Investigation." A matter may be opened at any stage, whether that is during the research phase, the investigation stage, or at the stage when the Bureau is ready to approach a subject to settle or file a complaint. Opening a matter at a later stage may be necessary due to the need to coordinate activity with other Bureau components or due to the need to address violations immediately.

The decision to conduct either a Research Matter or an Investigation must be carefully considered in light of its impact on: (1) Bureau resources; (2) the market in general; (3) the potential subject(s); (4) other Bureau divisions; (5) the Office of Enforcement Strategic Plan; and (6) law enforcement partners. This policy is designed to promote vigorous enforcement while effectively monitoring investigation activities.

I. Research Matters

While not necessary in every instance, conducting a Research Matter prior to deciding whether to open an Investigation permits Staff to gather information and evaluate the potential for successful enforcement of suspected violations of Federal consumer financial law while minimizing the disruptions and risks associated with contacting investigation subjects during an Investigation. The primary purpose of a Research Matter is to collect and analyze easily obtainable information in order to:

- Determine whether the relevant conduct likely violates Federal consumer financial law and the Bureau likely has jurisdiction.
- Determine whether non-Bureau law enforcement partners are investigating the matter or should be advised of the Bureau's interest in the matter.
- Evaluate whether an Investigation is in the best interest of the Bureau and would be an effective use of Office of Enforcement resources.
- Determine how the matter will be staffed.
- Identify and prepare to address issues that may be raised during the Enforcement Action Process (EAP).
- Draft an Investigation Opening Memorandum.

a. *Coordination and Avoiding Duplication of Efforts*

Procedures: When Staff obtain information that could ripen into a Research Matter or an Investigation, Staff should refer the information to the Issue Team, which will discuss the general merits of the matter and determine whether to recommend that a matter be opened. Prior to preparing such a recommendation, the Issue Team should ascertain whether any Research Matters or Investigations into the conduct or related entity or persons are already underway by the Office of Enforcement or the FTC by searching the matter management system (MMS) spreadsheet located

here and the FTC spreadsheet located here. If similar matters do exist, the Issue Team should consult with the appropriate ALD to determine whether a new matter should be initiated. As appropriate, the Issue Team should also consult with other components of the Bureau.

When regional Staff obtain information that they believe could ripen into an Enforcement Matter they should contact their ALD who will contact the relevant Issue Team lead to ascertain if there is a legally cognizable violation or whether the Issue Team is already considering the potential subject. The ALD should coordinate with the Issue Team lead to determine the merits of the matter and avoid duplication of existing matters.

b. *Opening a Research Matter*

Procedures: The Issue Team or regional Staff (after consultation with the appropriate Issue Team) should submit a Recommendation for Assignment of a Research Matter to their LD for approval prior to opening a Research Matter. Staff should use the template located here. The LDs, Deputy Enforcement Director for Professional Support, and Deputy Enforcement Director for Strategy will confer and determine whether to open a Research Matter and how to staff such a matter. They will give notice to the Assistant Director for Enforcement by submitting the memo to the Litigation Review Inbox (located here) indicating whether the matter will be opened.

c. *Limiting External Contact*

Procedures: During Research Matters, Staff should avoid any direct interaction with potential investigation subjects, their known agents, or third party witnesses (other than consumers or potential victims). Staff should consult with the ALD supervising the matter to discuss evidence gathering, including when and how to approach consumers and potential victims. Evidence gathering is generally limited to non-identifiable internet searching, review of consumer complaints, media sources, legal research, and contact with other law enforcement agencies and consumers.

Staff should ask consumers that they contact during Research Matters to keep their conversations confidential, although it is understood that consumers may choose to ignore such requests.

II. Opening an Investigation

Pursuant to the Enforcement Action Process (page 2-3), the Assistant Director for Enforcement must approve the opening of any new Investigation. When submitting any proposal to open an Investigation to the Assistant Director for Enforcement, Staff should follow the procedures described below.

Guidance: The Bureau is authorized to investigate merely on suspicion that any person has violated any provision of Federal consumer financial law, or to seek assurance that a violation has not occurred. An Investigation is a means to gather facts to assist in the determination of whether further action by the Bureau has the potential to address conduct that violates Federal consumer financial law. The existence of an Investigation does not suggest that the subject has indeed violated the law. It is not necessary to have evidence that a law has in fact been violated before opening a formal Investigation. This means, for example, that the Bureau could conduct a "compliance" sweep

to investigate whether industry participants are complying with a law or regulation.

Prior to proposing the opening of an Investigation, you should consider a number of factors, which may include the following:

- Whether there is a need for immediate action to protect consumers;
- Whether there exists a sufficiently credible source of information or set of facts indicating potential violations of Federal consumer financial law;
- The statutes or rules potentially violated and defenses that may be raised;
- Whether the conduct is relevant to a Bureau program or priority;
- Whether the conduct involves a possibly widespread and/or emerging industry practice;
- The egregiousness of the potential violation;
- The magnitude of potential harm to consumers;
- Whether the potentially harmed group is particularly vulnerable or at risk;
- Whether the conduct is ongoing;
- Whether the perpetuator of the conduct is a recidivist;
- Whether the conduct can be investigated efficiently and within the relevant statute of limitations period;
- Whether it might be more appropriate for other Bureau components to address the conduct;
- Whether other authorities, including federal or state agencies or regulators, are already investigating the conduct and/or might be better suited to do so than the Bureau;
- Whether the matter presents a good opportunity to cooperate with other civil and criminal agencies including strategic law enforcement partners;
- Whether the matter gives the Bureau an opportunity to be visible in a community that might not otherwise be familiar with the Bureau or the protections afforded by Federal consumer financial law;
- Whether opening an Investigation would be an appropriate use of Bureau resources; and
- Whether opening an Investigation would advance the goals articulated in the Office of Enforcement Strategic Plan.

a. *The Investigation Opening Memorandum*

Procedures: Before drafting an Investigation Opening Memorandum, Staff should first obtain approval of the appropriate supervising ALD.

Staff should use the Investigation Opening Memorandum template (located here and on page 11-7) when drafting Investigation Opening Memoranda. The following information should be included in every Investigation Opening Memorandum:

- The Investigation's identifying number;
- The Subject's name;
- The origin or source(s) of the Investigation;
- A brief description of the Background Facts;
- Potential violator(s);
- Other relevant parties;

- Counsel of potential violators or other relevant parties (if known);
- The Statement of Purpose pursuant to 12 C.F.R. § 1080.5;
- The Investigation's supervising LD and ALD (if known);
- The Bureau's jurisdiction; and
- The potential legal violations.

After drafting the Investigation Opening Memorandum, Staff should circulate it to the appropriate ALD who will distribute it to the LD for further distribution and discussion. The Senior Team will use the Investigation Opening Memorandum to discuss the merits of opening the matter as an investigation. If the Senior Team approves the opening of an investigation, the LD will submit the Investigation Memorandum to the Assistant Director for Enforcement for submission to the EAP process (page 2-3) through the Litigation Review Inbox, located here (Litigation_Review_Inbox@cfpb.gov).

Guidance: The Background Facts section of the Investigation Opening Memorandum should be a brief description of the central facts and issues that led to the opening of the Investigation. The objective in this section is to provide enough information to convey to the reader the proposed Investigation's general topic, scope, and subjects, and to allow the reader to identify potential concerns, especially for other Bureau units. Among other things, this section should provide the factual basis for the inclusion of the specific statutes and rules included in the Statement of Purpose section.

The primary purpose of the Potential Violators section of the memorandum is to alert Bureau employees to potential conflicts of interest that might require them to curtail their participation in the matter, and to alert other Bureau components to the subjects of the Investigation. Therefore, while you may not be able to accurately predict the ultimate outcome of the Investigation, you should list any person or entity whom you reasonably believe might be a defendant in an Enforcement action arising from the Investigation.

b. *Creating an Investigation File and Opening a New Matter in the MMS*

Procedures: Once the Investigation has been approved, Staff should create a new matter file consistent with the Maintaining a Matter File Policy (page 1-3), open a new matter in the MMS, and name the matter using the subject's name (*i.e.*, *In re Subject*). The matter number will be assigned by MMS.

III. Notifying the Federal Trade Commission

Under the Dodd-Frank Act, the FTC and the Bureau have overlapping jurisdiction over a number of the same nonbank entities and shared responsibility to enforce a number of the same Federal consumer financial laws. The CFP Act therefore mandates that the FTC and the Bureau coordinate their activities with respect to nonbanks. The agencies have signed a memorandum of understanding (MOU) (located here) to fulfill this statutory mandate. This policy is designed to ensure that Staff comply with the terms of that MOU.

Procedures: Upon approval of a Research Matter and at least five days before opening an Investigation involving nonbanks, Staff should ensure that the FTC is notified. The responsible LD

typically provides such notification.

Electronic Communications Privacy Act Compliance

Revised 09.14.12

The Electronic Communications Privacy Act (ECPA) places limitations on the Bureau's ability to obtain certain types of information from providers of "electronic communications service" and "remote computing service," including, but not limited to, phone companies, Internet Service Providers, electronic Bulletin Board Systems, and third-party data warehouses.[17] *See* 18 U.S.C. § 2703(a)-(b). ECPA applies to stored "electronic communications" (*e.g.*, email) from such service providers and all other information pertaining to the service providers' customers or subscribers. *See* 18 U.S.C. § 2703. Under ECPA, the Bureau may use an administrative or trial subpoena to obtain the contents of electronic or wire communications that have been held in storage more than 180 days, as long as prior notice is provided to the subscriber or customer. *See* 18 U.S.C. §§ 2703(a) and 2703(b)(1)(B). There are certain procedures, however, through which the Bureau can access some information about stored electronic communications without notifying the subscriber or consumer.

Procedures: To seek information covered by ECPA from a provider subject to the statute without notice to the subscriber or consumer, Staff should limit the request to six standard categories:

- Name;
- Address;
- Local and long distance telephone connection records (inbound and outbound, if applicable), or records of session times and durations;
- Length of service (including start date) and types of service utilized;
- Telephone number or other subscriber number or identity information, including any temporarily assigned network address (IP address) or email address; and
- Means and source of payment for such service (including any credit card or bank account number).

Staff should also include the following Cautionary Note:

> NOTE: This CID is issued in conformance with Sections 2702 and 2703 of Title 18 of the United States Code (the Electronic Communications Privacy Act). To the extent that you are a provider of electronic communication service or remote computing service, your response to this CID should not divulge a record or information pertaining to a subscriber or customer of your service, other than that allowed pursuant to 18 U.S.C. § 2703(c)(2). If you have any questions, please contact CFPB attorney _____ at _____ before providing responsive information.

Prior to sending a CID covered by ECPA, staff should review the CID recipient's confidentiality policy regarding law enforcement subpoenas. If the policy is not available on-line, staff should request it from the CID recipient. Before sending the CID, Staff should also request that the recipient keep it confidential. Notice to a subscriber or customer is *not* required if the

[17] ECPA also prohibits the Bureau from using certain investigative tools and practices, such as intercepting wire, oral and electronic communications; and using pen registers and trap and trace devices. *See* 18 U.S.C. § 2511 and § 3121.

information sought from the electronic communications service is limited to the standard six categories. 18 U.S.C. § 2703(c)(3). If the CID recipient indicates that it will not or may not keep the CID confidential, Staff should discuss whether to send the CID with their Assistant Litigation Deputy (ALD).

If you are unsure whether ECPA applies, you may want to draft a CID with the standard six requests and more substantive conditional requests that the recipient must answer if it does not assert it is covered by ECPA. This approach is useful if, despite diligent investigation, you cannot determine whether ECPA applies. Before sending such a request, however, you should consider whether the recipient is sufficiently sophisticated to determine whether it is a provider of "electronic communications service" or "remote computing service" as defined by the statute.

In general, it is better practice to refrain from issuing a CID to a provider of remote computing service or electronic computing service for the content of emails. But, if notice to the subscriber or consumer is acceptable, you may obtain content information from a provider of remote computing servicer or electronic computing servicer under Section 2703(b)(1)(B). You should consult with your ALD before requesting information pursuant to this Section. You may also require that the service provider preserve records while you determine an appropriate course of action. 18 U.S.C. § 2703(f).

Guidance: ECPA has narrow applicability, although it is a complex statute with a growing body of case law. You should carefully consider whether the entity you are seeking information from is an electronic communications service or remote computing service in determining whether ECPA applies.[18] ECPA does not apply to direct requests for electronic communications to consumers and entities that are outside the scope of the statute. ECPA generally does not apply to obtaining information, including stored emails, from a corporation or financial institution's internal email network. Additionally, you may always access communications or request information "readily accessible to the general public." *See* 18 U.S.C.A. § 2511(2)(g). You may also obtain additional information with "the consent of the subscriber or customer to such disclosure." 18 U.S.C. § 2703(c)(1)(C).

Please note that ECPA does not prohibit a service provider from notifying customers, even though you should request that a service provider keep a CID confidential (and ideally get confirmation in writing that the service provider will do so). The only way to ensure confidentiality absent voluntary agreement by the provider is to obtain a court order that will prohibit the provider from disclosing the existence of the CID under certain circumstances for a period of time. *See* 18 U.S.C. § 2705.

Remember that ECPA is a criminal law. Improper government access may create liability for the Bureau and result in statutory disciplinary actions against Bureau employees. When in doubt, talk to your ALD for further guidance.

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[18] While not directly on point, if you are practicing in the Ninth Circuit, it is worth noting that the Ninth Circuit has restricted the means through which the government can obtain certain contents of electronic communications. *See* Theofel v. Farey-Jones, 359 F.3d 1066 (9th Cir. 2003). More information on that case and ECPA in general can be found in the Department of Justice's Searching and Seizing Computers and Electronic Evidence in Criminal Investigations Manual, which can be found at http://www.justice.gov/criminal/cybercrime/docs/ssmanual2009.pdf.

Obtaining and Sharing Personally Identifiable Financial Information in Compliance with RFPA

Revised 01.07.13

If the Bureau makes a voluntary or compulsory request to a financial institution for personally identifiable financial information about one or more consumers, that request could implicate the Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3401 *et seq.* While the RFPA generally does not limit the Bureau's ability to request or obtain information, it can impact our ability to share it with other law enforcement partners. The procedure described below ensures that Staff will comply with the RFPA both when they request information and when they share that information with law enforcement partners. Please note that information subject to the RFPA may also be subject to other laws, such as the Privacy Act, 5 U.S.C. § 552a, or the Bureau's confidentiality rules, 12 C.F.R. § 1070.41 *et seq.*

Background:

Section 1022(c)(9)(A) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") requires the Bureau to either obtain consumer permission or comply with the RFPA prior to requesting "personally identifiable financial information" (PIFI) from a covered person or service provider. While the Dodd-Frank Act does not define PIFI, it is reasonable to construe the phrase consistently with its use in Section 509 of the Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. § 6809(4) and in the Bureau's rules implementing the GLBA, 12 C.F.R. § 1016.3(q)(1). Accordingly, PIFI is generally construed as information a consumer provides to a financial institution in connection with the offer or provision of a financial product or service, or information about a consumer obtained by a financial institution in connection with a specific transaction. *See* 12 C.F.R. § 1016.3(q)(1).[19] Since in most cases it is impracticable to seek the permission of every consumer when requesting PIFI from a covered person or service provider, the Bureau will usually meet its Section 1022(c)(9)(A) obligations by complying with the RFPA.

Although the Dodd-Frank Act requires the Bureau to comply with the RFPA, Section 3413(r) of the RFPA states that it does not apply to the "examination by or disclosure to the Bureau of Consumer Financial Protection of financial records or information in the exercise of its authority with respect to a financial institution." The focus of this Section is on the exercise of the Bureau's authority over the institution to which the request is sent, not whether the institution is itself the focus of an investigation. Consequently, this exemption applies whether the Bureau is investigating the financial institution it is seeking information from or a different financial institution. A "financial institution" for purposes of the RFPA is any entity that is a provider of a "consumer financial product or service" under 12 U.S.C. § 5481(5). However, while the Bureau's exemption under the RFPA is relatively broad, there are limits. Service providers, for example, may include entities that

[19] Examples of such information include: "[i]nformation a consumer provides to [a financial institution] on an application to obtain a loan, a credit card, a credit union membership, or other financial product or service; [a]ccount balance information, payment history, overdraft history, and credit or debit card purchase information; [t]he fact that an individual is or has been [a] customer or has obtained a financial product or service from [a financial institution]; [a]ny information about [a] consumer if it is disclosed in a manner that indicates that the individual is or has been [a] consumer [of financial products or services]; [a]ny information that a consumer provides to [a financial institution] or that [a financial institution] otherwise obtain[s] in connection with collecting on, or servicing, a loan or a credit account; [a]ny information [financial institutions] collect through an internet 'cookie' (an information collecting device from a Web server); and [i]nformation from a consumer report." 12 C.F.R. § 1016.3(q)(2).

are not "financial institutions." In such cases, the Bureau may use other applicable RFPA exceptions for collecting and sharing information for supervisory and law enforcement purposes. *See* 12 U.S.C. § 3413(b) and (h). In short, the Bureau itself is generally exempt from the RFPA.

The Bureau's ability to share PIFI with other federal and state agencies, however, varies depending on the identity of the agency at issue. Whether information may be shared will be determined on a case-by-case basis by the Legal Division. To avoid any issues that may arise from sharing PIFI, Staff should follow the certification procedure below.

Procedures: When Staff seeks PIFI through voluntary requests or civil investigative demands to covered persons or service providers, Staff should provide certification to the institution that the Bureau is in compliance with the applicable provisions of the RFPA. To the extent Staff wish to share information with a law enforcement partner, Staff should direct the agency to file an information access letter (also on page 11-35) with the Legal Division as described in 12 C.F.R. §1070.43(b). Any questions about the information access letter should be directed to the Legal Division. The Legal Division will then determine if the sharing is permissible under the RFPA and respond to the access request as appropriate.

Guidance: The Bureau's procedures regarding sharing PIFI with law enforcement partners vary depending on the partner agency. Although the Legal Division will determine in each particular case whether and how the RFPA applies, following are some general guidelines.

- The Bureau has relatively broad authority to transfer PIFI to the Federal Reserve, FDIC, NCUA, OCC, SEC, FTC, and CFTC under 12 U.S.C. § 3412(e).
- Records containing PIFI that are relevant to potential violations of federal criminal law may generally be transferred to the DOJ, United States Attorney's Offices, and the Secretary of the Treasury. These records, however, must be returned to the CFPB upon completion of the investigation or litigation at issue. *See* 12 U.S.C. § 3412(f)(2).
- If a matter does not involve violations of federal criminal law, PIFI may be shared with any government agency in connection with a lawful proceeding, investigation, examination or inspection if the certification discussed above has been sent to the covered person or service provider from whom the records were obtained. *See* 12 U.S.C. § 3413(h)(2).
- RFPA is not implicated when sharing PIFI with state agencies and officials since these entities are not subject to the statute. Sharing PIFI with state agencies and officials is still subject, however, to the Legal Division's approval of an information access letter.

Forms/Templates: Certificate of Compliance with RFPA Template also see page 11-21
Related Policies: Criminal Referrals to DOJ

Further Reading: More information regarding the RFPA is available here.

Suspicious Activity Reports

Revised 02.25.13

Suspicious Activity Reports (SARs) are reports that financial institutions are required by federal law to file if they determine that a banking transaction raises a suspicion of being involved in a possible violation of law. 31 U.S.C. § 5313 and 31 C.F.R. § 1020.320(e).[20] SARs are maintained by the Financial Crimes Enforcement Network (FinCEN), a bureau under the Department of the Treasury, as part of its regulatory responsibilities for administering the Bank Secrecy Act. Most SARs are supported by additional documentation that is maintained by the financial institution filing the SARs.

Financial institutions are required to maintain for five years both a copy of any SAR filed and the original or business record equivalent of any supporting documentation. 31 C.F.R. § 1020.320(d). The five year period begins at the date the SAR is filed. Financial institutions are required to make all supporting documentation available to FinCEN and any agency designated by FinCEN as a law enforcement agency. FinCEN, currently, does not include civil law enforcement agencies, such as the Bureau, in its definition of law enforcement for purposes of obtaining SARs and supporting documentation. *Id.*[21] Therefore, Staff should contact FinCEN through the Enforcement Staff point-of-contact to obtain SARs and supporting documentation.

Generally, financial institutions must file a SAR in relation to the following: (1) insider abuse of any amount; (2) violations of $5,000 or more where a suspect is identified; (3) violations of $25,000 or more where a suspect is not identified; and (4) any time there is a computer intrusion or access to the financial institution's computer system has been compromised. In addition, financial institutions may report any suspicious transaction that a financial institution believes is relevant to a possible violation of law, but whose reporting is not required by law. 31 C.F.R. § 1020.320.

It is potentially a violation of federal criminal law to disclose a SAR or the existence of a SAR. 31 U.S.C. § 5318(g)(2); 31 C.F.R. § 1020.320(e). The following policies and procedures are designed to ensure that Staff handle SARs and SARs material properly and to prevent the unlawful disclosure of SARs or SARs material.

I. Obtaining a Suspicious Activity Report and Supporting Documentation

Procedures: Staff should request SARs and supporting documents from FinCEN by going through the specified Enforcement point-of-contact for FinCEN. This person(s) will be listed on the Enforcement Wikipage as the point-of-contact for obtaining SARs and supporting documents from FinCEN.

Staff should make all initial requests for SARs and supporting documentation to FinCEN by going through the Enforcement point-of-contact. Staff should not request this information from the filing institution. However, if the filing financial institution voluntarily offers to provide the

[20] http://www.fincen.gov/statutes_regs/ChapterX/

[21] "A bank shall make all supporting documentation available to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the bank for compliance with the Bank Secrecy Act, or any State regulatory authority administering a State law that requires the bank to comply with the Bank Secrecy Act or otherwise authorizes the State authority to ensure that the institution complies with the Bank Secrecy Act, upon request." 31 CFR § 1020.320(d).

additional SAR supporting documentation, Staff may accept this documentation from the filing institution and does not need to go through FinCEN to obtain the same material.

When requesting SARs and supporting documentation, the Enforcement point-of-contact will call FinCEN to determine the best manner to securely obtain the SAR-related material. This communication should be conducted telephonically to prevent inadvertent disclosure through a mistaken email address or otherwise. If FinCEN requires a written request, Enforcement point-of-contact should refer to the material in a written request by stating, "**Per our conversation of [Date of conversation], please produce any and all Bank Secrecy Act materials filed by [institution/firm/office] on [Date].**"

II. Confidentiality of Suspicious Activity Reports

Procedures: Inside the Bureau, Staff should disclose SARs and supporting documentation only to other Staff who need to know the information for Bureau-related purposes. Outside of the Bureau, Staff should not disclose the existence of SARs and supporting documentation to anyone, except for authorized law-enforcement personnel and the personnel at the filing institution responsible for the filing and management of SARs. Staff should not disclose any SAR information publicly, including but not limited to in documents filed in court, administrative proceedings, or otherwise publicly available. Specifically,

- Staff should not introduce a SAR as an exhibit during any testimony on-the-record, unless the matter is specifically about a SAR, *e.g.*, failure to file a SAR.

- Staff should not refer to a SAR as a source of information or make it evident that a SAR was the source of any information.

- Staff may, however, disclose the information contained in the SAR, so long as there is no reference to the SAR or any indication that the information came from a SAR. For example, Staff may disclose the information contained in a SAR by writing what is sometimes referred to as a disclosure letter. This type of letter lists the factual information obtained from a SAR without disclosing the existence of a SAR. Another way to disclose information contained in a SAR would be to disclose the underlying bank documents kept in the ordinary course of business by the financial institution (provided the documents do not disclose the existence of a SAR).

Staff should be careful as to how they reference SARs in case files and work product. To insure that the existence of a SAR is not unintentionally disclosed to parties who gain access to case file material through discovery or the Freedom of Information Act, Staff should refer to a SAR in notes or memoranda as "**Bank Secrecy Act Information**" or "**BSA Information**."

Staff should pay particular attention to the SAR non-disclosure requirement when conducting discovery. SARs must not be disclosed as part of the affirmative disclosure requirement in the Bureau's administrative proceedings. 12 C.F.R. § 1081.206(b)(v)(exemption for documents where applicable law prohibits disclosure). The SAR supporting documentation may be exempt from disclosure to the extent that it reveals the existence of a SAR.

As noted previously, Staff should make requests for SARs and supporting documentation through FinCEN. However, it is possible that when issuing civil investigative demands or conducting discovery that a request for non-SAR material may result in the production of SAR-related material. Therefore, if Staff believe that their request may result in the production of SARs and supporting documentation, Staff should state in the request, "If your response to this [discovery request (*i.e.* document production request)] contains Bank Secrecy Act materials, please segregate and label those materials within the production."

When responding to a discovery request, Staff should pay particular attention to insure that their response does not disclose a SAR or the existence of a SAR. If responding to the request requires the production of a SAR or material that would disclose the existence of a SAR, Staff should note an objection and not comply. For example, Staff could object because the discovery request requires the production of material that may violate the Bank Secrecy Act and related regulations. *See* 31 U.S.C. § 5311 *et seq.*; 31 C.F.R. Chapter X. If opposing counsel insists on the production of the withheld material, Staff should consult with a supervisor and consider whether it would be appropriate to file for a protective order under seal or to seek a ruling from the court on the production (*in camera* and under seal).

Any Staff concern about a potential disclosure of a SAR or how to handle a SAR should be brought to the attention of an immediate supervisor.

III. Storing Suspicious Activity Reports and Supporting Documentation

Procedures: Staff should take necessary precautions to secure and segregate from other work material SAR and supporting documentation. Staff should segregate the SAR and supporting documentation from the rest of their case files – both in electronic and hardcopy case files. Staff should keep SAR material received from FinCEN or otherwise in distinguishable folders or separate from other case material. This separation will assist in preventing accidental disclosure and facilitate securing the SAR information.

- When SAR-related material is not actively being used, Staff should store the SAR-related material in a secure location. A secure location includes a locked office or a locked file cabinet within an open work space. SAR material is not actively being used when Staff leaves SAR-related material unattended for anything other than a brief period of time. Therefore, if Staff leaves the SAR-related material for any activity such as lunch, a meeting, or coffee break, Staff should secure the SAR-related material.

- Staff should include a header that states "**Confidential BSA Material**" on any memorandum, note, email, or other material that contains a SAR or would disclose the existence of a SAR.

- Emails containing SARs and supporting documentation should be encrypted. Similarly, SARs and supporting documentation placed on "thumb drives," flip drives, or USB drives should be encrypted and stored in a secure location.

- When mailing SARs or supporting information, Staff should send the material via a postal courier that provides tracking information.

Civil Investigative Demands

The CID policy is currently being revised and will be included in this manual once it has been finalized. The following blank pages are to help preserve pagination in the manual.

In the meantime, please refer to the CID folder on the Z-Drive Z:\Enforcement\Resources\Policy Manual and Templates\Templates and Forms\CID Forms and Templates and the forms in Appendix B.

Use of the "Notice To Persons" Form

Revised 12.05.12

In the course of an investigation, when Staff request documents, data, or answers to questions voluntarily or under oath (whether in writing or in an investigational hearing or deposition), certain of the witness' Constitutional and statutory rights, including the right against self-incrimination, may be implicated. The "Notice to Persons Supplying Information" form will be provided to prospective witnesses as set forth in this policy.

Procedures:

- Whenever a CID is issued, Staff should include the "Notice to Persons" form in the CID package served on the recipient of the CID.

- Whenever a letter or other written request for voluntary production of documents or data is issued, Staff should include the "Notice to Persons" form in the letter or otherwise transmit the form to the witness simultaneous with the transmittal of the letter or request.

In every investigational hearing, Staff conducting the hearing should, at a preliminary stage of the hearing, mark the "Notice to Persons" as its first exhibit. Bureau counsel should then ask questions of the witness sufficient to confirm that 1) the witness previously received the Notice to Persons and 2) the witness previously reviewed the Notice (or if not, has been given an opportunity to review it in the hearing).

In addition, in circumstances where Staff has directed a CID (other than for oral testimony) or voluntary request to a person unrepresented by counsel, Staff may wish to confirm with the witness that she or he has received, reviewed, and understood the Notice to Persons.

It is not necessary to provide the "Notice to Persons" form to consumers and other third party witnesses participating in informal, voluntary telephone interviews. Nevertheless, in certain circumstances you may wish to consider providing the form to such witnesses and discussing it briefly with them before the interview.

For Form, see page 11-23or here

Complying with Rule of Investigation 1080.5 (Notification of Purpose)

Revised 02.01.12

Section 1052(c)(2) of the Dodd-Frank Act, 12 U.S.C. § 5562, and Section 1080.5 of Bureau's Rules Relating to Investigations, 12 C.F.R. § 1080.5, require that CIDs state "the nature of the conduct constituting the alleged violation that is under investigation and the provisions of law applicable to such violation."

Procedures: Staff should provide a description of the nature of the conduct under investigation and potentially applicable provisions of law in the section of the Bureau CID Form labeled "Notification of Purpose Pursuant to 12 C.F.R. § 1080.5." Including this information in the CID also helps ensure that our CIDs will withstand constitutional and other legal challenges.[22] For more details about how this language is used in conjunction with CIDs, see the CID Policy on page 2-27

Staff should draft the language for this section of the Bureau CID Form at the outset of the investigation, and must include it in the opening memorandum in the section labeled "Statement of Purpose Pursuant to 12 C.F.R. § 1080.5." This statement of purpose will be retained in the matter management system and, if Staff later seeks to issue a CID, it will serve to fulfill the requirement in Section 1080.5 of the Rules Relating to Investigations that the Bureau notify the recipient of a CID of the purpose of the Bureau's investigation.

Forms: Opening Memorandum Template and Bureau CID Form.

Guidance: To promote consistency, we have developed model language for the Statement of Purpose section of the opening memorandum. The general approach of the model language is to describe the nature of the conduct and the potentially applicable law in very broad terms to preserve our ability to request a broad spectrum of information in any CIDs issued in the investigation, particularly since the precise contours of the investigation might change over time. Furthermore, the model language does not identify any potential subjects of the investigation because, pursuant to Section 1080.14 of the Rules Relating to Investigations, investigations are generally non-public. Among other things, we would not want to reveal the subjects under investigation in CIDs to third parties.

Examples:

Model Language

> ***Statement of Purpose Pursuant to 12 C.F.R. § 1080.5:***
> The purpose of this investigation is to determine whether [**category of entity**] or other unnamed persons have engaged or are engaging in [**describe conduct**] in violation of [**insert list of relevant laws**], and whether Bureau action to obtain legal

[22] The Supreme Court has held that the Fourth Amendment of the U.S. Constitution requires that government-issued subpoenas be sufficiently limited in scope, relevant in purpose, and specific in directive that compliance will not be unreasonably burdensome. *See, e.g. United States v. Morton Salt Co.,* 338 U.S. 632, 652-59 (1950) ("Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.").

or equitable relief would be in the public interest.

Specific Examples

DEBT RELIEF SERVICES

Statement of Purpose Pursuant to 12 C.F.R. § 1080.5:

The purpose of this investigation is to determine whether debt relief providers, lead generators, or other unnamed persons have engaged or are engaging in unlawful acts or practices relating to the advertising, marketing, or sale of debt relief services or products, including but not limited to debt negotiation, debt elimination, debt settlement, credit counseling, mortgage loan modification and foreclosure rescue, in violation of Section 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5536, the Telemarketing Sales Rule, 16 C.F.R. Part 310, or the Mortgage Assistance Relief Services Rule, 16 C.F.R. Part 322, and whether Bureau action to obtain legal or equitable relief would be in the public interest.

FAIR LENDING-MORTGAGE

Statement of Purpose Pursuant to 12 C.F.R. § 1080.5:

The purpose of this investigation is to determine whether mortgage lenders, brokers, or other unnamed persons have been or may be engaged in discriminatory acts or practices relating to any aspect of a credit transaction, including assessing higher discretionary charges, rates, and fees for residential mortgage loans on the basis of an applicant's race, national origin, color, or other protected class characteristic, in violation of the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 *et seq.* or Regulation B, 12 C.F.R. Part 202, and whether Bureau action to obtain legal or equitable relief would be in the public interest.

CREDIT CARD ADD-ON PRODUCT

Statement of Purpose Pursuant to 12 C.F.R. § 1080.5:

The purpose of this investigation is to determine whether credit card issuers or other unnamed persons have been or are engaging in unlawful acts or practices relating to the advertising, marketing, or sale of credit card add-on products, including but not limited to payment protection, identity theft protection, wallet protection, and credit score monitoring products, in violation of Section 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §5536, the Telemarketing Sales Rule, 16 C.F.R. Part 310, the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, or Regulation Z, 12 C.F.R. Part 226, and whether Bureau action to obtain legal or equitable relief would be in the public interest.

MORTGAGE ORIGINATOR COMPENSATION

Statement of Purpose Pursuant to 12 C.F.R. § 1080.5:

The purpose of this investigation is to determine whether mortgage lenders or other unnamed persons have been or are paying a "yield spread premium" to independent mortgage brokers, or otherwise basing broker compensation on any term of a loan other than its size, in violation of the Mortgage Loan Originator Rule, 75 FR 58509-01, 12 C.F.R. Part 226, and whether Bureau action to obtain legal or equitable relief would be in the public interest.

MORTGAGE SERVICING

Statement of Purpose Pursuant to 12 C.F.R. § 1080.5:

The purpose of this investigation is to determine whether mortgage servicers or other unnamed persons have been or are engaging in unlawful acts or practices relating to the servicing of mortgage loans, in violation of the Section 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5536, the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.*, the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, Regulation Z, 12 C.F.R. Part 226, the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p, or the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, and whether Bureau action to obtain legal or equitable relief would be in the public interest.

Taking Testimony

Revised 02.22.13

The Dodd-Frank Act 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 Federal consumer financial law. Section 1052 of the Dodd-Frank Act sets forth the parameters that govern these investigations. Investigations conducted by the Bureau may include witness testimony.

I. Compelling Witness Testimony by Issuing a CID

Procedures: Issuing a CID is the only means for Staff to compel a witness to provide testimony in the course of an investigation. The Office of Enforcement's policy regarding CIDs can be found on page 2-27.

A witness may agree to provide testimony in a voluntary investigational hearing with a court reporter present to record and transcribe the testimony. To conduct a voluntary investigational hearing, a witness must consent to the hearing being governed by 12 C.F.R. Part 1080. In determining whether a voluntary investigational hearing is appropriate, Staff should consider that:

- The witness would be testifying voluntarily;
- The witness may decline to answer questions that are asked; and
- The witness is free to leave at any time.

Guidance: You are not limited to taking a witness's testimony in a single day if the circumstances of your investigation necessitate multiple days of testimony. If you know in advance multiple days of testimony are necessary, the CID should set forth multiple dates.

a. *Bureau Investigators Conduct Investigational Hearings*

Procedures: The Bureau investigator(s) that will conduct or be present at the investigational hearing should be the same as those identified in the CID. A Bureau investigator is any attorney or investigator of the Bureau charged with the duty of enforcing or carrying into effect any Federal consumer financial law.

Staff should consider whether they want to take testimony with a partner or other Bureau investigators. If so, such a person should be listed on the CID. The Office of Enforcement's policy regarding CIDs is currently being revised to include language that should be used when listing additional Bureau investigators on the CID. You should use this language once the revised policy has become final.

b. *Location and Transcription Services*

Procedures: Staff should select a location for an investigational hearing in the judicial district of the United States in which the witness resides, is found, or transacts business, unless otherwise agreed upon by the Bureau investigator and the witness.

Staff are responsible for reserving a location for the investigational hearing. Absent compelling circumstances, Staff should first contact federal and state government offices in the area to inquire about possibly reserving space in those offices. If Staff are unable to reserve space at a federal or state government office, then Staff may use their Government Travel Card to pay for the cost of reserving the space. Staff should fill out a Travel Approval Form, which requires approval from the supervising Assistant Litigation Deputy (ALD), prior to incurring the expense. Staff should contact the Office of Enforcement's Administrative Officer with questions regarding the Travel Approval Form and space reservation process.

Staff are responsible for making the appropriate arrangements to have a court reporter attend the investigational hearing and obtaining a transcript. The paralegal assigned to the investigation is authorized to obtain a court reporter. Staff should notify the appropriate paralegal of their need for a court reporter as far in advance as possible but no later than two weeks in advance of the hearing unless there are exigent circumstances.

c. *Petitions Challenging a CID*

Procedures: Petitions challenging the Bureau's authority to conduct an investigation or the sufficiency or legality of a CID should be submitted to the Bureau in advance of the investigational hearing in accordance with 12 C.F.R. § 1080.6(e). Arguments in support of any such petition at the investigational hearing are not permitted.

II. Compliance with Existing Laws

Procedures: In connection with any witness testimony, Staff should exercise and perform their duties in accordance with the laws of the United States and the regulations of the Bureau. Prior to conducting an investigational hearing, Staff should be familiar with Section 1052 of the Dodd-Frank Act, which grants the Bureau authority to conduct investigations, and the Rules relating to Investigations that implement Section 1052 of the Dodd-Frank Act, particularly 12 C.F.R. §§ 1080.7 and 1080.9 that address taking testimony. Staff should also comply with the Office of Enforcement's Notice to Persons Supplying Information policy, which can be found on page 2-35. If Staff is asked whether a witness is the target of an investigation, Staff must adhere to the No Targets of Investigations policy, which can be found on page 2-59. Staff should further be aware of the limitations the Electronic Communications Privacy Act (ECPA) and the Right to Financial Privacy Act (RFPA) place on the Bureau's ability to obtain and share information, and should refer to the policies related to those laws to determine if the limitations are applicable to the hearing (found on page 2-19 and page 2-21, respectively).

Guidance: The Rules relating to Investigations draw from the investigative procedures of other law enforcement agencies, including the procedures used by the Federal Trade Commission (FTC), the Securities Exchange Commission, and the prudential regulators. In constructing these rules, the Bureau drew most heavily from the FTC's investigative procedures, in part due to the similarities between Section 1052 of the Dodd-Frank Act and Section 20 of the FTC Act, 15 U.S.C. § 41. You, therefore, may find case law related to the FTC's rules pertaining to investigations and the FTC Act to be a useful resource when issues arise.

III. Meet and Confer

Procedures: The Office of Enforcement's policy on meet and confers can be found in the CID policy on page 2-27. This section is meant to supplement, not replace, the meet and confer procedures in the CID policy. The following is a list of topics Staff should cover in the course of a meet and confer after issuing a CID compelling testimony:

- Advise the witness and counsel that investigational hearings are governed by 12 U.S.C. § 5562 and its implementing regulations, and objections that may be properly raised are limited as set forth in the regulations;
- Advise that only the recording arranged and procured by the Bureau for the hearing is permitted, and no other recording may be created;
- If Staff would like a person not listed in 12 U.S.C. § 5562(c)(13)(B) to attend the hearing, ask the witness and counsel if they consent to the presence of such person. The attendance of a person not listed in 12 U.S.C. § 5562(c)(13)(B) should be agreed upon in advance of the investigational hearing; and
- Where a CID requires testimony from an entity, pursuant to 12 C.F.R. § 1080.6(a)(4)(ii), Staff need a list of the individuals designated to testify on the entity's behalf and the subject areas each designee will be testifying about in advance of the hearing.

a. *Preparing Exhibits*

Procedures: Staff should identify and prepare the requisite number of copies of the exhibits they wish to use in the course of the hearing. Staff should instruct the court reporter that each exhibit should be labeled with an exhibit sticker containing the matter number followed by the exhibit number that corresponds to the chronological introduction of the document at the hearing (*e.g.*, 2013-XXXX-XX Ex. 1, 2013-XXXX-XX Ex. 2). After the first investigational hearing, the exhibits will continue to be marked in chronological order starting with the number that follows the last exhibit number entered in the most recent investigational hearing. Staff should collect all of the exhibits at the conclusion of the hearing. The court reporter is not permitted to leave the investigational hearing with the original exhibits. Keeping a chart that lists the exhibits by number, a brief description of the exhibit, and the witnesses that have identified the exhibit will assist Staff in tracking the exhibits introduced to date and every witness that has identified each exhibit.

IV. Conducting an Investigational Hearing

a. *Parties Permitted to Attend Investigational Hearings*

Procedures: Only certain parties are permitted to be present at an investigational hearing. Before testimony is given, the Bureau investigator should exclude *all but* the following persons from the hearing room:

- The Bureau investigator(s);
- The person giving testimony;

- The attorney for the person giving testimony;
- Any investigator or representative of an agency with which the Bureau is engaged in a joint investigation;
- Any stenographer taking testimony; and
- At the discretion of the Bureau investigator, and with the consent of the person giving testimony, persons other than those listed above for either side.

b. *Counsel Representing the Witness*

Procedures: A person compelled to give oral testimony may be accompanied, represented, and advised by counsel at the investigational hearing. If the witness is being represented by counsel, advise the witness and counsel they will be asked at the hearing to state on the record that counsel represents the witness. While counsel for the witness may represent another party in the investigation (*e.g.*, the witness's employer), counsel must be appearing as the witness's attorney to be present at the investigational hearing.

To the extent Staff are aware that counsel for the witness is representing other parties in the investigation, and this representation raises a potential conflict of interest, Staff should consult with the supervising ALD regarding the potential conflict of interest, and determine how the issue should be addressed, if at all.

c. *Prior to Commencing Testimony*

Procedures: Staff should advise the witness and witness's counsel that the Bureau investigator controls the record at the investigational hearing, and to the extent either the witness or witness's counsel wishes to go off-the-record, those requests should be directed to the Bureau investigator. It is in the Bureau investigator's discretion to grant or deny any such request.

The Bureau investigator should provide the court reporter with the caption of the investigation. Captions for investigations are dictated by the Office of Enforcement's policy on opening investigations, which can be found on page 2-13. To the extent possible, Staff should assist the court reporter with the spelling of proper names and unusual words.

d. *Commencement of the Record*

Procedures: In commencing an investigational hearing, the Bureau investigator should:

- Have the witness state his or her name for the record, and state whether he or she is represented by counsel;
- If the witness is represented by counsel, have counsel identify himself or herself, and state that counsel is representing the witness;
- Have any person not from the Bureau identify himself or herself, or Staff may identify these additional parties by name, address, and employer;

- Have any person from the Bureau identify himself or herself, or Staff may identify these additional parties;
- If any person not listed in 12 U.S.C. § 5562(c)(13)(B) is in attendance, confirm the witness's consent to the presence of such person;
- Ask the witness if he or she had the opportunity to review the CID compelling his or her testimony and the Notice to Persons Supplying Information provided to the witness, and if the response is no, provide the witness time to review both documents before continuing;
- For a witness appearing as an individual designated to testify on behalf of an entity, confirm the subject areas that the designee will be testifying about;
- Advise the witness and counsel that this is an investigational hearing governed by 12 U.S.C. § 5562 and its implementing regulations, and objections that may be properly raised are limited as set forth in the regulations; and
- Advise that only the recording arranged and procured by the Bureau is permitted, and no other recording may be created.

e. *Testimony Given Under Oath and Transcribed*

Procedures: Witness testimony should be given under oath or affirmation before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place at which the examination is held. The testimony should be taken stenographically and transcribed. If the testimony will be recorded by audio, audiovisual, or other means, Staff should provide advance written notice to the witness or witness's counsel, as appropriate, of the other means by which his or her testimony will be recorded. At an investigational hearing, only the recording arranged and procured by the Bureau is permitted. No other recording may be created.

After receiving a copy of the transcript, the Bureau investigator should ensure the court reporter provides a certification as part of the transcript that the witness was duly sworn and that the transcript is a true record of the testimony given by the witness.

The Bureau investigator may direct that the testimony also be recorded by audio, audiovisual, or other means. Staff should consult with the supervising ALD prior to incurring the additional expense of having the testimony videotaped.

f. *Counsel's Ability to Advise the Witness*

Procedures: The Bureau investigator should permit the attorney to advise the witness, in confidence, either upon the request of the witness or upon the initiative of the attorney, with respect to any question asked of the witness where it is claimed that a witness is asserting privilege. Except in the limited circumstance of claiming privilege to refuse to answer, counsel may not otherwise consult with a witness while a question is pending. *See* 12 C.F.R. § 1080.9(b)(1).

g. *Objections Made at the Investigational Hearing*

Procedures: The witness or counsel for the witness may only refuse to answer or object to questions on the grounds of a constitutional or other legal right or privilege, including the privilege against self-incrimination. If a witness refuses to answer a question on the grounds of privilege against self-incrimination, Staff should follow the Office of Enforcement's policy on a witness asserting his or her Fifth Amendment right once it is finalized.

Staff may want to remind the witness and counsel that this is an investigational hearing governed by 12 U.S.C. § 5562 and its implementing regulations, and objections that may be properly raised are limited as set forth in the regulations. Staff may also want to inform counsel or the witness that an investigational hearing is not a deposition, and it is not governed by the Federal Rules of Civil Procedure.

Counsel is prohibited from making statements on the record, but may ask the Bureau investigator that the witness be allowed to clarify any of his or her answers. It is in the Bureau investigator's discretion to grant the request. The proper time for a witness to clarify his or her answers is at the end of the examination.

h. *Avoidance of Delay or Disorderly Conduct*

Procedures: The Bureau investigator is authorized to take action in the course of an investigational hearing to avoid delay, to prevent disorderly, dilatory, obstructionist, or contumacious conduct, and to restrain or prevent contemptuous language. If counsel for a witness refuses to conduct himself or herself in accordance with these obligations or any other obligation under 12 C.F.R. Part 1080, Staff may state, for the record, counsel's conduct, and report the conduct to the supervising ALD for further action, if any.

Guidance: You should keep in mind, when recounting counsel's conduct, you are creating a record you will want to use to support a petition to enforce the CID or to inform the Director on whether to issue an order requiring counsel to show cause why he or she should not be suspended or disbarred from practice before the Bureau, so it is essential that you cover all of the relevant behavior and events. Be particularly aware that the transcript will not convey tone, the volume of counsel's voice, or nonverbal communications, so to the extent such conduct is relevant, you must describe that conduct for the record.

If counsel for the witness is obstructing the proceeding, you should consider whether counsel is responding in this manner to a particular topic or line of questions. If it is a particular topic or line of questions that is causing an issue, you should address the other areas you want to cover with the witness first, and then proceed with questions on the topic drawing obstructionist reactions. To the extent that you find yourself at an impasse with counsel, after creating a record of his or her conduct, you may advise counsel that an investigational hearing concludes when you are satisfied that the witness adequately complied with the CID, and to the extent the Bureau finds the events that transpired to amount to noncompliance, the Bureau has the ability to enforce the current CID.

i. *Documenting an Unprepared Entity Witness*

Procedures: If a CID is issued compelling entity testimony, the individual(s) designated by the entity must be able to "testify about information known or reasonably available to the entity." 12 C.F.R. § 1080.6(a)(4)(ii). If the witness is generally unable to provide information about a specific subject area, Staff should establish for the record that the witness was generally unprepared by asking questions related to:

- the amount of time the witness spent preparing for his or her testimony;
- who the witness spoke to in order to prepare for his or her testimony; and
- the volume of documents the witness reviewed in preparation for his or her testimony.

j. *Intermittent Breaks*

Procedures: Staff may permit breaks in the course of an investigational hearing as necessary.

k. *Concluding the Investigational Hearing*

Procedures: The investigational hearing should not be adjourned unless and until the Bureau investigator is satisfied that the witness adequately complied with the CID. Staff should collect all copies of documents provided at the conclusion of the investigational hearing.

In closing an investigational hearing, the Bureau investigator should ask the witness if he or she is willing to waive his or her right to examine and read the transcript, which is permitted under 12 U.S.C. § 5562(c)(13)(E)(ii).

l. *Witness Fee*

Procedures: Any witness compelled to testify at an investigational hearing is entitled to the same fees and mileage that are paid to witnesses in the district courts of the United States as set forth in 28 U.S.C. § 1821. Staff should contact the Office of Enforcement's Administrative Officer with any questions regarding payment of fees and mileage to a witness.

m. *Witness's Right to Obtain Copy of Transcript*

Procedures: Following an investigational hearing, the Bureau "shall furnish a copy of the transcript (upon payment of reasonable charges for the transcript) to the witness only, except that the Bureau may for good cause limit such witness to inspection of the official transcript of his testimony." 12 U.S.C. § 5562(c)(13)(G). The Bureau should not be responsible for providing copies of transcripts for third parties to retain. For a witness to obtain a copy of the transcript of his or her hearing, the witness should have the Bureau's permission to order a copy for cost from the court reporter, and then submit an order to the court reporter. The court reporter should not provide a copy of any transcript without Bureau authorization.

Guidance: A witness should submit his or her request in writing to a Bureau investigator present at the investigational hearing, within a reasonable time following the hearing. When a witness or

witness's counsel requests a copy of the transcript, Staff receiving the request should authorize the court reporter to allow the witness to obtain a copy of the transcript (upon payment of reasonable fees) unless Staff has reason to believe there is (or may be) good cause to provide the transcript for inspection only. When Staff has reason to believe there is (or may be) good cause to refuse to provide a copy of the transcript, they should consult with their supervising ALD and LD about whether providing a transcript is appropriate under the circumstances, taking into account the considerations listed below. The determination of whether there is "good cause" to prevent a witness from obtaining a transcript should be made by the supervising LD, who will keep the Enforcement Director informed about any decisions in that regard.

The presumption is that witnesses will be allowed to obtain transcripts. The Office of Enforcement may determine that there is good cause not to provide a copy of a transcript where, among other potential circumstances:

- The witness is a third-party recipient, and the subject of the investigation is not aware of the investigation, the particular theories that the Office of Enforcement is considering, and/or the contents of the witness's testimony;

- There are specific articulable reasons to believe that provision of the transcript at that time would compromise a confidential investigation; or

- Other relevant considerations as articulated by the Staff at the time of the determination.

When a transcript is provided, Staff may, if appropriate, ask that the transcript not be shared with any other person until the investigation is complete. Such a request may be appropriate where the party requesting the transcript is not the subject of the investigation and where there is reason to believe that the requester would support the Office of Enforcement's goal of preserving the confidentiality of the investigation.

n. *Review and Signing of Transcript*

Procedures: Once an investigational hearing is complete, the court reporter will prepare two bound copies – one original and one copy – of the transcript and transmit them to the Bureau. Staff should forward the original transcript to the Bureau custodian, who is identified on the CID and who generally will be the paralegal assigned to the investigation. The Bureau investigator should then provide the witness a reasonable opportunity to review the transcript of his or her testimony. The witness has 30 days from the date the transcript was first made available, including the date the witness or witness's counsel received the transcript, to sign the Certification of Witness form and return to the Bureau the original signed Certification of Witness, the copy of the transcript, and the Errata Sheet for Changes to Transcript, if used by the witness.

When the Bureau decides to deny a witness's request to obtain a copy of the transcript, the witness should be provided the opportunity to examine the transcript of his or her testimony in a supervised location. Otherwise, a copy of the witness's transcript will be provided by the Bureau to the witness for examination, but any such copy must be returned to the Bureau. The procedures for both types of examinations are set forth below in greater detail.

o. *Examination of a Transcript in a Supervised Location*

Procedures: When the Bureau decides to deny a witness's request to obtain a copy of the transcript, the Bureau investigator should:

- In a supervised location, provide the witness for review and signature:
  - A copy of the transcript;
  - A cover letter, using the Cover Letter for Supervised Investigational Hearing Transcript Review as a template, which can be found here and on page 11-31;
  - A Certification of Witness, which can be found here and on page 11-27, with the highlighted fields completed (*e.g.*, the "In the Matter of"; "Witness Name"; "Hearing Date" and "Bureau Investigator(s)" fields); and
  - An Errata Sheet for Changes to Transcript, which can be found here and on page 11-33, with the highlighted fields completed (*e.g.*, the "In the Matter of"; "Witness Name"; "Hearing Date" and "Bureau Investigator(s)" fields). Where Staff must insert the name of the investigation on a form, captions for investigations are dictated by the Office of Enforcement's policy on opening investigations, which can be found on page 2-13.

- The use of the Errata Sheet for Changes to Transcript satisfies the Bureau investigator's obligation under 12 U.S.C. § 5562(c)(13)(E)(iii) to enter and identify any of the witness's desired changes in form or substance to the transcript and that those changes are accompanied by a statement of reasons.

- After the witness has completed the review, the Bureau investigator should collect the transcript, errata sheet, and signed certification form.

- If the witness refuses to sign the transcript or provides a written waiver of signature, then the Bureau investigator should execute a Statement of Bureau Investigator Confirming Non-Signature, which can be found here and on page 11-25, and attach the document to the transcript. Staff signing the Statement of Bureau Investigator Confirming Non-Signature fulfills the requirements under 12 U.S.C. § 5562(c)(13)(E)(v) to "sign the transcript and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign."

p. *Examination of a Transcript not in a Supervised Location*

Procedures: For transcripts not required to be reviewed and signed in a supervised location, the following steps should be followed for the review of the investigational hearing transcript:

- Staff should use the Cover Letter for Investigational Hearing Transcript Review as the template for the cover letter sent to the witness accompanying the transcript, which can be found here and on page 11-29. There are a number of empty highlighted fields in the letter that must be completed.

- Staff should complete the "In the Matter of"; "Witness Name"; "Hearing Date" and "Bureau Investigator(s)" fields on the Certification of Witness form, which can be found here and on page11-27, and Errata Sheet for Changes to Transcript form, which can be

found here and on page 11-33. The use of the Errata Sheet for Changes to Transcript satisfies the Bureau investigator's obligation under 12 U.S.C. § 5562(c)(13)(E)(iii) to enter and identify any of the witness's desired changes in form or substance to the transcript and that those changes are accompanied by a statement of reasons. Where Staff should insert the name of the investigation on a form, captions for investigations are dictated by the Office of Enforcement's policy on opening investigations, which can be found on page 2-13.

- Staff should assemble the Cover Letter, transcript copy, an Errata Sheet for Changes to Transcript, and a Certification of Witness for mailing.

- Staff should mail the bound copy of the transcript, the Cover Letter, an Errata Sheet for Changes to Transcript, and a Certification of Witness to witness's counsel (or witness, if he or she is pro se), via overnight mail. Staff should track the package to ensure that they can account for the date of delivery. Since a witness has 30 calendar days to read, review, and sign the transcript, including the date of receipt by the witness or witness's counsel, it is important the Bureau have a record of the date the transcript was made available to the witness. Staff should make a calendar entry to follow-up after 30 days to determine whether the witness has returned the Certification of Witness and the transcript copy.

- If a signed Certification of Witness is not received within 30 calendar days, Staff should execute a Statement of Bureau Investigator Confirming Non-Signature, which can be found here and on page 11-25, and attach the document to the transcript. Staff signing the Statement of Bureau Investigator Confirming Non-Signature fulfills the requirements under 12 U.S.C. § 5562(c)(13)(E)(v) to "sign the transcript and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign."

- Staff must make sure the witness has returned the copy of the transcript provided to him or her.

Handling Law Enforcement Tip Calls and Emails

Revised 12.18.12

Tips from current and former employees and other industry insiders (such as competitors) can serve as a valuable resource for the Office of Enforcement in identifying potential legal violations. The Bureau has created a law enforcement tip hotline and email address where individuals can provide tips concerning potential legal violations. The primary role of Staff in answering the tips hotline is to document the information provided by the individual providing the tip.

I. Documenting Law Enforcement Tip Information

Procedures: Staff should document information provided through whistleblower@cfpb.gov, the hotline, or from any other internal or external source in the Law Enforcement Leads Database ("Database") available here. To the extent possible, Staff should collect the following pieces of data from the individual:

- Name, phone number, email, and mailing address.
- Name of the entity or entities about which the individual is providing information.
- Description of the conduct that constitutes the alleged violation.
- Other law enforcement agencies (if any) the individual has contacted.
- Basis for the individual's knowledge (*i.e.* industry insider, former employee, competitor).
- Description of any evidence they are aware of to support their allegations (see guidelines below for obtaining documents).
- In the case of a current or former employee, the last title/position the individual held with the company.

Staff should indicate in the Database the Federal laws that might be implicated by the information provided by the individual. Staff should also include in the Database any recommendations for further action, including whether the information should be forwarded to the relevant issue team and potential follow up steps.

II. Routing Law Enforcement Tips to Issue Teams

Procedures: A duty Enforcement Attorney will be responsible for reviewing the Database. If there is an indication of a possible violation of Federal consumer financial law, the duty attorney should forward the tip information to the appropriate issue team. Issue teams are responsible for consulting with management, documenting what (if any) action was taken in response to the tip, and for tracking any documents received in conjunction with the tip.

III. Whistleblowers Represented by Counsel

Procedures: Staff should ask the individual if they are represented by counsel in relation to the information they are providing. If so, Staff should ask for the attorney's contact information to get approval to communicate directly with the individual. Staff should follow up with their ALD once they have spoken to counsel about next steps.

In the case of a current employee, if the employee responds that they are not represented by counsel in relation to the information they are providing, Staff should next ask whether the employee's company is represented by counsel in relation to the information the employee is providing. If the answer is yes, Staff should ask for the employee's title/position. If the employee responds that they are a manager or director of the company, Staff should end the conversation and consult with Enforcement Senior Staff before proceeding in order to avoid any potential Rule 4.2 issues. If, based on the current employee's response, Staff are unsure whether the employee is a manager or director, Staff should err on the side of caution by terminating the conversation and consulting with Office of Enforcement Senior Staff before proceeding.

In the case of a former employee, Staff should avoid soliciting information that implicates the former employer's attorney-client privilege. Staff should not inquire about any legal advice received by the former employee from in-house counsel.

IV. Making Representations to Individuals Providing Law Enforcement Tips

Procedures:

- Staff should not make any promises or representations to individuals regarding any potential action that the Bureau might take in response to the information provided. Staff should only inform individuals that they may be contacted if additional information is required.

- While communicating with individuals, Staff should refrain from providing legal advice and clearly articulate that the Bureau does not represent individual consumers. Staff should also refrain from opining on whether the conduct described constitutes a violation of law.

- Staff should not promise individuals that their information will be kept confidential. Staff can inform individuals that the Bureau takes their privacy seriously and will keep their identities confidential to the extent permitted by federal law.

- When appropriate, Staff may refer individuals to a state or federal agency when the alleged violation falls outside the jurisdiction of the Bureau. Staff may also inform individuals that they may wish to consult a private attorney.

V. Obtaining Documents from Whistleblowers

Procedures: Staff should never implicitly or explicitly communicate to whistleblowers that they should: (a) obtain documents to provide support for their allegations; or (b) submit privileged documents to the Bureau. Nor should Staff ask current employees if they have documents they are willing to provide to the Bureau.

Staff should ask whistleblowers who are not currently employed by the company that is the subject of the tip if they have any documents supporting their allegations that they are willing to share with the Bureau.

If such non-employees offer to share documents with the Bureau, Staff may accept the documents.

If current employees volunteer that they have documents they are willing to provide the Bureau, Staff should consult with their ALD before accepting the documents.

When appropriate, Staff should instruct individuals to submit any additional information through whistleblower@cfpb.gov or by calling the law enforcement tips hotline. Individuals can also mail additional information to:

[YOUR NAME]
Consumer Financial Protection Bureau
Attention: Office of Enforcement
1700 G Street, NW
Washington, DC 20552

Guidance: You should consult with your ALD or LD regarding any legal or ethical issues regarding the receipt of documents from whistleblowers.

VI. Routing Calls to Consumer Response

Procedures: If the caller is a consumer with a complaint about a financial institution or a general inquiry, Staff should direct them to call Consumer Response at (855) 411-2372.

VII. Referral of Tips to Law Enforcement Partners

Procedures: When appropriate, Staff may pass along information provided by individuals to state and/or Federal law enforcement partners.

Staff seeking to make an official criminal referral to the Department of Justice based on the information provided should follow the policies for criminal referrals once they are finalized. Staff seeking to make other referrals to a law enforcement partner based on the information provided should follow the policies for outgoing referrals once they are finalized.

VIII. Whistleblower Protections

Procedures: If individuals indicate they have suffered adverse job actions, Staff should inform current employees that under the Dodd-Frank Act, they may be protected from termination or other forms of workplace retaliation. Staff should direct individuals to www.whistleblowers.gov or to call the U.S. Department of Labor Occupational Safety & Health Administration at (800) 321-6742 for more information. Staff should refrain from offering any legal advice to individuals on their potential claims.

Guidance: Section 1057(a) of the Dodd-Frank Act prohibits "covered persons" or "service providers" from terminating or discriminating against employees for providing information to the Bureau about potential violations of the laws it enforces. Individuals who believe they have been terminated or discriminated against in violation of Section 1057(a) are required to file a complaint

with the Secretary of Labor within 180 days of the alleged retaliatory conduct. The Secretary of Labor can award relief which may include reinstatement, back pay, and compensatory damages.

IX. Monetary Awards

Procedures: If individuals inquire about potential monetary awards for providing information to the Bureau, Staff should inform them that the monetary awards provisions in the Dodd-Frank Act do not apply to information regarding potential violations of consumer financial protection laws.

Guidance: Under Section 922 of the Dodd-Frank Act, individuals who report securities violations to the Securities and Exchange Commission (SEC) may be entitled to a percentage of any monetary sanctions imposed by the SEC. There is no analogous provision in the Dodd-Frank Act covering the reporting of violations of consumer financial protection laws to the Bureau.

X. Following Up

Procedures: Staff should seek approval from an ALD before meeting with individuals or engaging in significant follow up telephone communications with them.

In determining whether to devote Bureau resources to following up on tips, Staff should consider the following factors:

- Whether the alleged facts indicate potential violations of laws or rules under the jurisdiction of the Bureau.
- The credibility of the individual and reliability of the information provided.
- Whether there is a need for immediate action to protect consumers.
- Whether the conduct is relevant to a Bureau program or priority.
- Whether the conduct involves a possibly widespread and/or emerging industry practice that should be addressed.
- The egregiousness of the potential violation.
- The magnitude of potential harm to consumers.
- Whether the potentially harmed group is particularly vulnerable or at risk.
- Whether the conduct is ongoing.
- Whether the alleged perpetrator of the conduct is a recidivist.
- Whether the conduct can be investigated efficiently and within the relevant statute of limitations period.
- Whether it might be more appropriate to pass along the information to Supervision or Rulemaking to address the conduct.
- Whether other authorities, including federal or state agencies or regulators are already investigating the conduct and/or might be better suited to do so than the Bureau.

Forms/Templates:
The Enforcement Leads Database is located here.

No Targets of Investigations

Revised 02.01.12

At some point during most Bureau investigations, usually upon being contacted by Enforcement Staff, people will ask (directly or through counsel) whether they are the "target" of the investigation. The Staff's answer to this question should always be "No, Bureau investigations do not have targets."

There are many reasons for this uniform response. "Target" is a term of art in criminal law that carries a specific meaning with legal consequences. In the grand jury process, individuals are often identified as the target of a criminal investigation, and that characterization has important Fifth and Sixth Amendment implications. Because Bureau investigations are civil, the notification of "targets" is not required. Furthermore, the term "target" incorrectly implies that the objective of an Enforcement investigation is to reach a specific result (legal action against the target) rather than to search for the truth. Although some parties involved in investigations eventually may be named as defendants or respondents in subsequent litigation, the Bureau does not have targets of its preliminary inquiries or investigations. Therefore, the Staff should never use the designation "target" to describe the subjects of Enforcement investigations.

Closing an Enforcement Matter

Revised 09.11.12

A supervising LD may close a matter at his or her discretion with advance notice to the Assistant Director for Enforcement. Closing an Investigation also requires subsequent notice to the following Bureau components: Supervision; Office of Fair Lending; Research, Markets, and Regulations; Legal Division; and Consumer Engagement. The following procedures describe when and how Staff should recommend closing a matter and how a matter should be formally closed upon approval by a LD.

I. Closing a Research Matter

Procedures: After the supervising LD has approved closing a Research Matter, Staff should fill out the form for closing a research matter, located here and on page 11-41.

Staff should recommend the closure of a Research Matter as soon as it becomes clear that no Investigation will be opened, even if every possible research action has not been completed.

II. Closing an Investigation

a. *Actions Required Before Closing an Investigation*

Procedures: Prior to closing every Investigation, Staff should:

- Review and follow Enforcement's FOIA procedures (page 1-15), to ensure compliance with FOIA;
- To the extent a litigation hold is in place, take appropriate steps to release the hold, including notifying all persons subject to the hold;
- Review and follow the Bureau's document retention and destruction policies to ensure the appropriate preservation, organization, and storage of physical and electronic documents collected or created during the Investigation;
- Complete an Investigation Closing Memorandum (located here and on page 11-42), have the supervising LD sign the memorandum, save it in the matter file, and change the MMS status to "Closed"; and
- Notify third parties who received a document retention letter or were otherwise required to retain documents, including CID recipients that the matter is terminated and a litigation hold is no longer required.

Guidance: The Investigation Closing Memorandum provides a record of how you conducted the Investigation, a description of any legal action taken and its resolution, or an explanation of the reasons you decided to conclude it without enforcement action. The memorandum may be used to inform any evaluation of subsequent activity by the Investigation's subjects, or to facilitate oversight of the Bureau's enforcement program.

b. *Investigations with No Enforcement Action*

Procedures: Staff should send a Termination Letter (located here and on page 11-43), as soon as a LD decides that no enforcement action will be recommended against any person or entity who:

- Was identified as a potential violator of consumer financial laws in the Investigation Opening Memorandum and Staff contacted to make aware of the Investigation, including any subject who received a CID;
- Submitted or was solicited to submit a NORA submission;
- Received a third-party CID and subsequently requested written confirmation that Staff would recommend no enforcement action against them; or
- Staff otherwise reasonably believes that the subject is aware that Staff considered recommending an enforcement action against the subject.

A Termination Letter should be sent unless there is a valid reason to refrain from doing so. Staff should send Termination Letters to the above individuals or entities even if an Investigation remains open as to other potential defendants or respondents. If Staff decide not to send a Termination Letter to persons or entities that fall into any of the above categories, the supervising LD should be notified and approve the decision.

Staff should recommend the closure of an Investigation as soon as it becomes apparent that no enforcement action will be recommended, even if every possible investigative action has not been completed.

Guidance: Closing an Investigation without recommending enforcement action may require a difficult judgment call, but failing to do so interferes with your ability to do other more productive work. Avoid the temptation to delay recommending closing an Investigation based solely on the possibility that some unforeseen development could make an enforcement action more likely. You should consider the following factors when deciding whether to recommend the closure of an Investigation without enforcement action:

- Seriousness of the conduct and potential violations
- Staff resources necessary to pursue available relief
- Sufficiency and strength of the evidence
- Extent of potential consumer harm if an action is not commenced
- Realistic expectation of meaningful victim restitution after successful Bureau action
- Expectation that actions will be commenced by other government agencies
- Expectation that consumers will be compensated through private litigation

- Age of the conduct underlying the potential violations

c. *Investigations Resulting in Enforcement Action*

Procedures: Staff should recommend closing an Investigation that resulted in the Bureau taking enforcement (legal) action as soon as:

- The legal action (including appeals) has concluded;
- Staff have followed through on every step authorized by the Director;
- Defendants have made all payments they owe pursuant to the action's resolution; and
- There is no ongoing investigation into additional conduct or entities that were not the subject of the legal action.

Guidance: You should recommend closing any Investigation as soon as there is nothing further to investigate and defendants have made all financial payments they owe as a result of the enforcement action. Because Investigations may have multiple subjects, and all enforcement actions arising from an Investigation may not be commenced simultaneously, Investigations may remain open after the conclusion of any particular legal action.

d. *Monetary Collections (Before Closing Investigations with Enforcement Action)*

Procedures: Staff should not recommend that an Investigation be closed until all litigation (including appeals) in the case is complete and all ordered monetary relief is accounted for, meaning:

- All restitution, disgorgement, and civil penalties have been paid in full or a decision has been made to terminate collection of any unpaid amounts;
- All funds collected have been distributed to consumers; and
- All money collections and distributions have been properly recorded.

When the only work that remains to be done on a matter is the collection or disbursement of monetary relief, Staff should change the matter's MMS status accordingly.

Guidance: An Investigation cannot be closed if any debts of a defendant or respondent are the subject of collection activity by the Bureau or on the Bureau's behalf (*e.g.*, by the Department of the Treasury's Financial Management Service or the Department of Justice), or if any funds are being held pending final distribution.

3. Litigation Policies

Statutes of Limitations and Tolling Agreements

Revised 02.27.12

During an investigation and before recommending an enforcement action, Staff should consider whether the alleged violations fall within the applicable statutes of limitations, and whether it would be prudent to seek an agreement tolling the applicable limitation periods.

I. Determining Applicable Statutes of Limitations

Subtitle E of the Dodd-Frank Act states that "except as permitted by law or equity, no action may be brought under this title more than 3 years after the date of discovery of the violation to which an action relates." 12 U.S.C. § 5564(g)(1). However, for actions arising "solely under" the enumerated consumer laws or the transferred laws, the action may be brought in accordance with the requirements of that provision of law. *See* 12 U.S.C. § 5564(g)(2)(B).

Most of the enumerated consumer laws do not contain an explicit time period for bringing a Bureau enforcement action. Where no statute of limitations is specified in the law, an action seeking a fine, penalty, or forfeiture must be brought within five years from the date the claim first accrued pursuant to 28 U.S.C. Section 2462. However, under the enumerated consumer laws, unless specified otherwise, there is no limitations period when bringing an action for other relief, including equitable monetary relief.

Guidance: You should be familiar with the statute of limitations issues arising under 28 U.S.C. Section 2462, such as when limitation periods begin to accrue. You should also be aware of the statutes of limitations for any enumerated consumer laws that may be relevant to your investigations. You should thoroughly research the applicable statutes of limitation and related issues at the early stages of your investigation and prior to recommending an enforcement action.

II. Tolling Agreements

Procedures: If at any point during the investigation Staff believes there might be a statute of limitations issue, Staff should consult with their supervising LD about whether to ask the potential defendant or respondent to enter into a tolling agreement.

Guidance: In some cases, the subject of an investigation may be willing to enter into a tolling agreement at the beginning of an investigation. However, it is more common for subjects to resist entering into a tolling agreement prior to the commencement of settlement negotiations or the filing of an enforcement action.

Forms/Templates: A sample tolling agreement can be found on page 11-53.

Notice and Ex Parte Preliminary Ancillary Relief

Revised 03.22.13

There are situations in which the Bureau will find it necessary to seek preliminary ancillary relief, such as seeking a notice or *ex parte* temporary restraining order (TRO), asset freeze, receivership, and other preliminary ancillary relief.[23] *Ex parte* relief is an extraordinary remedy that is sought without providing notice to adverse parties and should be sought only in certain situations.

I. Legal Standard for a Notice Temporary Restraining Order

The purpose of a TRO is to maintain the status quo pending a more complete hearing on the matter – such as a preliminary injunction hearing and/or a trial on the merits. Incident to their authority to issue permanent injunctive relief, courts have the inherent equitable power to grant all temporary and preliminary relief necessary to effectuate final relief. To prevail on a motion for a TRO, the Bureau will have to meet the specific evidentiary requirements of the court in which the action is filed. The standard for obtaining a TRO is generally the same as that to obtain a preliminary injunction.

Traditionally, a litigant must satisfy a four-prong test in order to prevail on a motion for a TRO and preliminary injunction by showing:

(1) Irreparable injury unless the TRO is granted;

(2) Substantial likelihood that the Bureau will prevail on the merits;

(3) A balance of the equities in favor of issuing the TRO; and

(4) The TRO would not be adverse to the public interest.

II. Legal Standard for an *Ex Parte* Temporary Restraining Order

The purpose of an *ex parte* TRO is to maintain the status quo when notice would make further prosecution fruitless or impossible. Consumer fraud cases often fall into this category. If the Bureau provides notice to individuals and corporations engaged in consumer fraud schemes, it is likely that those involved in the scheme will hide or dissipate assets and move or destroy business records and other inculpatory evidence. In addition, expedited action without notice will allow the Bureau to prevent immediate and irreparable harm and preserve the Bureau's ability to secure effective final relief to consumers through funds and assets frozen by the court's order.

The Federal Rules of Civil Procedure provide that a court can issue an *ex parte* TRO only if the legal standards for a notice TRO and the following requirements are met:

- Specific facts in an affidavit or verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

[23] Section 1054 of the Dodd-Frank Act, 12 U.S.C. § 5564(a) specifically allows the Bureau to seek temporary injunctions as permitted by law.

- The movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

Fed. R. Civ. P. 65(b).

III. Seeking a Notice or *Ex Parte* Temporary Restraining Order

Procedures: Provided that an investigation has been opened through the Enforcement Action Process, Staff should use their best judgment to determine whether a particular case merits a notice or *ex parte* proceeding based on the factors listed below. If Staff believe that the case merits a notice or *ex parte* TRO, Staff should consult with their supervising ALD, as soon as possible, to determine the appropriate course of action.

Staff should consider seeking an *ex parte* TRO in the following situations:

- Where the facts of the investigation demonstrate that assets and evidence stemming from the unlawful activity will be dissipated, destroyed, or otherwise made unavailable pending the outcome of litigation; or

- Where ongoing conduct of the defendant(s) threatens or continues to subject consumers to harm; and

- Where the situation meets the legal standard for *ex parte* TRO relief under the Federal Rules of Civil Procedure and relevant case law.

Contemporaneously with the filing of a motion for a notice TRO, Staff should file all other necessary pleadings to effectuate the TRO. These pleadings usually include, but are not limited to the following:

- Motion for a TRO;
- Memorandum of points and authorities in support of the motion;
- Proposed TRO;
- Motion for a preliminary injunction (sometimes referred to as a motion to show cause why a preliminary injunction should not issue);
- Memorandum of support for the preliminary injunction;
- Proposed preliminary injunction; and
- Civil complaint.

If Staff seek an *ex parte* TRO, contemporaneously with the filing of a motion for an *ex parte* TRO, Staff should file all other necessary pleadings to effectuate the TRO. These pleadings usually include, but are not limited to the following:

- Motion for *ex parte* TRO;
- Memorandum of points and authorities in support of the motion;

- Attorney affidavit pursuant to Fed. R. Civ. Pro. 65(b)(1)(B) attesting to efforts made to give notice and reasons why notice should not be required;
- Proposed TRO;
- Motion for a preliminary injunction (sometimes referred to as a motion to show cause why a preliminary injunction should not issue);
- Memorandum of support for the preliminary injunction;
- Proposed preliminary injunction;
- Civil complaint; and
- Motion to seal all documents and memorandum in support.[24]

Guidance: Additional pleadings and other material may be necessary to support the TRO depending on case-specific facts and the local rules where the motion is filed. Staff should always review local rules and seek out any judge-specific rules when seeking a TRO. The Bureau is not required to provide security, as is normally required of private litigants seeking injunctions and restraining orders, and Staff should note this fact in the memorandum of support for the TRO and the proposed TRO. *See* Fed. R. Civ. Pro. 65(c).

Staff should consider including the following fact-related provisions in a proposed notice and *ex parte TRO* (the specifics of each provision are discussed in more detail below):

- Asset freeze;
- Accounting of assets;
- Repatriation of foreign assets;
- Expedited discovery;
- Prohibition on filing for bankruptcy without prior court approval;
- Stay of other actions;
- Limitations on business activities;
- Obtaining defendants' credit reports;
- Service upon the Bureau;
- Appointment of a court-appointed receiver; and
- Immediate access to the business premises / Forensic Collection of Evidence.

Additional filings and considerations may include, for example, a motion for admission to the court *pro hac vice*, a motion to seal the court filing for a limited time, or having a local attorney on the pleadings – *i.e.*, a Bureau attorney admitted to practice in that district or a Civil Division Assistant United States Attorney for that district. As federal government attorneys, Staff may appear in any court in the country and motions to be admitted *pro hac vice* should not be necessary. However, some courts require such admission and local electronic case filing (ECF) registration before appearing.

[24] Until a policy regarding filing under seal is issued, Staff should consult with their supervising ALD regarding a determination of whether the civil complaint, TRO pleadings, and preliminary injunction pleadings should be filed under seal. To seal information, Staff generally must file a motion to seal with a brief memorandum in support and a proposed order. Any proposed order to seal the civil complaint should provide for the seal to be lifted automatically after notice of service on the defendant(s) (and restraint of assets, if any) has been filed with the court or within 14 days from issuance of the TRO or whichever occurs first.

Staff should be prepared to address the merits of a TRO on very short notice. Some courts will decide the motion in chambers on the pleadings without a formal hearing in court and some courts will conduct a brief hearing in court. In the latter situation, if Staff seeks an *ex parte* TRO Staff should have the court closed to the public and be prepared to have an investigator testify as to evidence necessary to establish the elements for a TRO. Because hearsay testimony is admissible to establish a TRO, most courts will not require witnesses be present for a TRO determination. Still, it is advisable to have the case investigator present and, if possible, to seek guidance from the court regarding whether it will expect or want other witnesses present. Staff generally will not know which judge has been assigned until after the case has been filed and docketed with the Clerk of the Court. However, once the Clerk's Office assigns the case to a particular judge, Staff should provide a blackberry or cellphone number to the assigned Judge's courtroom deputy clerk so that Staff may be reached easily should the court have questions or want to decide the motion in chambers. Staff should also consider communicating with the local United States Attorney's Office Civil Division to obtain further information relating to local practice and whether there is a district court duty judge to whom TROs are assigned.

TROs are valid only for a limited time and good cause must be shown to extend a TRO. *See* Fed. R. Civ. Pro. 65. Once a TRO is granted, the court will likely set a date for the preliminary injunction hearing. Staff should always insure that the preliminary injunction hearing is set prior to the expiration of the TRO, which is 14 days from date of issuance. Fed. R. Civ. Pro. 65(b)(2). If the court overlooks this planning, Staff should seek a continuance of the TRO. When seeking any continuance, Staff should lay the foundation that the continuance has been granted for good cause as required in the Federal Rules of Civil Procedure. This additional finding will assist in preventing an appellate issue regarding the timing and/or continuance of the TRO.

Staff should be prepared immediately to send a copy of the signed TRO via email, facsimile, U.S. mail, FedEx, or personal service to financial institutions where the defendants have accounts or other businesses used by or holding assets of the defendants. Each financial institution will likely have different procedures for receipt of court orders. Generally, financial institutions require that a TRO be served on its legal-process or subpoena department. Many financial institutions require a hardcopy be sent via overnight delivery or FedEx. This may not always be necessary if your TRO specifically provides for service via facsimile and email. This process is particularly important because once the financial institution has received notice of the TRO it may be liable for the release of funds from the frozen accounts.

a. *Seeking a Court-Appointed Receiver*

Procedures: When the Bureau seeks to have the court appoint a receiver as part of either a notice or *ex parte* proceeding, to avoid the appearance of an impropriety, *i.e.*, favoritism in using certain receivers, Staff should be prepared to recommend *at least two* potential receivers to the court for consideration. The receivers recommended by Staff must be in good standing with the applicable state bar association or other professional organization(s). In addition, the recommended receiver should have some experience as a receiver or business monitor, including but not limited to, the following: working with federal government agencies (*e.g.*, Federal Trade Commission, Securities and Exchange Commission, Commodities Futures Trading Commission, or the prudential regulators),

auditing and managing businesses, financial accounting practices, and/or management and liquidation of assets in bankruptcy.

Staff should consider whether it is necessary to seek a court-appointed receiver when seeking either a notice or *ex parte* TRO. A court-appointed receiver acts under the authority granted to it by the court. *See* Fed. R. Civ. Pro. 66. Although the request for a receiver may come from the Bureau, the receiver is independent from the Bureau and accountable to the court. Thus, it is important that any proposed TRO that includes an appointment of a receiver clearly state the receiver's authority and power are granted by the court to the receiver.

Staff should maintain close communications with the receiver, assist the receiver when necessary, and monitor the receiver's costs and expenditures. The proposed TRO should state how the receiver will be paid. The court may require the receiver to submit periodic reports and to seek authorization from the court to be paid. Staff should monitor the receiver's expenses to insure that there are no miscellaneous or unexplained expenses. Staff should also insure that the receiver's expenses are justified by the work performed. The amount of funds paid out to the receiver from any business taken over will determine the amount of funds returned to consumers for redress, as most receivers are paid either from the business profits or the liquidation of the business assets. An experienced receiver will minimize expenses or costs and maximize consumer redress.

A court-appointed receiver will also likely need immediate access to the business premises (discussed in the next section). Thus, Staff should include a provision in a proposed TRO allowing the receiver to enter the business premises or anywhere business is conducted and to secure such premises. For more information about such a provision, see the draft provisions template once it is finalized.

b. *Immediate Access to Business Premises / Forensic Collection of Evidence*

Procedures: If Staff believe that an immediate access to a business premises should be included as part of either a notice or *ex parte* TRO, Staff should obtain approval from Staff's supervisory ALD to include such a request as part of a TRO. Staff should also provide the Director of Professional Support with as much advance notice as possible regarding the seeking of a TRO. The Director of Professional Support will notify the Bureau's Office of Technology and Innovation and coordinate the procurement of any necessary contractor services for forensic collection of evidence (collectively "forensic collection team") from the immediate access and from the forensic collection.

If a TRO provides for the appointment of a receiver, Staff should coordinate with the receiver to insure that the business premises will be secured by local, state, or federal law enforcement immediately prior to Staff and the receiver's entry into the premises. Staff should not enter the premises until it is secured by law enforcement. If a TRO does not provide for the appointment of a receiver, but does provide for an immediate access to a business premises, Staff should directly coordinate with law enforcement to insure that the business premises will be secured prior to Staff's entry into the premises. If Staff is present at an immediate access, Staff should maintain a safe distance from the business premises until informed by law enforcement that the premises are secure. Only then may Staff enter the premises.

If Staff seek an immediate access to the business premises through a receiver, Staff should consider having present at least one attorney, investigator, and paralegal or legal assistant, in addition to the forensic collection team. Any investigators or other Staff present at the immediate access should be prepared to potentially testify as a witness as to what occurred at the immediate access.

Staff should insure that the necessary steps have been taken to coordinate the immediate access with local or other law enforcement and that forensic and other evidence necessary for the successful prosecution of the case will be collected and preserved. Staff should consider asking law enforcement to remain present during forensic collection while employees of the business are present.

Once inside the business premises, Staff should assist, if necessary, in reviewing evidence, including but not limited to records, documents, and electronic information discovered at the immediate access that may be used for the prosecution of the case. Staff may also assist in interviewing employees, but should only do so in the presence of other Bureau staff, such as the case paralegal, investigator or other third-party that can testify about the interview.

Forms/Templates: This section provides guidance and examples of provisions that Staff should consider including in any proposed TRO.

- Template - Draft Provisions of an Ex Parte TRO and on page 11-57
- Guidance: Evidence Check List for Immediate Access in TROs on page 11-58

4. Remedies Policies

Civil Money Penalties

Revised 12.19.12

Section 1055(c)(1) of the Dodd–Frank Act states that "[a]ny person that violates, through any act or omission, any provision of Federal consumer financial law shall forfeit and pay a civil penalty pursuant to this subsection."[25] However, the Bureau may not assess a civil money penalty (CMP) for a violation of any Federal consumer financial law unless it first provides the person accused with a notice and an opportunity for a hearing, or the appropriate court has ordered such assessment and entered judgment in favor of the Bureau.[26] Section 1055(c)(2) of the Dodd-Frank Act sets forth a three-tiered framework for the maximum CMP the Bureau may assess based on whether the person who committed the violation knowingly or recklessly violated the law.

I. Three-Tiered Framework

a. *First Tier (Penalty for any violation)*

The Bureau may assess first tier CMPs for the "violation of a law, rule, or final order or condition imposed in writing by the Bureau," but such penalty "may not exceed $5,000 for each day during which such violation . . . continues."[27]

b. *Second Tier (Penalty for any reckless violation)*

Section 1055(c)(2)(B) of the Dodd-Frank Act raises the maximum daily CMP to $25,000 where a person recklessly engages in a violation of a Federal consumer financial law.[28]

c. *Third Tier (Penalty for any knowing violation)*

For any person that knowingly violates a Federal consumer financial law, the Bureau may assess a CMP of up to $1,000,000 for each day the violation of law continues.[29]

II. Consideration of Other Statutory Factors

Section 1055(c)(3) of the Dodd-Frank Act, 12 U.S.C. § 5565(c)(3), also requires the Bureau or a court to take into account the appropriateness of the CMP amount with respect to the following factors:

- Size of financial resources,
- Good faith,
- Gravity of the violation or failure to pay,

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[25] 12 U.S.C. § 5565(c)(1). "Federal consumer financial law" includes "the provisions of [the CFP Act], the enumerated consumer laws, the laws for which authorities are transferred under subtitles F and H of [the CFP Act], and any rule or order prescribed by the Bureau under [the CFP Act], an enumerated consumer law, or pursuant to the authorities transferred under subtitles F and H. The term does not include the Federal Trade Commission Act." 12 U.S.C. § 5481(14).
[26] 12 U.S.C. § 5565(c)(5).
[27] 12 U.S.C. § 5565(c)(2)(A).
[28] 12 U.S.C. § 5565(c)(2)(B).
[29] 12 U.S.C. § 5565(c)(2)(C).

- Severity of the risks to or losses of the consumer,
- History of previous violations, and
- Such other matters as justice may require.

Procedures: Staff should always consider whether to seek a CMP where there is a violation of a Federal consumer financial law. If they believe a CMP may be appropriate in the matter, they should calculate the CMP within the parameters of the three-tiered framework. Staff should also always consider all of the mitigating factors as required by the statute. In cases where the violations of law occurred prior to the transfer date, however, Staff should calculate the CMP amount in accordance with the appropriate provision of law in effect at the time of the violation.

In circumstances where the same conduct by a person violates multiple laws (*e.g.*, the person failed to disclose a fee, which both violated TILA and was deceptive under Section 1036 of the Dodd-Frank Act), imposing only one CMP is appropriate. However, in cases where a person's practice or conduct leads to multiple, separate violations (*e.g.*, the person's initial marketing was deceptive and the person also engaged in separate credit reporting violations), Staff should consult with the supervising ALD to determine whether multiple CMPs are appropriate.

When submitting a recommendation memorandum for authority to sue or to enter into settlement negotiations, Staff should include a recommendation for a CMP amount or range or explain why Staff recommends not pursuing a CMP.

After a case is completed, Staff should update the CMP Tracking Chart, located here, and input the final CMP amount and factors used to calculate and assess the CMP.

Staff should consider seeking the statutory daily maximum based on the three-tiered framework. Staff should not specify the tier level of the CMP in public documents, including Consent Orders and Complaints. However, Staff should plead each of the elements of the underlying violations that justify the penalty sought or imposed in the statement of facts, including the level of *scienter* where necessary (*e.g.*, reckless or knowing).

If Staff have questions regarding whether a person's conduct may be characterized as "reckless" or "knowing" for purposes of Tier Two and Tier Three penalties, Staff should consult the supervising ALD for guidance.

For purposes of calculating the appropriate CMP amount, Staff should consider each violation of law affecting an individual consumer as a separate violation. For example, if a company engaged in a deceptive telemarketing scheme for three months and deceptively induced 3,000 consumers to purchase a product, the number of violations would equal 3,000 rather than 90 (the number of days the deceptive telemarketing scheme was in place). If Staff believes that the circumstances of a case warrant a different calculation (*e.g.*, a calculation based on the number of days the violation lasted or the number of days the violative conduct lasted), Staff should consult the supervising ALD for guidance.

Certain statutes provide specific CMP amounts for violations of law that are different than the amounts set forth in Section 1055 of the Dodd-Frank Act.[30] If a particular statute provides a different maximum CMP amount or framework for calculating CMPs, Staff may choose to rely on the framework set forth in that particular statute or may rely on Section 1055 of the Dodd-Frank Act for violations of that statute that occurred after the transfer date. Before relying on the penalty framework set forth in such statutes, Staff should carefully review the applicable penalty procedures to ensure compliance with any technical requirements they may contain.

Staff should generally require that a CMP be paid in full at the time an Order to pay a CMP is issued. In cases where Staff determines that a suspension of a CMP or a payment plan for a CMP is appropriate, Staff should consult with the supervising ALD to determine whether one of these options is appropriate.

In cases involving CMPs against individuals, Staff should generally require that individuals pay CMPs with their own resources and not be indemnified by another entity. In cases where Staff determines that allowing an individual to be indemnified by another entity would be appropriate, Staff should consult with the supervising ALD.

Guidance: When considering the statutory factors, Staff should take into account the following:

a. *Size of Financial Resources*

In considering the size of a person's financial resources, you should determine whether a person has the ability to pay a potential CMP by requesting and examining financial statements or other financial records during your examination or investigation into the person's misconduct. Please see the Policy on Financial Disclosures, once it is finalized. Note that obtaining information from the subject regarding its financial resources may be necessary to determine an appropriate penalty amount. You may also want to consider the amount of the CMP and its potential deterrent effect. For example, a smaller CMP may have a large impact on a small non-banking institution while a smaller CMP may be considered the cost of doing business for a multi-billion dollar institution. In cases where the defendant raises a valid claim of financial hardship and redress may not be possible, you should consider imposing at least a nominal CMP so that victims may be eligible to receive future payments from the Bureau's Consumer Financial Civil Penalty Fund. You may also want to consider a person's bankruptcy when evaluating financial resources; however, whether a CMP would be dischargeable in bankruptcy may depend on the facts and circumstances of the case.

b. *Good Faith*

When considering a person's good faith, it may be appropriate to lower the maximum penalty amount when a subject cooperates throughout an investigation, has established a strong compliance management system, provides evidence or other information that indicates the subject did not intend to violate the law, or voluntarily reimburses customers or engages in other corrective action.

[30] For example, the Real Estate Settlement Procedures Act, 12 U.S.C. § 2609(d), the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1717a, and the Secure and Fair Enforcement for Mortgage Licensing Act, 12 U.S.C. § 5113(d).

c. *Gravity of the Violation or Failure to Pay*

When you are considering the gravity of a particular violation, you may want to consider the maximum statutory penalty for violations that are particularly egregious, whereas technical violations may warrant lower penalties.

d. *Severity of the Risks to or Losses of the Consumer*

In examining the severity of the risk to or losses of consumers as a result of a violation of consumer financial law, you should take into account the number of products or services sold or provided and the magnitude of each consumer's loss.[31] For example, you should consider whether the product was sold nationwide or to a narrow group of consumers; whether the violation involved a minor fee or caused consumers great financial distress; and whether the product was marketed for years or for a matter of months.

e. *History of Previous Violations*

As you examine the person's history of previous violations, a larger CMP may be appropriate where the person has a history of engaging in the same types of violations for the same or similar products or the person has previously been the subject of enforcement actions for violations of consumer financial laws. In a case where the person has a strong history of compliance with consumer financial laws, a lower CMP may be warranted.

f. *Such Other Matters as Justice May Require*

Some factors that you may want to consider under this category include: whether the person received material or substantial benefit from its practices or violations of law; whether the amount of the penalty would have a sufficiently deterrent effect; and whether previous supervisory or enforcement actions (*e.g.*, Memoranda of Understanding or cease-and-desist orders) have been ineffective in eliminating or deterring a violation or practice. You may also want to consider whether the person should have known that its acts or practices violated the law or whether the Bureau's enforcement action involved novel interpretations of a particular statute or regulation.

III. Consideration of Past Precedent

Guidance: You should also consider the past precedent of the Bureau by consulting the Bureau's CMP Tracking Chart located here, and to a lesser extent, the past precedent of the Federal Trade Commission and the prudential regulators by using their CMP guidance and previous CMP assessments as a tool to determine whether your proposed penalty is appropriate under the circumstances.

For example, please see the CMP Guidance folder on the Z Drive, which includes the Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies, which sets forth thirteen factors that the Federal Financial

[31] 12 U.S.C. § 5565(c)(3)(C).

Institutions Examination Council (FFIEC) agencies[32] should consider in addition to the statutory factors found in each agency's enabling statute.[33] These factors, which you may wish to consider, include:

- Evidence that the violation or practice was intentional or was committed with a disregard of the law;
- The duration and frequency of the violations or practices;
- The continuation of the violations or practices after the respondent was notified or, alternatively, its immediate cessation and correction;
- The failure to cooperate with the agency in effecting early resolution of the problem;
- Evidence of concealment of the violation or practice, or alternatively, voluntary disclosure of the violation or practice;
- Any threat of loss, actual loss, or other harm to the institution, and the degree of such harm;
- Evidence that a participant or his or her associates received financial gain or other benefit as a result of the violation or practice;
- Evidence of any restitution paid by a participant of losses resulting from the violation or practice;
- History of prior violations or practices, particularly where they are similar to the actions under consideration;
- Previous criticism of the institution or individual for similar actions;
- Presence or absence of a compliance program and its effectiveness;
- Tendency to engage in violations of law; and
- The existence of agreements, commitments, orders, or conditions imposed in writing intended to prevent the violation or practice.[34]

In order to implement the policy, each of the agencies adopted a "CMP Matrix" that serves as a formula for calculating CMPs. Each of the thirteen FFIEC factors is assigned a numerical value as well as a multiplier, which is based on how the individual agency weighs the relative significance of each of the factors. Once the appropriate penalty tier is established, a value is assigned for each factor and is plugged into a mathematical formula that yields a point total that correlates to a range of possible CMPs for the offense.

Guidance from other agencies, including matrices published by the prudential regulators, are also included in the CMP Guidance folder for your reference. Although you may want to use these tools as a way to gauge whether your potential CMP would be comparable to a CMP assessed by

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[32] At the time the policy was published, the Federal Financial Institutions Examination Council agencies included the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the National Credit Union Administration.

[33] *See Federal Financial Institutions Examination Council: Assessment of Civil Money Penalties, Notice of Revised Policy Statement*, 63 Fed. Reg. 30226-02 (1998). The statutory factors cited in each agency's enabling statute are nearly identical to the list of mitigating factors found in Section 1055(c)(3) of the CFP Act. However, Section 1055(c)(3)(C) of the CFP Act contains an additional factor, namely "the severity of the risks to or losses of the consumer, which may take into account to number of products or services sold or provided." 12 U.S.C. § 5565(c)(3)(C).

[34] Although the thirteen factors also reference specific safety and soundness concerns, such as breaches of fiduciary duty and losses to the institution, those references are omitted here because they are not applicable to violations of Federal consumer financial laws.

other regulators, you should rely primarily on your calculation of the statutory daily maximum, Bureau precedent, and other statutory factors in determining the appropriate CMP in your case.

5. Adjudicative Proceedings Policies

Affirmative Disclosure and Other Disclosure Obligations for Adjudication Proceedings

Revised 01.18.13

Rules 206 and 207 of the Bureau's Rules of Practice for Adjudication Proceedings (page 10-15), 12 C.F.R. §§ 1081.206, 1081.207, impose on the Office of Enforcement certain obligations to produce material without request and shortly after the commencement of adjudication proceedings (Rule 206) or upon request of the respondent (Rule 207). It is the Office of Enforcement's policy to interpret its disclosure obligations under these Rules broadly and to err on the side of disclosure. This policy should be read in conjunction with (1) the Office of Enforcement's Maintaining Matter Files policy (page 1-3), which is designed, in part, to ensure that documents and information will be maintained in a way that enables Staff to efficiently and timely comply with Rules 206 and 207; (2) the Bureau's eDiscovery Framework, which guides the review of material for privilege as well as the production of electronically stored information (ESI); and (3) the Bureau's Rules of Practice for Adjudication Proceedings and the section-by-section analysis.

I. Compliance with Rule 206

Procedures: When the Office of Enforcement determines that it will seek approval to bring an adjudication proceeding pursuant to the EAP, Staff should take steps to ensure that the materials required to be disclosed under Rule 206 are gathered to ensure that Staff timely comply with this Rule.

Staff should review the following folders in the Matter File to ensure that each folder contains all required documents:

- Agreements Folder;
- CIDs and Voluntary Requests for Information Folder;
- Information Informally Obtained from Outside the Bureau Folder; and
- Witness Statements and Testimony Folder.

If these folders do not contain a complete record of all required documents, Staff should gather any missing documents and save them to the appropriate folders as required by the Maintaining Matter Files policy.

Guidance: Rule 206 describes the documents the Office of Enforcement must make available for inspection and copying by any respondent. When reviewing the folders described above, Staff should refer to Rule 206 as well as the commentary on Rule 206 contained in the section-by-section analysis published in the Federal Register. Generally, the Rule requires Enforcement to make available for inspection and copying documents obtained by the Office of Enforcement prior to the institution of proceedings, from persons not employed by the Bureau, in connection with the investigation leading to the institution of proceedings, including:

- Any documents turned over in response to CIDs or other written requests to provide documents or to be interviewed issued by Enforcement;

- All transcripts and transcript exhibits; and
- Any other documents obtained from persons not employed by the Bureau.

Rule 206 also requires Staff to make available for inspection and copying by any respondent:

- Each CID or other written request to provide documents or to be interviewed issued by Enforcement in connection with the investigation leading to the institution of proceedings; and
- Any final examination or inspection reports prepared by any other Office of the Bureau if Enforcement either intends to introduce any such report into evidence or to use any such report to refresh the recollection of, or impeach, any witness.

a. *Timing and Form of Production*

Procedures: The Office of Enforcement must commence making documents available to the respondent for inspection and copying no later than seven days after service of the notice of charges. 12 C.F.R. § 1081.206(d). Rule 206 provides the Office of Enforcement with discretion regarding the timing and format of production (*e.g.*, paper, electronic copies, or making documents available for inspection and copying). However, the Office of Enforcement has committed to making documents available to the respondent as soon as possible (but in any event commencing no later than seven days after service of the notice of charges) and to producing the information in electronic format, unless electronic production is not feasible.

When the Office of Enforcement determines that it will seek approval to bring an adjudication proceeding pursuant to the EAP, Staff should contact the T&I Team to discuss producing documents and the format of production by sending an email to the following listserv: _DL_CFPB_eDiscoveryIT. Topics to address with the T&I Team include:

- Determining the timing of production;
- Identifying data sources and data for inclusion in the production set;
- Assisting the T&I team in determining appropriate production format; and
- Performing quality check of production data to prevent inadvertent disclosure of privileged information.

Guidance: Situations in which Staff should consider providing hard copies or delaying production of materials include when the information to be produced includes:

- physical evidence not susceptible to reproduction in electronic format (*e.g.*, oversized documents, such as advertising posters or banners, or physical objects);
- documents subject to a non-disclosure agreement (*e.g.*, documents obtained from a State pursuant to a confidentiality agreement) that are the subject of a pending motion for a protective order; or

- confidential documents or documents prohibited from disclosure under law that are the subject of a pending motion for a protective order.

Staff should consult with the supervising ALD or supervising LD assigned to the matter to determine whether other situations warrant providing hard copies or delaying production in particular cases.

b. *Material Obtained From Third Parties Subject to a Claim of Confidentiality (Other than Documents Obtained From State or Federal Partners)*

Procedures: If any party to an adjudication proceeding (including the Office of Enforcement) intends to disclose information obtained from a third party that is subject to a claim of confidentiality, Rule 119 requires the producing party to give the third party at least ten days' notice prior to the proposed disclosure of the information. 12 C.F.R. § 1081.119(a). The third party claiming confidential status may consent to the disclosure of the material, which may be conditioned on the entry of an appropriate protective order, or may intervene in the proceeding for the limited purpose of seeking a protective order. *Id.*

When the Office of Enforcement determines that it will seek approval to bring an adjudication proceeding pursuant to the EAP, Staff should review the Agreements Folder within the Matter File to identify any agreements governing the disclosure of materials the Office of Enforcement obtained from third parties, for example confidentiality or non-disclosure agreements.

Staff should also identify:

- any documents or information the producing party marked "confidential," as "exempt from disclosure," or some similar stamp indicating that the producing party intended to protect the confidentiality of the document;

- any cover letters or emails the producing party included with document productions to determine whether the producing party indicated that it was seeking confidential treatment of the material; and

- any documents Staff are otherwise aware of that are subject to a claim of confidentiality or that constitute trade secret materials.

If Staff locate documents subject to a claim of confidentiality, Staff should ascertain whether the documents are subject to one of the exemptions from mandatory disclosure set forth in Rule 206(b)(1). If any such documents are not exempt from disclosure, Staff should, as soon as practicable but in any event no later than ten days prior to producing the documents, notify the third party claiming the documents are confidential to inform the third party that the Office of Enforcement intends to disclose the documents.

Guidance: Rule 119(a) does not provide the procedure for handling documents obtained from federal or state partners pursuant to a non-disclosure agreement. Rule 206(b)(1)(iii), addressed below, governs those documents.

II. Material Obtained From Supervision or Other Offices within the Bureau in Connection With the Investigation

Procedures: The affirmative disclosure obligation under Rule 206 extends to documents obtained by the Office of Enforcement prior to the institution of proceedings, from persons not employed by the Bureau, in connection with the investigation leading to the institution of proceedings. 12 C.F.R. § 1081.206(a)(1). Staff should review the section-by-section analysis of Rule 206 contained in the Federal Register for further information regarding the scope of this obligation.

Guidance: The Bureau interprets its obligation to affirmatively disclose material under Rule 206 as including both records obtained by the Office of Enforcement directly from persons not employed by the Bureau, as well as documents obtained by the Office of Enforcement indirectly from persons not employed by the Bureau. For example, if the Office of Enforcement obtained information from Supervision in connection with an investigation that Supervision obtained from a person not employed by the Bureau, then the Office of Enforcement will disclose that information, subject to 12 C.F.R. § 1081.206(b). 77 FR 39070-71, 39073.

a. *Material Obtained From Supervision*

Procedures: When Staff obtain documents from Supervision in the course of an investigation or when an exam-related matter is identified for possible public enforcement action, Staff should maintain those documents.

When the Office of Enforcement determines that it will seek approval to bring an adjudication proceeding pursuant to the EAP, Staff should review any documents or information obtained from Supervision in connection with the underlying investigation to determine whether there are any documents Supervision obtained from persons not employed by the Bureau. If Staff locate such documents, Staff should include those documents in the pre-production review described in the Bureau's eDiscovery Framework, and must ultimately produce those documents unless they are privileged or otherwise protected from affirmative disclosure by Rule 206(b).

b. *Material Obtained From Other Offices within the Bureau*

Procedures: When the Office of Enforcement receives documents from other offices in the course of an investigation, Staff should maintain those documents.

When the Office of Enforcement determines that it will seek approval to bring an adjudication proceeding pursuant to the EAP, Staff should review any documents or information obtained from other offices within the Bureau in connection with the underlying investigation to determine whether there are any documents those offices obtained from persons not employed by the Bureau. If Staff locate such documents, Staff should include those documents in the pre-production review described in the Bureau's eDiscovery Framework, and must ultimately produce those documents unless they are privileged or otherwise protected from affirmative disclosure by Rule 206(b).

III. Documents That May be Withheld under Rule 206

Guidance: Rule 206(b) lists several categories of documents that the Office of Enforcement may withhold notwithstanding the affirmative disclosure obligation under Rule 206(a):

- Privileged documents (12 C.F.R. § 1081.206(b)(1)(i));

- Internal memoranda, notes, or other writings prepared by a person employed by the Bureau or another governmental agency, other than examination or supervision reports, or documents subject to the work product doctrine that will not be offered into evidence (12 C.F.R. § 1081.206(b)(1)(ii));

- Documents obtained from a domestic or foreign governmental entity that is either not relevant to the proceeding or was provided on condition that the information not be disclosed (12 C.F.R. § 1081.206(b)(1)(iii));

- Documents that would disclose the identity of a confidential source (12 C.F.R. § 1081.206(b)(1)(iv));

- Documents prohibited from disclosure under applicable law (12 C.F.R. § 1081.206(b)(1)(v)); or

- Documents that the hearing officer has granted leave to withhold as not relevant to the subject matter of the proceeding or for good cause shown (12 C.F.R. § 1081.206(b)(1)(vi)).

Guidance: The Office of Enforcement cannot withhold material exculpatory evidence that would otherwise be required to be produced under Rule 206(a). That means that if the Office of Enforcement is prohibited from disclosing a document that contains material exculpatory evidence either because applicable law prohibits the disclosure or because the governmental entity from which the document was obtained insists on maintaining the confidentiality of that document, the Office of Enforcement should move the hearing officer for an order permitting the Office of Enforcement to withhold those documents.

a. *Documents Obtained from State or Federal Partners Subject to Non-Disclosure Agreements or Statutes or Rules Restricting Further Disclosure (Rule 206(b)(1)(iii))*

Procedures: When the Office of Enforcement determines that it will seek approval to bring an adjudication proceeding pursuant to the EAP, Staff should review the Agreements Folder within the Matter File to identify any agreements governing the disclosure of materials the Office of Enforcement obtained from State or Federal law enforcement partners, for example confidentiality or non-disclosure agreements. Staff should identify any relevant agreements and determine their applicability to documents that may be subject to Rule 206.

Guidance: Rule 206(b)(1)(iii) permits the Office of Enforcement to withhold a document if it was obtained from a governmental entity on condition that the information not be disclosed. The Rule does *not* permit the Office of Enforcement to withhold such documents if they contain material exculpatory evidence. 12 C.F.R. § 1081.206(b)(2).

Procedures: If the Office of Enforcement obtained documents from a governmental entity on condition that the documents not be disclosed, Staff should take the following steps:

- Review the documents and, in consultation with the ALD or LD assigned to the matter, determine (1) whether the documents contain material exculpatory evidence that must be

produced under 12 C.F.R. § 1081.206(b)(2) and 12 C.F.R. § 1081.206(a)(1); and (2) whether the Office of Enforcement wishes to introduce the documents in the proceeding despite the non-disclosure or confidentiality agreement;

- If Staff determine that the documents contain material exculpatory evidence, Staff should contact the governmental entity from which the documents were obtained to inform the governmental entity from which the documents were obtained that the Bureau's Rules do not permit the Office of Enforcement to withhold those documents and to determine whether the entity will consent to the disclosure of the documents in the proceeding;

- If Staff determine they wish to use the documents in the proceeding (but the documents do not contain material exculpatory information), Staff should contact the entity from which the documents were obtained to determine whether the entity will consent to the disclosure of the documents, unless Staff determine, in consultation with the ALD or LD assigned to the matter, that the benefit of using the documents is outweighed by the risk that contacting the entity to make this request will be detrimental to the Bureau's relationship with the governmental entity;

- If the entity does not consent in either of the above-referenced circumstances, or conditions its consent upon the entry of an appropriate protective order, staff may either move for a protective order pursuant to Rule 119 and 206(a), or advise the governmental entity of its right to intervene for the limited purpose of seeking a protective order pursuant to Rule 119; and

- If the documents do not contain material exculpatory evidence and the Office of Enforcement determines that it does not wish to use the documents or if the entity from which the documents were obtained does not consent to the disclosure, Staff should (1) inform the respondent of the fact that the documents are being withheld and identify the governmental agency from whom the documents were obtained; and (2) inform the governmental agency that the documents will be identified as being withheld in the adjudication proceeding pursuant to Rule 206(c).

Guidance: "Material exculpatory evidence" under Rule 206(b)(2) means all information material and favorable to the respondent and should be interpreted broadly to include, among other things, information that tends to:

- Cast doubt on respondent's liability as to any essential element in any claim in the notice of charges;

- Cast doubt on the admissibility of evidence that the Office of Enforcement anticipates using in its case-in-chief;

- Cast doubt on the credibility or accuracy of any evidence that the Office of Enforcement anticipates using in its case-in-chief; or

- Diminish the degree of the respondent's culpability or the respondent's liability for civil money penalties under 12 U.S.C. § 5565(c).

Staff should err on the side of disclosure and should consult with the supervising ALD or supervising LD if there is any doubt as to whether the documents contain material exculpatory evidence. Note that Rule 206(b)(2) only applies to evidence that would be required to be produced pursuant to Rule 206(a); it thus does *not* apply to internal memoranda, notes, etc., as such documents are not within the scope of Rule 206(a)'s affirmative disclosure obligation.

b. *Material Disclosing the Identity of a Confidential Source (Rule 206(b)(1)(iv))*

Guidance: Rule 206(b)(1)(iv) permits the Office of Enforcement to withhold a document if it would disclose the identity of a confidential source. A confidential source is someone who requested that his or her identity not be disclosed, and may include whistleblowers and former employees.

Procedures: When the Office of Enforcement determines that it will seek approval to bring an adjudication proceeding pursuant to the EAP, Staff should, consistent with the Bureau's eDiscovery Framework, review the documents likely to be produced under Rule 206 to determine whether any documents would disclose the identity of a confidential source. If a document would disclose the identity of a confidential source, Staff should:

- Contact the source to determine whether the source will consent to the disclosure of the documents despite the fact that disclosure would reveal his or her identity, unless Staff determine, in consultation with the ALD or LD assigned to the matter, that contacting the source to make this request will be detrimental to the Bureau's relationship with the source;

- If the source does not consent to the disclosure of the document, Staff should determine whether the document can be redacted in such a way that it would not disclose the identity of the confidential source;

- If Staff determine that the document cannot be redacted, Staff should, in consultation with the ALD or LD assigned to the matter, determine whether the document contains material exculpatory evidence;

- If the Staff determine that the document contains material exculpatory evidence, Staff should (1) inform the source whose identity would be revealed that the Bureau's Rules do not permit the Office of Enforcement to withhold those documents; (2) inform the source that the Bureau's Rules permit him or her to seek a protective order; and (3) move the hearing officer for an order pursuant to Rule 206(a) seeking to withhold the documents;

- If the source does not consent, the document cannot be redacted in such a way that it would not disclose the identity of the confidential source, and the document does not contain material exculpatory evidence, the document should be withheld.

c. *Material Prohibited from Disclosure under Law (Rule 206(b)(1)(v))*

Guidance: Rule 206(b)(1)(v) permits the Office of Enforcement to withhold documents when applicable law prohibits the disclosure of the document. Though there are other sources of law that may prohibit the production of documents, the Trade Secrets Act, 18 U.S.C. § 1905, and the Bank Secrecy Act, are two statutes Staff should consider when determining what documents to produce under Rule 206.

Procedures: Before producing documents under Rules 206 or 207, Staff should, consistent the Bureau's eDiscovery Framework:

- Review the documents and, in consultation with the ALD or LD assigned to the matter, determine whether the Bureau is prohibited from disclosing the document under any law, including the Trade Secrets Act;

- Review the documents and, in consultation with the ALD or LD assigned to the matter, determine whether any documents prohibited from being disclosed are "material exculpatory evidence" that must be disclosed under Rule 206(b)(2); and

- If there are documents that are prohibited from being disclosed and that also contain material exculpatory evidence, Staff should move the hearing officer for an order exempting the documents from disclosure.

d. *Privileged Documents or Other Internal Documents Prepared by a Person Employed by the Bureau (Rule 206(b)(1)(i))*

Procedures: When Staff gather the documents that may be produced pursuant to Rule 206, Staff should review those documents and take reasonable steps to protect privileged documents from disclosure and production consistent with the Bureau's eDiscovery Framework. Staff should identify and protect from disclosure privileged documents and internal documents prepared by a person employed by the Bureau or another government agency (other than examination or supervision reports identifying in Rule 206(a)(2)(ii)).

Guidance: Rule 206(i) contains a "clawback" provision under which the disclosure of privileged information does not operate as a waiver if:

- The disclosure was inadvertent;

- The holder of the privilege took reasonable steps to prevent disclosure; and

- The holder promptly took reasonable steps to rectify the error, including notifying the other party of the claim of privilege and the basis for the claim.

See 12 C.F.R. § 1081.206(i).

e. *Withheld Document List*

Guidance: Under the Rules, the Office of Enforcement is not automatically required to produce a privilege log identifying withheld documents. 12 C.F.R. § 1081.206(c). With some exceptions, however, the hearing officer can order the Office of Enforcement to produce a list of documents or categories of documents that are being withheld pursuant to paragraphs (b)(1)(i) through (v) of Rule 206, or to submit to the hearing officer any document withheld.

Procedures: Though the Office of Enforcement is not automatically required to prepare and produce a privilege log, Staff should consider whether to prepare a list of withheld documents that would comply with Rule 206(c) while they are reviewing the documents before production.

IV. Production of Witness Statements under Rule 207

Procedures: As set forth in the Maintaining Matter Files policy (page 1-3), for every Matter File, Staff should create a folder titled "Witness Statements and Testimony" to preserve all witness statements obtained during the course of an investigation. Before commencing an adjudication proceeding, Staff should ensure that all witness statements have been saved within this folder in compliance with the Maintaining Matter Files policy. If there are any documents missing, Staff should gather those missing documents and save them in the "Witness Statements and Testimony" folder.

Rule 207 permits a respondent to move that the Office of Enforcement produce for inspection and copying any statement of any person called or to be called as a witness by the Office of Enforcement that pertains, or is expected to pertain, to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. § 3500, if the adjudication proceeding were a criminal proceeding. 12 C.F.R. § 1081.207(a). The production shall be made at a time and place fixed by the hearing officer. *Id.* Unlike Rule 206, the production of witness statements is not automatic and, instead, the respondent is required to move for the production of these statements.

Guidance: The Jencks Act does not require production of a witness's prior statement until the witness takes the stand. In ordinary cases, the Office of Enforcement should not object to voluntarily providing prehearing production of witness statements covered under Rule 207 upon motion. Submission of a witness's prior statement, however, may provide a motive for intimidation of that witness or improper contact by a respondent with the witness. Where Staff believe there is risk of improper use of a witness's prior statement, Staff should move the hearing officer to take appropriate steps to mitigate that risk. For example, Staff may move for an order delaying production of a prior statement, or prohibiting parties from communicating with particular witnesses.

Staff should consult the definition of "statement under the Jencks Act," 18 U.S.C. § 3500(e), as well case law interpreting that definition. Generally speaking, non-verbatim notes written by an interviewing attorney or investigator that are not adopted by witness are not "statements" under the Jencks Act and the Office of Enforcement would not have to produce those notes under Rule 207. *E.g.*, *Palermo v. United States*, 360 U.S. 343, 352 (1959) ("only those statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment"); *United States v. Valera*, 845 F.2d 923, 926 (11th Cir. 1988) (a report written by U.S. Attorney and never adopted by witness and summaries written by agent of what witness had told him "did not fall within the Jencks definition of 'statement' because neither of them was a verbatim transcription of what [the witness] had stated … and [the witness] had adopted neither of the statements"); *United States v. Ricks*, 817 F.2d 692, 698 (11th Cir. 1987) ("FBI memoranda of witness interviews" did not fall within the Jencks Act because "the witnesses never adopted the memoranda as their own statements.").

a. *Statements of Bureau Personnel, Including Exam Team Members and Investigators*

Procedures: Under Rule 206, reports prepared by exam team members or investigators would generally not be required to be produced because those reports would not be "documents obtained by the Office of Enforcement prior to the institution of proceeding, from persons not employed by

the Bureau." 12 C.F.R. § 1081.206(a). Such reports may, however, be required to be produced under Rule 207.

In proceedings in which Bureau personnel – particularly exam team members or Enforcement investigators – may be called as witnesses, Staff should take the following steps to ensure that witness's statements have been gathered and can be produced in the event that the Respondent moves for production under Rule 207(a):

- Review the Matter File, particularly the Witness Statements and Testimony Folder, to locate any documents that may constitute statements under Rule 207 and 18 U.S.C. § 3500(e);
- Contact the Bureau personnel to be called as a witness to determine whether he or she created other documents that may qualify as "statements" under the Jencks Act and, if so, obtain copies of those statements and save those documents in the appropriate file pursuant to the Maintaining Matter Files policy (page 1-3); and
- Consult with the ALD or LD assigned to the matter to determine whether any documents are "statements" under Rule 207 and 18 U.S.C. § 3500(e).

6. Law Enforcement Partners Policies

Working with Criminal Law Enforcement Partners

Revised 04.09.12

Cooperating with criminal authorities and other law enforcement agencies is an important part of the Bureau's enforcement mission. The Bureau has authority to bring civil actions to enforce Federal consumer financial laws, but may not bring criminal actions and must refer evidence of violations of Federal criminal law to the Department of Justice (DOJ). Criminal referrals are handled in compliance with the Memorandum of Understanding between the Bureau and the DOJ and our internal policy on criminal referrals (located here). The Bureau's civil authority is not compromised when the DOJ or state criminal authorities conduct a criminal investigation and/or make a determination to bring criminal charges concurrent with the Bureau's investigation and/or civil action. Nonetheless, important considerations arise when cooperating with criminal authorities, as discussed below.

I. Parallel Criminal Investigations

Procedures:

- Staff should consult with a supervisor before engaging in significant discussions and written communications with criminal authorities.

- Staff should not take an investigative action for which the sole aim is to benefit a parallel criminal investigation.

- Staff should not affirmatively mislead the subject or potential subject of an investigation about the existence or possibility of a parallel criminal investigation or that the investigation is solely civil in nature and will not lead to criminal charges.

- In response to a question by counsel or an individual about the existence of a parallel criminal proceeding, Staff should respond that it is the policy of the Bureau not to comment on investigations conducted by other law enforcement authorities. Staff should also refer counsel or the individual to section E of the Notice to Persons Supplying Information, "Privacy Act Statement" (the full Notice is available on page 11-23). That section states, in relevant part:

  > 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.

- Staff should consult with a supervisor before making or responding to a request for a stay

in civil proceedings due to a parallel criminal proceeding.

Procedures:

a. *Responding to Questions about Parallel Criminal Investigations*

In most instances, you are under no affirmative obligation to disclose the existence of a parallel criminal investigation.[35] But, if counsel or an individual asks whether there is a parallel criminal investigation, you cannot give a false or misleading answer. The critical point is that you not represent or imply that there is not, or will not be, a parallel criminal investigation, because such a representation is likely to raise valid Fourth and Fifth Amendment defenses to any resulting prosecution. *See United States v. Stringer*, 521 F.3d 1189, 1199-1200 (9th Cir. 2008).

Staff may invite counsel or any individual to contact criminal authorities if they wish to pursue the question of whether there is a parallel criminal investigation, but do not have to identify which agencies or offices. However, if Staff is in communication with a criminal prosecutor, Staff may ask the criminal prosecutor whether Staff may direct counsel or any individual to contact the criminal prosecutor.

b. *Cooperating with Criminal Authorities*

Staff should work cooperatively with criminal authorities, share information, and coordinate investigations with parallel criminal investigations where appropriate.

If there is an ongoing parallel criminal proceeding, Staff should consider whether to wait until the criminal proceeding has concluded before initiating a civil investigation. Similarly, Staff should consider whether to stay an ongoing investigation or civil or administrative action after learning of a parallel criminal proceeding. In some instances, a prior conviction or plea agreement will enable Staff to negotiate a settlement without the need for a lengthy investigation. If Staff is in communication with a criminal prosecutor, Staff should consider asking the criminal prosecutor to include enough facts in the criminal plea (if a plea is entered) to find liability in the civil case.

Guidance:

c. *Conducting Parallel Proceedings*

The Supreme Court recognized in *United States v. Kordel*, 397 U.S. 1, 11 (1970) that the government can conduct parallel civil and criminal proceedings without violating the Constitution, so long as the government does not act in bad faith. The Bureau may be considered to act in bad faith if it conducts a civil investigation solely for the purpose of obtaining the evidence in a criminal prosecution and does not advise the individual or his or her counsel of the planned use of the evidence solely for a criminal proceeding.[36]

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[35] One court has ruled that civil agencies have such an obligation. *See United States v. Scrushy*, 366 F.Supp.2d 1134 (N.D. Ala 2005).

[36] For a general discussion of parallel proceedings, see Gabriel L. Gonzalez, Blair G. Connelly & Elias Eliopoulos, *Parallel Civil and Criminal Proceedings*, 30 Am. Crim. L. Rev. 1179 (1992-1993).

As the Court of Appeals for the D.C. Circuit put it in the leading case of *SEC v. Dresser*, 628 F.2d 1368, 1377 (D.C. Cir. 1980), "effective enforcement of the securities laws require that the SEC and [the Department of] Justice be able to investigate possible violations simultaneously." Other courts have issued opinions to the same effect. *SEC v. First Fin. Grp. of Texas*, 659 F.2d 660, 666-67 (5th Cir. 1981) ("The simultaneous prosecution of civil and criminal actions is generally unobjectionable."); *Stringer*, 521 F.3d at 1191 ("There is nothing improper about the government undertaking simultaneous criminal and civil investigations. . .").

The Dodd-Frank Act expressly provides that the Bureau can share information gathered in a civil investigation with other government agencies and provide information to the Department of Justice for a determination whether to institute criminal proceedings. *See* Section 1056, Title X; 12 C.F.R. §§ 1081.121 (cooperation with other agencies), 1070.43 (disclosure of confidential information to law enforcement agencies).

A civil investigation that precedes a criminal investigation or prosecution is unlikely to result in a finding that the investigation was undertaken in bad faith. *Stringer*, 521 F.3d at 1197 (finding that this sequence of events tended to "negate any likelihood that the government began the civil investigation in bad faith, as, for example, in order to obtain evidence for a criminal prosecution."). Similarly, cooperation with criminal authorities, even extensive cooperation, does not constitute bad faith. In *Stringer*, the SEC cooperated in a number of ways with the U.S. Attorney's Office that was conducting a parallel criminal investigation. The SEC offered to conduct the interviews of defendants so as to create "the best record possible" in support of "false statement cases" against them, and the AUSA instructed the SEC Staff Attorney on how best to do that. *Id.* At the AUSA's request, the SEC took defendants' depositions in the AUSA's district so that the USAO would have venue over any false statements case that might arise from the depositions. *Id.* Finally, the SEC Staff Attorney kept the existence of a criminal investigation confidential. *Id.*

d. Brady *Obligations and Becoming a Member of the Prosecution Team*

You should be aware that criminal authorities may be constitutionally obliged to disclose to a defendant any information that you share with them and sometimes information that you collect but which you do not share with them. A criminal prosecutor has a duty to seek and disclose exculpatory and impeachment information that is material to the guilt and punishment of a criminal defendant. This information is known as *Brady* material. *See, e.g., Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Kyles v. Whitley*, 514 U.S. 419, 431 (1995). In addition, a criminal prosecutor must disclose *Giglio* material, or evidence that is useful for impeachment, *i.e.*, having the potential to alter the jury's assessment of the credibility of a significant prosecution witness. *See, e.g., Giglio v. United States*, 405 U.S. 150, 154-55 (1972); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("[J]ury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence.").

In some cases, *Brady* material may include information that you collect even if you never share that information with the criminal prosecutor. A criminal prosecutor is presumed to have knowledge of all information gathered in connection with her office's investigation of the case and "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case." *Kyles v. Whitley*, 514 U.S. at 437; *see United States v. Payne*, 63 F.3d 1200, 1208 (2d Cir. 1995). Although a civil attorney working on a parallel civil investigation or case is not usually considered a part of the prosecution team, if you act as part of a joint investigative task force you

may be considered part of the prosecution team. *See, e.g., United States v. Antone*, 603 F. 2d 566, 570 (5th Cir. 1979) (finding that "extensive cooperation between the investigative agencies" warranted imputation of state agent's knowledge to federal prosecutors). In such a case, information that you collect in a civil investigation will be subject to *Brady* obligations and must be shared with the criminal prosecutor. *See United States v. Meros,* 866 F.2d 1304, 1309 (11th Cir. 1989) (defining prosecution team as "the prosecutor or anyone over whom he has authority.").

Your knowledge of *Brady* material will not normally be imputed to the criminal prosecutor. *See United States v. Locascio*, 6 F.3d 924, 949 (2d Cir.1993) (declining to impute to the AUSAs prosecuting that action knowledge of reports prepared by FBI agents who were "uninvolved in the investigation or trial of the defendants-appellants."); *United States v. Quinn*, 445 F.2d 940, 944 (2d Cir. 1971) (refusing to impute the knowledge of a State prosecutor to an AUSA, rejecting as completely untenable [the] position that 'knowledge of any part of the government is equivalent to knowledge on the part of this prosecutor.'"). The closer that you work with the prosecution team, however, the more likely it is that a court will deem you part of the "prosecution team" with a resultant obligation that prosecutors disclose your investigative materials under *Brady*. *Moon v. Head*, 285 F.3d 1301 (11th Cir. 2002). Although it is the criminal prosecutor's responsibility to seek and disclose *Brady* material, to avoid any potential *Brady* issues and to assist the criminal prosecutor in seeking justice, Staff should share any material that Staff believes may implicate *Brady* or *Giglio* with the criminal prosecutor.

In addition, you should be aware of a criminal prosecutor's obligations to provide Jencks Act material to the defense. 18 U.S.C. § 3500. Jencks Act material includes statements of a government witness, which are discoverable after the witness has testified on direct examination at trial. Typically, the material consists of police notes, memoranda, reports, letters, or verbatim transcripts of the witness related to the testimony or relied upon by the witness to testify at trial. Whether or not such witness statements in your possession are Jencks Act material can also depend on whether you are deemed part of the prosecution team. For example, if you take notes regarding consumer statements in a case that is ultimately set for criminal prosecution, the notes may be required to be provided to the defense.

II. Grand Jury Material

Procedures: Before receiving information from criminal authorities, Staff should inquire whether any of the information provided comes directly or indirectly from grand jury proceedings, including subpoenas. Absent a court order, Staff should not request or receive grand jury material from any third party. If Staff inadvertently receives grand jury material, Staff should immediately contact a supervisor in order to take appropriate steps.

Staff should receive their supervisor's permission before attending a witness interview in a criminal case.

Staff should receive their supervisor's permission before seeking or receiving designation by a criminal prosecutor as a person to whom a grand jury matter may be disclosed.

Guidance: The Bureau is generally not privy to grand jury matters, which are subject to confidentiality restrictions set forth in Federal Rule of Criminal Procedure 6(e) and analogous state

rules of criminal procedure.

a. *Rule 6(e) Restrictions on Grand Jury Material*

Under Rule 6(e), "all matter(s) occurring before the grand jury" are secret, subject to certain exceptions. Government attorneys seeking grand jury materials for use in a civil matter must obtain a court order authorizing disclosure of grand jury materials. *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 442 (1983). If you require grand jury materials, you should seek a court order under Rule 6(e)(3)(C)(i), which authorizes a court to order disclosure "preliminarily to or in connection with a judicial proceeding." In most cases, you should make such a request to the court that supervised the grand jury's activities. *See Douglas Oil Co. v. of Cal. v. Petrol Stops Northwest,* 441 US 211, 226 (1979). The Supreme Court has interpreted Rule 6(e) to "require a strong showing of particularized need for grand jury materials before any disclosure will be permitted." *Sells Eng'g,* 463 U.S. at 443.

Not all documents presented to a grand jury constitute "matters occurring before the grand jury." "[D]ocuments are not cloaked with secrecy merely because they are presented to a grand jury." *United States v. Lartey*, 716 F.2d 955 (2d Cir. 1983). However, the circuits are divided as to the correct standard for determining whether a document presented to the grand jury constitutes a matter occurring before the grand jury. *See United States v. Dynavac, Inc.*, 6 F.3d 1407, 1412 (9th Cir. 1993) (discussing various standards in use). The Ninth and Second Circuits have both held that business records are not matters occurring before the grand jury. *Dynavac, Inc.*, 6 F.3d at 1412 ("[W]e think that the disclosure of business records independently generated and sought for legitimate purposes would not 'seriously compromise the secrecy of the grand jury's deliberations.'"); *DiLeo v. CIR*, 959 F.2d 16, 21 (2d Cir. 1992) (holding that bank records were properly disclosed). Similarly, the Fourth Circuit has held that material gained through a search warrant is not considered grand jury material unless the search warrant is a *de facto* grand jury process. *In re Grand Jury Subpoenas*, 920 F.2d 235, 243 (4th Cir. 1990).

Due to the circuit split and the fact-intensive inquiries that many circuits use, you should carefully research the local rules and case law in the district where the grand jury sits and consult with your supervisor before possessing any document or requesting any information that has been presented to a grand jury. For more information, see the Department of Justice's Grand Jury Handbook, located here.

Civil attorneys or investigators can attend interviews of witnesses in a criminal case. But there are potential issues where the witness is expected to testify before the Grand Jury. For example, "To have violated Rule 6(e)(2), and thus to warrant the invocation of the district court's equity powers, the agents must have disclosed to the . . . investigators information revealing what had transpired, or will transpire, before the grand jury." *Blalock v. United States*, 844 F.2d 1546, 1551 (11th Cir. 1988). Therefore, you should speak to a supervisor first and weigh the value of sitting in on such an interview versus the risk of a potential Rule 6(e) challenge.

As a matter of practice, Staff should request that the criminal prosecutor provide Staff with a copy of the interview memorandum or interview report produced by the federal agent conducting the interview. You should be aware that criminal authorities can turn over memos of interviews and summaries of investigation made by investigators and agents, even after a grand jury has been convened, as long as the documents were not presented to a grand jury. *Anaya v. United States*, 815

F.2d 1373 (10th Cir. 1987).

Finally, the prosecutor can include you on the list of people who are privy to the grand jury's operations under Rule 6(e), thus allowing the prosecutor to share and disclose grand jury information with you. However, being on this list will subject you to the grand jury secrecy rules and prohibits you from disclosing the grand jury proceedings to other Bureau staff and anyone not on the list. Discuss with your supervisor and seriously consider the impact of being so designated because the prohibitions on communication may interfere with the investigation or litigation of a Bureau case.

b. *State Law Restrictions on Grand Jury Material*

States have similar rules restricting disclosure of materials presented to grand juries. *See e.g.* N.J. Court Rule 3:6-7; Kentucky Rule of Criminal Procedure 5.24. Unlike Federal grand juries, some state grand juries are also used to investigate civil matters. You cannot assume, therefore, that information shared by state civil authorities has not been presented to a grand jury. As above, you should carefully research state law in the state where the grand jury sits and consult with your supervisor before handling any documents or requesting any information that has been presented to a state grand jury.

Exchanging Confidential Information with Law Enforcement Agencies

Revised 03.27.13

This policy discusses the procedure Staff should follow to share confidential information with and receive confidential information from local, state, federal, and tribal law enforcement agencies. In addition, this policy discusses how Staff can securely send and store confidential information. Please be aware that this policy covers only the necessary documentation and procedures for information-sharing. Guidance regarding whether and when information should be shared is found, among other places, in the policies on general referrals and criminal referrals.

Under the Bureau's Rule on Disclosure of Records and Information ("Housekeeping Rule," available on page 10-5), 12 C.F.R. § 1070 *et seq.*, confidential information means confidential consumer complaint information, confidential investigative information (CII), and confidential supervisory information (CSI), as well as any other information that may be exempt from disclosure under the Freedom of Information Act pursuant to 5 U.S.C. § 552(b).CII is civil investigative demand material and any documentary material prepared, received, or used in an investigation or enforcement action. 12 C.F.R. § 1070.2(h). Generally speaking, CSI is information that the Bureau collects through supervisory activity.

This policy does not cover sharing non-confidential material, such as publicly available business information or materials cleared by the Bureau for use with law enforcement (*i.e.* powerpoints, prepared training documents, etc.). Sharing non-confidential information does not require advance approval but, depending on the source of the information, other restrictions may apply.

I. Responding to Requests for Confidential Information

Procedures: Staff may receive inquiries from agencies regarding obtaining confidential information in situations in which the agency is not seeking Enforcement information and Enforcement does not have a stake in the request. In those cases, Staff should direct the agency to contact the Bureau's Office of Intergovernmental Affairs for further guidance. If Enforcement information is sought, the request involves a potential joint investigation, and/or Enforcement has any equities in providing information to the agency, Staff will determine what procedure applies to the information-sharing and guide the agency through the process.

Sharing Confidential Information with a Law Enforcement Agency

Disclosing any confidential information – orally or in writing – to a law enforcement agency should be discussed with and approved by your ALD in advance. The Bureau's Housekeeping Rule governs both discussing confidential information with law enforcement agencies in summary fashion and responding to requests from law enforcement agencies for confidential information. In most cases, Legal Division approval will be necessary before sharing any written confidential material.

II. Discussing Confidential Information with Other Law Enforcement Agencies

Applicable Rule: Under 12 C.F.R. § 1070.45(a)(5), Staff may share confidential information with law enforcement agencies in summary form *to the extent necessary* to notify the agencies of potential violations of laws subject to their jurisdiction.

Procedures: Staff may use the affirmative disclosure provision to summarize confidential information, but not to share copies of confidential written documents with another law enforcement agency. The summary disclosure is meant to facilitate, not obviate, the need for agencies to follow the access letter procedure in 12 C.F.R. § 1070.43(b).

Guidance: Under Section 1070.45(a)(5), Staff may describe a matter with sufficient clarity to allow another law enforcement agency to determine whether it has relevant information to share with Enforcement or if it might be interested in obtaining more information. This description may include such things as entity names, background facts, and laws potentially at issue.

III. Step-by-Step Process for Sharing Confidential Information

Law enforcement agencies will almost always have to follow 12 C.F.R. § 1070.43(b) to obtain confidential information – even if they are signatories to memoranda of understanding (MOUs) or common interest agreements with the Bureau. Please see the discussion below regarding the agencies who, in some circumstances, might be exempt from this process.

Applicable Rule: Under the access letter procedure set forth in 12 C.F.R. § 1070.43(b), Enforcement may disclose confidential information to a federal or state agency upon the Legal Division's approval of a written request from the agency that:

- Describes the kinds of information sought and, where possible, the particular documents to which access is sought;
- States the law enforcement purpose for which the information will be used;
- Identifies the agency's legal authority for requesting the information, *i.e.* the agency's jurisdiction over the matter or entity to which information pertains;
- States whether the requested information may be subject to disclosure under any applicable law or regulation, such as a state FOIA law, and, if so, can the agency assert any arguments or exemptions to prevent disclosure; and
- Commits the agency to maintaining the requested confidential information in a manner that conforms to the standards that apply to federal agencies for the protection of the confidentiality of personally identifiable information and for data security and integrity.

Procedures: Staff have four responsibilities with respect to the access request process: assisting the requesting agency with completing the letter, if needed; submitting the letter and accompanying materials to the Legal Division; preparing any materials approved by the Legal Division for disclosure; and transmitting the confidential materials to the agency securely.

a. *Assisting the Agency with Completing an Access Request Letter*

Staff should provide a template access request letter (page 11-35) to an agency that plans to request confidential information. A modified template access request letter (page 11-36) is available if the agency is seeking CSI.

b. *Submitting the Access Request Letter to the Legal Division*

Staff should ask the requesting agency to address the request letter to the Legal Division, but submit it to Staff. After receiving the letter, Staff should send an email to the Legal Division with the access request letter and any other relevant documents attached. The email should also address:

1. If you know, does the requestor need the information within any particular timeframe?

2. Do you anticipate working with the requestor on a matter related to the information sought? If so, please describe Enforcement's interest in conducting the potential joint investigation and explain whether sharing the requested information is vital to the potential joint investigation. If not, please explain the Bureau's interest in sharing the information.

3. Do you plan on entering into a common interest agreement with the requestor related to a matter relevant to the information sought? If you have already done so, please provide a copy of the common interest agreement.

4. Please describe the nature of the investigation in which we obtained the information. If you know, please also describe the nature of the investigation for which the information is sought.

5. Please describe the types of information requested, from whom the information was obtained, and how the information was obtained (*e.g.*, financial statements, personnel files, and consumer complaints obtained via CID and voluntary requests to Acme Corp, the subject of an ongoing Enforcement investigation).

6. Does the information requested come from any Bureau component outside Enforcement?

7. (a) Does the information requested come from an entity currently under examination?
   (b) Does the information come from an entity subject to our supervisory authority?
   (c) Is there any reason that the requested information could otherwise be considered supervisory information?

8. Aside from our housekeeping rules, are there any restrictions on our ability or procedures we must follow to disclose the information? For example, is any of the information subject to a protective order, confidentiality agreement, or any type of agreement with another agency? Even if no agreement exists, did the source of the information submit a request that we not further disclose the information? If so, please provide that request.

9. Does Enforcement recommend that the Legal Division grant the request? If not, please explain. In addition, please explain if Enforcement recommends any limitations on granting the request,

has concerns about the disclosure of the information, or would like restrictions on how the information may be used.

10. Please state whether Enforcement believes that compliance with the information-sharing request would be burdensome. For example, are the materials already identified? Will they be easy to produce?

Based upon the answers to these questions and the information set forth in the request letter, the Legal Division will determine whether the Bureau is authorized to grant the request. Please note that, depending on the context, the Legal Division may seek additional information to facilitate its determination.

- Staff should note that requests for CSI will receive closer scrutiny than other requests. Pursuant to Section 1022(c)(6)(C)(ii) of the Dodd-Frank Act, the Bureau has discretion to share CSI only with an agency that has jurisdiction over the covered person or service provider to which the information pertains. In addition, pursuant to CFPB Bulletin 12-01, the Bureau "will not routinely share confidential supervisory information with agencies that are not engaged in supervision." When a non-supervisory agency, such as a state attorney general, seeks access to CSI, the Legal Division will evaluate the strength of the law enforcement interest at stake in consultation with Enforcement. The Legal Division will also consult Supervision to determine the supervisory implications of sharing the information, if any.

The Legal Division will issue a written letter granting or denying an agency's access request letter. The Legal Division will send Staff a copy of that letter, which will set forth any limitations or conditions that the Legal Division places on the disclosure of the requested information.

c. *Procedure for Transmitting Confidential Information to a Third Party*

If the Legal Division approves the disclosure of confidential information, Staff is responsible for executing the disclosure through the following procedure.

- Staff should stamp all materials to be produced with the footer: "Confidential Information; Property of the CFPB."
- In addition, Staff should maintain an electronic copy of the approval letter, along with the transmitted materials, in an appropriately designated subfolder in the case folder on the shared drive, *e.g.* "Materials Provided to DOJ."
- Staff should send the requested materials in a format that provides a reasonable level of security for the data, as described in the guidance below.

Guidance: Please be aware that the Legal Division's approval of an agency's request to access the Bureau's confidential information does not imply permission to also utilize the confidential information in court or in another law enforcement proceeding, even if the agency and Enforcement are engaged in a joint or parallel investigation. An agency must separately submit a request to the Legal Division to utilize the Bureau's confidential information in court or in another law enforcement proceeding. In appropriate circumstances, the Legal Division may require the requesting agency to file the confidential information under seal or to obtain a protective order prior

to using the confidential information in the proceeding. The Legal Division is available to assist with or respond to any questions or concerns raised by the requesting agency regarding the access request process, particularly any follow-on requests by the agency to utilize disclosed information in a law enforcement proceeding. If you believe the Legal Division should grant anything other than full use of shared information, please speak to your ALD about the best way to proceed.

IV. Joint Investigations and Standing Access Requests

Guidance: In some circumstances, particularly when Enforcement and an agency have a joint investigation or litigation, it may be impractical for the agency to submit an access request letter each time Enforcement has new information relevant to a matter. In those situations, the agency can submit a written request under 12 C.F.R. § 1070.43(b) that seeks information related to a subject or matter on a standing basis, as permitted by 12 C.F.R. § 1070.43(d).

V. Common Interest Agreements and Protection of Work Product

Procedures: If Staff wish to share Enforcement work product with an agency in the instance of a joint investigation or action, Staff should propose that the Bureau and the agency enter into a common interest agreement specific to that investigation or action. A common interest agreement provides greater protection and flexibility for the ongoing exchange of work product between the Bureau and the agency. The Legal Division has approved a model common interest agreement (page 11-37) that may be used for this purpose. Please be aware that the agency will still have to submit an information access request letter to receive confidential information. To avoid any confusion about whether the agency will receive confidential information, the best practice is for Staff to ensure the access request is submitted and approved prior to entering into a common interest agreement.

VI. Special Information-Sharing Issues Related to the CSBS, Federal Prudential Regulators, Fair Lending Investigations, FTC, and Department of Education

Procedures: Certain information requests from a small group of federal and state agencies may be governed by MOUs that the Bureau has entered into with the agencies authorizing the bilateral sharing of certain information or a statute requiring the sharing of certain information. If Staff receive a request involving any of the agencies set forth below, they should consult their ALD or the Legal Division to determine whether one of the authorization MOUs apply and, if so, the procedure for complying with the MOU or statute. While this list may change, the impacted requests and agencies are:

- CSI or personal consumer information requests from a CSBS MOU signatory;
- Requests for any confidential information from the OCC, FDIC, Federal Reserve Board, NCUA, and HUD:
- Exchanges of fair lending investigatory materials with DOJ's Civil Rights Division or among the DOJ's Civil Rights Division, the FTC and HUD;
- Enforcement information requests from the FTC and/or notifications regarding certain activities;
- Sharing consumer complaint information with the Department of Education; and
- Evidence of criminal violations that we send to DOJ.

Guidance: The Bureau has entered into a number of MOUs with federal, state, local and tribal law enforcement agencies that address the mechanics of information-sharing. These MOUs do not replace the access request procedure described above. There are a small number of MOUs between the Bureau and other law enforcement agencies, however, that authorize information-sharing outside the 12 C.F.R. § 1070.43(b) procedure. Navigating the requirements of these MOUs can be difficult and will generally be done in consultation with the Legal Division or according to previous direction from the Legal Division. A list of all of the MOUs that the Bureau has entered into is available on the MOU wiki page.

VII. Data Breaches

Procedures: Staff should immediately report to their supervisor, the Legal Division, and the Chief Information Security Officer, any instance in which Staff know or have reason to believe that:

- confidential information has been accessed, used, or disseminated internally or disclosed externally without proper authorization or in violation of these procedures or has been lost or stolen; or
- an agency with which Staff have shared confidential information has violated the terms of its access or of the Bureau's confidentiality regulations, including by further disclosing the information without permission or using it for purposes other than those specified by the Bureau.

Receiving Information from a Law Enforcement Agency

The procedures below should be used for the receipt of any type of material that an agency wishes to share. Please note that, if the agency wishes to send the Bureau consumer complaints to process through Consumer Response, the agency should contact Consumer Response directly.

VIII. Establishing Protections for Shared Information

Procedures: Before receiving information from a law enforcement agency, Staff should establish – in writing – how the agency wants the information handled and any limitations on using the information. Staff may do this in a letter to the agency requesting the materials. Sample access letters sent by the Bureau to other agencies are kept on the shared drive. Some agencies have entered into memoranda of understanding or common interest agreements with the Bureau that detail how any information disclosed by the agency should be treated. A list of all of the MOUs that the Bureau has entered into, along with links to some of the actual documents, is available here. Common interest agreements are available here. If none of these mechanisms apply, Staff should send the ownership disclaimer below to the agency, prior to receiving any materials.

> The information below describes how the CFPB will treat your materials. Please acknowledge receipt of this information prior to sending materials to the CFPB.
>
> Any materials sent to the CFPB remain your property and we will maintain them in a manner identifying them as such. In the event that we receive any legally enforceable demand or request for the materials or if they are subject

to an affirmative disclosure obligation, we will promptly inform you in writing and provide a copy of the demand or request or description of the obligation.

If the request is made pursuant to the Freedom of Information Act, the Privacy Act, or a state analogue, we will inform the requester that the materials may not be disclosed as they are your property and any request for the materials is properly directed to you.

If the request or demand or affirmative disclosure obligation is not pursuant to these statutes, we will consult with you before complying and give you a reasonable opportunity to respond. We will also assert all reasonable and appropriate legal exemptions or privileges that you may reasonably request. In addition, we will consent to any motion you make to intervene in any action to preserve, protect, and maintain the confidentiality of the materials.

We are not prevented, however, from complying with a legally valid and enforceable order of a court of competent jurisdiction, an order issued by a federal Administrative Law Judge or, if compliance is deemed compulsory, a request or demand from a duly authorized committee of the United States Senate or House of Representatives.

IX. Step-by-Step Process for Receiving Materials from a Law Enforcement Agency

Procedures: Whenever Staff plan to receive information from an agency, they should:

1. Confirm how the Bureau will treat the provided materials. This is done by sending an access request to the agency; confirming in writing that the agency is a signatory to a MOU or common interest agreement with the Bureau; or emailing the ownership disclaimer to the agency.

2. Ask the agency to send the materials in a format that provides a reasonable level of security for the data.

3. If the materials are coming in an electronic format, request a secure folder on the shared network drive from the Help Desk (5-7777) at least 24 hours prior to anticipated receipt. Please review the guidance below for more information on secure storage of information.

4. Upon receipt, immediately place the information received in an electronic format in the secured folder. Nothing should be stored in the secured folder, aside from materials provided by the agency. If the materials are in hard copy, they should be placed in a separate file in a locked file cabinet.

5. Label the information with the name of the sending agency, the date sent, and any restrictions on using the information, *i.e.* "FTC Information Subject to 1/1/13 MOU; Do Not Disclose without Authorization."

Before further disclosing any information provided by the agency, Staff should have written approval from the agency or confirmation from the agency in writing that it does not deem the provided information confidential. Unless prohibited by law or previously agreed otherwise, this approval or confirmation must be sought for any disclosure of another agency's information, regardless of whether the disclosure is discretionary or in the context of an access request, subpoena, discovery request, affirmative obligation, or other compulsory request. If the agency is a signatory to a memorandum of understanding with the Bureau or a common interest agreement related to the information, Staff should follow the notification requirements in those documents.

Guidance on Transmitting and Storing Materials Securely

X. Ways to Transmit Information Securely

The methods listed below are acceptable ways to send or receive information, listed in order of preference.

a. *Electronic Transmission*

For sensitive information sent electronically, either the transmission should be encrypted or the data itself should be encrypted. Sending restricted data in encrypted, password-protected attachments is acceptable as long as the password is communicated separately, securely and, ideally, in an alternative method (*e.g.* by phone, in person, or in the mail). The password should never be sent in the email containing the attachment.

b. *Removable Media*

Sensitive information should not be on removable media unless the data is encrypted. The Bureau does not accept all types of removable media. Staff should confirm the acceptability of the removable media with the Cyber Security team prior to receiving the information.

c. *Acceptable Physical Delivery Methods*

Physically mailing hard copies of sensitive information should only be done using the U.S. Postal Service's First Class Mail, Priority Mail, or an accountable commercial delivery service (*e.g.*, DHL), with the documents sealed in an opaque envelope or container. If possible, use a receipted delivery service (*i.e.* Return Receipt, Certified, or Registered mail) or a tracking service to ensure secure delivery is made to the appropriate recipient, or contact the intended recipient to confirm receipt.

d. *Facsimile*

Senders transmitting via facsimile should use a cover sheet that states that the fax includes sensitive data and clearly indicates the recipient. The sender should also confirm receipt.

XI. Advice to Law Enforcement Agencies on the Secure Transmission of Information

Although the Bureau does not require that law enforcement use a particular method of secure transmission, you may offer general guidance on best practices. You may wish to include the following statement in your correspondence with the agency that is sending you information.

> We ask that you send us the information in a format that provides a reasonable level of security for the data while it is in transit. While we do not require that you use any particular method, examples of reasonable security measures include using:
>
> - a password-protected Zip file;
> - an encrypted email using ZixSelect;
> - certified mail; or
> - an encrypted form of removable media, such as a CD or DVD. The CFPB has certain limits on removable media, so please contact me if you would like to use that option or if you have any other questions about secure methods of transmitting data.

XII. Shared Information Should be Securely Stored

Staff should create an access-restricted folder to store shared electronic information or, if information is shared in paper form, store it in a locked location. The Help Desk will apply security restrictions to a folder, but Staff should first create a folder in the location the information will be stored. The folder name should indicate the owner of the information, *i.e. Z:\Enforcement\Exam Support, Investigations and Cases\Formal Investigations\[subject]\Material from IL AG\Consumer Complaints.* If there is a common interest agreement, MOU, or access letter that governs treatment of the shared information, that document should be kept in the folder. Access to this folder should be restricted to a designated subset of Bureau employees who have a bona fide need for the information to carry out their assigned job responsibilities. To apply the security restrictions, the Help Desk will need to know the file location and a list of Bureau employees with need-to-know and specific access permissions for the data (read, write, etc...).

XIII. Further Questions

Talk to your supervisor or use the points of contact on the Enforcement wiki page if you have any further questions.

PRACTICE GUIDANCE

These Practice Guidance documents are intended to facilitate your work in the Office of Enforcement. They are not official policies or procedures of the Office, but rather represent recommended best practices. They are meant to be followed at your discretion in light of the specific circumstances surrounding the particular investigation.

7. Complaints Guidance

Ethical Guidance Related to Obtaining Information from Consumer Response

Revised 12.13.12

Consumer Response Investigators may occasionally contact Duty Day attorneys with questions involving a person or entity that is currently the subject of an Enforcement matter.

Procedures: Staff may not direct, order, or instruct Consumer Response Investigators to contact the subject of a complaint or obtain materials from the subject of a complaint. If Staff provide any opinion to Consumer Response Investigators regarding follow-up conversations or obtaining documentation from the subject of a complaint, Staff should clearly state that the advice is just an opinion, which the Investigators are in no way obligated to follow.

Guidance: You are not prohibited from providing advice to investigators in Consumer Response under Rule 4.2 of the Model Rules of Professional Conduct, as long as you do not *direct* investigators to communicate with or request materials from a company. Ethical concerns are not raised when you provide *advice* to Consumer Response investigators about issues in consumer complaints, even if the company is the subject of an Enforcement matter. Advice may consist of opinions about whether a legal violation has occurred and what documents might be relevant to that analysis. You may also obtain information received as part of a Consumer Response investigation as long as the information was not obtained at your direction. If you have any questions about ethics rules, please contact Wendy Collins in the Ethics Office of the Legal Division.

ADMINISTRATIVE POLICIES

8. Out of Office Work Activities Policies

Conference and Training Attendance Policy

Revised 3.20.2012

In support of their work at the Bureau, Office of Enforcement Staff should attend conferences and trainings to sharpen skills and substantive knowledge, enhance relationships with key stakeholders, and stay on top of new and cutting-edge developments in our sphere. Accordingly, Staff may attend conferences within the parameters described in this policy.

Procedures: Staff may determine what conferences to attend in accordance with this policy, but may only attend conferences that their supervisor approves.

Conference registration will be handled by a Legal Assistant designated by the Chief of Staff.

Staff should indicate their interest in attending a conference to the designated Legal Assistant no later than 30 days before the conference registration deadline. Failure to indicate interest within 30 days may complicate procurement of conference fees and may compromise one's ability to attend a conference.

Conference attendance will be presumptively capped in three ways:

1. No person may incur more than $3,500 in costs associated with conference attendance during a single fiscal year (October 1 to September 30). This includes all costs associated with conference attendance (registration fees, travel, hotel, etc.).
2. No person may spend more than six business days attending conferences during a single fiscal year.
3. No more than 10 people from the team may attend any conference.

The Chief of Staff may grant exceptions to any of these presumptive caps in specific circumstances when appropriate and justified. The caps will be modified as appropriate for those who have roles which specifically necessitate greater participation in conferences (*e.g.*, for people with significant outreach responsibilities).

Staff are responsible for ensuring that they comply with these caps and that their conference costs and attendance are tracked on the speaking engagement/conference attendance tracking spreadsheet located at Z:\Enforcement\Resources\Admin\Conference Budgeting Worksheet.

Guidance:

- This policy should be observed in accordance with Bureau-wide policies on training.
- Staff should be attentive to any ethical restrictions on conference participation or activity.
- Whenever applicable, Staff should obtain CLE credit for conferences attended.
- The limit on team participation in any conference will be managed on a "first come, first served" approach with sign-ups maintained by the designated Legal Assistant. To the extent 10 team members are already registered for a conference and there is a particular need to have one or more individuals attend the conference who are not registered, swaps will be negotiated or additional slots will be authorized.
- The Office of Enforcement's Public Speaking Policy governs Staff participation in conferences as speakers, panelists, etc. Attendance at conferences in such capacity on the day of the speaking engagement will not count against the caps above. Further, if a supervisor

specifically requests that a team member attend a particular conference, that conference will not count against the caps above for that team member.

Public Speaking Policy

Revised 3.20.2012

The Office of Enforcement recognizes the value of Staff periodically making public presentations. This policy explains how decisions will be made about public speaking opportunities. It applies to speaking invitations directed to Staff and similar opportunities they identify.

Procedures: Staff receiving speaking invitations or identifying speaking opportunities that might benefit the Office of Enforcement and/or the Bureau should notify his or her supervisor and the Chief of Staff.

Supervisors will decide whether invitations should be accepted or presentation opportunities should be pursued, according to the factors described below.

If it is determined that someone from the Office of Enforcement should make the presentation, that person, in coordination with his or her supervisor, should coordinate with the Bureau's Office of External Affairs before committing to any speaking engagement.

Remarks should be cleared by the speaker's supervisor or another member of the senior team. When speaking, Staff should first offer a disclaimer that the remarks do not represent official Bureau views.

Costs of the conference and travel will be paid for by the Bureau. The sponsoring entity may not reimburse the speaker, but it may waive the fee for the event on the day the speaking occurs.

The day on which a person speaks does not count against his or her "conference days," and any costs associated with the speaking engagement itself (*e.g.* airfare, hotel for day before/of speaking engagement) do not count against her annual conference attendance budget.

It is the responsibility of the person who receives a speaking invitation to ensure that an appropriate response to the invitation is made. It is the responsibility of the person who speaks to log the engagement on the speaking engagement/conference attendance tracking spreadsheet located at Z:\Enforcement\Resources\Admin\Conference Budgeting Worksheet.

Guidance: Supervisors will use the following factors in deciding whether an invitation should be accepted:

- Whether accepting the invitation promotes the mission of the Office of Enforcement and/or the Bureau;
- Whether the event provides an opportunity for the Office of Enforcement to build relationships with partners or relevant constituencies;
- Whether the topic to be discussed relates to an articulated enforcement priority or presents an opportunity to discuss an enforcement initiative; and
- What resource investments are associated with accepting the invitation in terms of working time spent, travel costs, admission fees, etc.

The person who receives an invitation to speak (or identifies a speaking opportunity) will not automatically be selected to make the presentation. Rather, supervisors will consider the following

factors in determining who should speak:

- Ability to perform this task well, taking into account experience working on the particular issues to be discussed, and interest and involvement in similar/related projects;
- Time to perform this task without undue interference with other work;
- Other public speaking opportunities;
- Receipt of the invitation to speak and interest in making the presentation; and
- The extent to which the invitation is only for the individual to whom it was directed.

9. Work Schedule Trial Policies

Work Schedule Trial Policies

Revised 08.01.12

I. General

• These policies supplement the Bureau-wide AWS and Telework Policies. Office of Enforcement Personnel must abide by both Bureau and Office policies.

• AWS and Telework are privileges for – not entitlements to – Enforcement Personnel whose work and performance permit them to take advantage of these opportunities.

• In order to take advantage of AWS or Telework, Enforcement Personnel must be performing satisfactorily.

• The Office of Enforcement is adopting these policies for a 90-day trial period. After 90 days, we will re-evaluate the policies.

II. Telework

• All Enforcement Personnel who have been on the Enforcement team for at least three months are eligible to be considered for Situational Telework.

• All Staff attorneys who have been on the team for at least three months are eligible to be considered for Routine Telework.

• Routine Telework may not exceed one day per week and must be the same day each week.

• Staff may be required to come in on scheduled Telework days when the work of the Office requires it. Routine Telework days missed due to such circumstances will not be permitted to be made up.

• Enforcement Personnel who are teleworking must be fully engaged in their work as if they were physically present in the office. Staff must also leave a note on their computer screen or office door stating that they are teleworking and providing a phone number at which they can be reached.

III. Alternative Work Schedule

• All non-attorney Enforcement Personnel (excluding contractors) who have been on the team for at least three months are eligible to be considered for AWS.

• Enforcement Personnel may only take Flex Days on Fridays.

• Enforcement Personnel are responsible for ensuring that work on their ongoing projects is not disrupted on their Flex Day. This includes identifying a back-up responsible for the Enforcement

Personnel member's work who can act on behalf of the Enforcement Personnel member who is out of the office.

• Enforcement Personnel must set an "Out of Office" email and voicemail on Flex Days and must indicate all planned absences on the Enforcement Calendar.

• Enforcement Personnel may be required to come in on their scheduled Flex days when the work of the Office requires it. Flex Days missed due to such circumstances will not be permitted to be made up.

APPENDICES

10. Appendix A – Enforcement Rules

Rules Related to Disclosure of Records and Information

Final Rule

The Bureau's Rules on the Disclosure of Records and Information as they appear in the Federal Register are on the next page.

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Part V

Bureau of Consumer Financial Protection

12 CFR Part 1070
Disclosure of Records and Information; Final Rule

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1070

[Docket No. CFPB–2011–0003]

RIN 3170–AA01

Disclosure of Records and Information

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule.

SUMMARY: This final rule establishes procedures for the public to obtain information from the Bureau of Consumer Financial Protection, under the Freedom of Information Act, the Privacy Act of 1974, and in legal proceedings. This final rule also establishes the Bureau's rule regarding the confidential treatment of information obtained from persons in connection with the exercise of its authorities under Federal consumer financial law.

DATES: This final rule is effective March 18, 2013.

FOR FURTHER INFORMATION CONTACT: Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau, 1700 G Street NW., Washington, DC 20552, 202–435–7275.

SUPPLEMENTARY INFORMATION:

I. Background

On July 21, 2010, the President signed into law the Dodd–Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203, codified at 12 U.S.C. 5301 *et seq.*) (the Dodd-Frank Act). Title X of the Dodd-Frank Act created the Bureau of Consumer Financial Protection (the Bureau or the CFPB). Pursuant to the provisions of the Dodd-Frank Act, the Bureau began to exercise its authority to regulate the offering and provision of consumer financial products and services under Federal consumer financial law on July 21, 2011.[1]

In order to establish procedures to facilitate public interaction with the Bureau, the Bureau published an interim final rule on July 28, 2011, 76 FR 45371 (Jul. 28, 2011), and solicited public comment on that rule. The Bureau is issuing this final rule in response to these comments as well as to clarify and correct certain aspects of the interim final rule.

[1] Pursuant to section 1062 of the Dodd-Frank Act, 12 U.S.C. 5582, the Secretary of the Treasury designated July 21, 2011 as the ''transfer date'' on which various provisions of Title X of the Dodd-Frank Act became effective. 75 FR 57252.

II. Summary of the Final Rule

The final rule consists of five subparts.

Subpart A of the final rule consists largely of definitions of terms that are used throughout the remainder of the part.

Subpart B of the final rule implements the Freedom of Information Act, 5 U.S.C. 552 (the FOIA). The FOIA grants the public an enforceable right to obtain access to or copies of Federal agency records unless disclosure of those records, or information contained within them, is exempt from disclosure pursuant to one or more statutory exemptions and exclusions. The FOIA also requires Federal agencies to routinely publish in the **Federal Register**, or make available to the public, certain information concerning their organizational structures, policies and procedures, final opinions and orders, and records that have or are likely to become the objects of frequent FOIA requests. The regulations in this subpart implement the FOIA as required or authorized by various provisions of the statute.

The Bureau modeled its FOIA rule upon regulations promulgated by the other Federal agencies, including the U.S. Department of the Treasury. In drafting the rule, the Bureau sought the input of the Department of Justice and the National Archives and Records Administration's Office of Government Information Services, which is responsible for promoting best practices among Federal agencies as to their FOIA regulations and practices.

Subpart C of the final rule sets forth procedures for serving the Bureau and its employees with copies of documents in connection with legal proceedings, such as summonses, complaints, subpoenas, and other litigation-related requests or demands for the Bureau's records or official information. Subpart C also describes the Bureau's procedures for considering such requests or demands for official information. These regulations (which are sometimes referred to as *Touhy* regulations) are modeled after similar regulations of other Federal agencies.

Subpart D of the rule pertains to the protection and disclosure of confidential information that the Bureau generates and receives during the course of its work. Various provisions of the Dodd-Frank Act require the Bureau to promulgate regulations providing for the confidentiality of certain types of information and protecting such information from public disclosure. Other provisions of the Dodd-Frank Act, however, require or authorize the Bureau to share information, under certain circumstances, with other Federal and State agencies to the extent that they share jurisdiction with the Bureau as to the supervision of financial institutions, the enforcement of consumer financial protection laws, or the investigation and resolution of consumer complaints regarding financial institutions or consumer financial products and services. In implementing these provisions, the Bureau has sought to provide the maximum protection for confidential information, while ensuring its ability to share or disclose information to the extent necessary to achieve its mission.

The Bureau recognizes that much of the information that it will generate and obtain during the course of its activities will be commercially, competitively, and personally sensitive in nature, and generally warrants heightened protection. The need for greater protection for these categories of information is reflected in the substantive law of privilege and in various statutes, including the FOIA and the Privacy Act of 1974, 5 U.S.C. 552a (the Privacy Act), that provide for the protection of such information from disclosure.

Notwithstanding these concerns, there are instances in which the disclosure of confidential information will be necessary or appropriate for the Bureau to accomplish its statutory mission, such as the investigation and resolution of consumer complaints or the enforcement of Federal consumer financial laws. Disclosures may also serve the public interest where Federal and State agencies share elements of the Bureau's mission and where, by sharing information, they can do their jobs more effectively.

The regulations in subpart D balance these competing concerns by generally prohibiting the Bureau and its employees from disclosing confidential information to non-employees, and even in certain cases to its employees, except in limited circumstances. Even where the Bureau permits disclosures of confidential information, the Bureau imposes strict limits upon the further use and dissemination of disclosed information.

Where appropriate, the Bureau has based the regulations in this subpart upon regulations of the other Federal financial regulatory agencies that provide for the confidentiality and disclosure of certain information generated or received in the course of supervising, investigating, or pursuing enforcement actions against financial institutions.

Subpart E contains the Bureau's rule implementing the Privacy Act. The Privacy Act serves to balance the government's need to maintain information about individuals with the rights of individuals to be protected against unwarranted invasions of their privacy stemming from Federal agencies' collection, maintenance, use, and disclosure of personal information about them.

The regulations in this subpart establish procedures by which members of the public may request access to information or records that the Bureau maintains about them, request amendment or correction of such information or records, and request an accounting of disclosures of their records by the Bureau. As with its FOIA regulations, the Bureau modeled its Privacy Act regulations upon regulations promulgated by the other Federal agencies, including the Treasury Department.

III. Overview of Comments Received

In response to the interim final rule, the Bureau received thirteen comment letters. Seven of these comment letters were submitted on behalf of financial institution trade associations. Three letters were submitted on behalf of individual financial institutions and two letters were submitted on behalf of public interest groups. The Bureau also received one comment letter from an individual that did not pertain to the interim final rule.

Public interest groups, along with some of the financial services trade associations, wrote comments regarding subpart B of the Bureau's interim final rule, which implements the FOIA. Public interest group commenters propose minor modifications to the rule to facilitate public access to Bureau records. Several trade association commenters ask the Bureau to impose limitations on a rule that permits the Bureau to exercise its discretion to disclose information and records that are otherwise subject to FOIA exemptions.

Most of the comments that the Bureau received from both financial services trade associations and financial institutions concern subpart D of the interim final rule. Commenters express concerns as to whether and to what extent the Dodd-Frank Act authorizes the Bureau to promulgate regulations that permit it to disclose confidential information that it obtains from covered persons and service providers. They also argue that subpart D is too permissive in its criteria for disclosing such confidential information to other agencies, and in particular, to State attorneys general. The commenters propose that the Bureau adopt stricter criteria that certain other Federal financial regulatory agencies apply when determining whether to share confidential information.

The Bureau received no comments regarding subpart E of the interim final rule.

The Bureau also received one public comment that pertains to the Bureau's general authority to promulgate the interim final rule. Rather than address this comment in Section IV, it does so here.

The commenter argues that section 1066 of the Dodd-Frank Act did not authorize the Bureau to promulgate this interim final rule prior to the appointment of a director, at a time when, pursuant to section 1066 of the Dodd-Frank Act, the Treasury Secretary performed functions of the Bureau pending such an appointment.[2] The commenter argues that even if the Treasury Secretary had general authority to do so, pursuant to 31 U.S.C. 321(b)(1), the Secretary was bound to promulgate a rule that was entirely consistent with corresponding rules of the other prudential regulators.

This comment is moot insofar as the President has appointed a director of the Bureau who has authority to issue the rule pursuant to the statutes listed in § 1070.1 of this rule. Moreover, prior to this appointment, the Secretary of the Treasury had ample authority to issue the interim final rule under section 1066 of the Dodd-Frank Act as well as 31 U.S.C. 321. The Secretary was not obligated, when exercising such authority, to issue regulations related to confidential information that were identical to those issued by the prudential regulators.

In section IV below, the Bureau provides a section-by-section summary of the other comments it received to the interim final rule and the Bureau's responses to these comments.

IV. Section-by-Section Analysis

Subpart A—General Provisions and Definitions

Section 1070.01 Authority, Purpose, and Scope

Section 1070.1 of the interim final rule sets forth the Bureau's authorities for issuing the rule in this part, including provisions of the Dodd-Frank Act that require or authorize the Bureau to disclose, share, or maintain the confidentiality of certain information that the Bureau obtains from others or generates itself. Section 1070.1 also identifies the various purposes of the rule. The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule without modification.

Section 1070.2 General Definitions

Section 1070.2 defines terms that are utilized elsewhere in part 1070 of the rule. For example, § 1070.2(e) of the interim final rule defines the term ''civil investigative demand material'' to encompass all types of materials provided to the Bureau in response to a civil investigative demand that the Bureau issues in accordance with section 1052 of the Dodd-Frank Act. The definition of this term also includes materials that a person provides to the Bureau voluntarily or in lieu of receiving a civil investigative demand.

Section 1070.2(f) defines the term ''confidential information.'' Confidential information refers to three categories of non-public information—confidential consumer complaint information, confidential investigative information, and confidential supervisory information—that the Bureau, in subpart D, protects from various types of disclosure in accordance with the Dodd-Frank Act and other laws. The term also includes other Bureau information that is exempt from disclosure pursuant to one or more of the statutory exemptions to the FOIA.

Section 1070.2(g) defines ''confidential consumer complaint information'' to mean information that the Bureau receives from the public or from other agencies or organizations, or which the Bureau generates through its own efforts pursuant to sections 1013 and 1034 of the Dodd-Frank Act, that comprises or documents consumer complaints or inquiries concerning financial institutions or consumer financial products and services. The term includes information, such as personally identifiable information, that is protected from public disclosure under the FOIA.

Section 1070.2(h) defines ''confidential investigative information'' to include all manner of materials received, generated, or compiled by the Bureau in the course of its investigative activities, including materials received through the issuance of civil investigative demands. It also includes confidential supervisory information and confidential consumer complaint information to the extent that such materials serve as a basis for or are utilized for purposes of an investigation. Lastly, the term includes materials that other Federal and State agencies provide to the Bureau or create for its use in

[2] 12 U.S.C. 5586.

investigating a possible violation of Federal consumer financial law.

Section 1070.2(i) defines ''confidential supervisory information'' to include various materials that the Bureau generates or receives that relate to the examination of financial institutions. These materials include, first, examination, inspection, visitation, operating, condition, and compliance reports, and any information contained in, relating to, or derived from such reports. Second, the term includes documentary materials, including reports of examination, which the Bureau prepares or that are prepared by others for use by the Bureau in exercising its supervisory authority over financial institutions, as well as information derived from such documentary materials. Third, the term includes the Bureau's communications with financial institutions and agencies to the extent that such communications relate to the exercise of the Bureau's supervisory authority over financial institutions. Fourth, confidential supervisory information includes information that financial institutions provide to the Bureau to help it to evaluate the risks associated with consumer financial products and services and whether institutions should be deemed ''covered persons,'' as that term is defined by section 1002(6) of the Dodd-Frank Act. Finally, the term includes other supervision-related information that is also exempt from public disclosure under the FOIA pursuant to 5 U.S.C. 552(b)(8).

The Bureau received no comments on the interim final rule. In the final rule, the Bureau adds a definition of the term ''State'' that incorporates the definition of that term set forth in section 1002(27) of the Dodd-Frank Act and which clarifies that the term also includes all political subdivisions of States. Furthermore, the Bureau modifies the definition of the term ''confidential supervisory information'' to clarify that it includes information provided to the CFPB by a financial institution to assess whether an institution is subject to the Bureau's supervisory authorities. The Bureau also modifies the definition of the term ''supervised financial institution'' to clarify that this term includes financial institutions that both are presently and may become subject to the Bureau's supervisory authority.

Section 1070.3 Custodian of Records; Certification; Alternative Authority

Section 1070.3 of the interim final rule designates the Chief Operating Officer of the Bureau to be the custodians of all Bureau records. Acting in this capacity, the Chief Operating Officer may certify the authenticity of any Bureau record or any copy of such record. The Chief Operating Officer may delegate his or her responsibilities as record custodian to other Bureau employees. The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule without modification.

Section 1070.4 Records of the CFPB Not To Be Otherwise Disclosed

Section 1070.4 of the interim final rule states that except as provided in this part, employees or former employees of the Bureau, or others in possession of a record of the Bureau that the Bureau has not already made public, are prohibited from disclosing such records, without authorization, to any person who is not an employee of the Bureau. The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule without modification.

Subpart B—Freedom of Information Act

Section 1070.10 General

Section 1070.10 introduces subpart B as consisting of regulations that implement the FOIA by setting forth procedures for requesting access to Bureau records. The rule also instructs the public to read subpart B together with the FOIA, the 1987 Office of Management and Budget Guidelines for FOIA Fees, the Bureau's Privacy Act regulations set forth in subpart E, and the FOIA page on the Bureau's Web site, *http://www.consumerfinance.gov*, because such materials offer important guidance on the topics that subpart B governs.

A trade association commenter argues that the Bureau should amend § 1070.10 to delete the phrase ''[t]hese regulations should be read together with,'' which immediately precedes ''the FOIA, the 1987 Office of Management and Budget Guidelines for FOIA Fees, the Bureau's Privacy Act regulations set forth in subpart * * *'' and the phrase ''which'' prior to ''provide additional information about this topic.'' The commenter argues that these phrases seemingly enable the Bureau to alter subpart B at will simply by specifying a contrary rule on its FOIA Web page. The commenter proposes that the rule simply state that the FOIA, the OMB Guidelines, the Privacy Act regulations, and the Bureau's FOIA Web page, provide additional information about this topic.

The Bureau disagrees with the commenter that § 1070.10 requires modification. As written, the rule makes clear that the public should consult the FOIA Web site, along with the other authorities cited, because they ''provide additional information on this topic.''

The Bureau does not intend to utilize its FOIA Web page to effect substantive revisions to subpart B and it does not interpret § 1070.10 to be a source of authority to do so. The FOIA Web page exists to summarize and provide public guidance as to the FOIA and the procedures set forth in the Bureau's regulations that implement the FOIA. In certain cases, such guidance may indicate how the Bureau interprets its FOIA regulations, but it will not alter or supplant such regulations.

Section 1070.11 Information Made Available; Discretionary Disclosures

Section 1070.11(a) of the interim final rule sets forth the three major categories of information that the FOIA requires the Bureau to publish or make accessible to the public. Paragraph (b) authorizes the Bureau, in response to a FOIA request, to make discretionary disclosures of information or records that are otherwise subject to non-mandatory FOIA exemptions. Paragraph (c) requires the Bureau to make publicly available all records that have become the subject of three or more requests or that are likely to become the subject of frequent requests because they are clearly of interest to the public at large.

Several trade associations expressed concerns that § 1070.11(b) does not specify who in the Bureau is responsible for making discretionary disclosures of Bureau records and what criteria this person will employ when doing so. One commenter argues that this provision should provide for notice and a means to contest a decision of the Bureau to make discretionary disclosures of information. Another commenter argues that this provision should clarify that the Bureau may not make discretionary disclosures of examination reports or confidential commercial information.

Commenters differ in their reactions to § 1071.11(c). Several commenters argue that the three-request publication threshold is too rigid and is easily manipulated to induce publication. One commenter argues that the Bureau should eliminate this provision in favor of a case-by-case approach to publishing frequently requested records. Another commenter suggests that the Bureau should publish records only when they are frequently and regularly requested by a broad range of requestors. Yet another commenter argues that the Bureau should revise the rule to allow for publication of frequently requested records regardless of whether they are ''clearly of interest to the public at large.''

The Bureau adopts § 1070.11(b) of the interim final rule without modification. This provision, which permits the Chief FOIA Officer to disclose FOIA exempt information ''if not precluded by law,'' [3] is a common provision that exists in the FOIA regulations of many Federal agencies.[4] This provision merely permits the Chief FOIA Officer to exercise the Bureau's discretion—to the extent that such discretion exists under law—to disclose information notwithstanding the fact that the Bureau could withhold such information pursuant to one or more of the FOIA exemptions. However, this provision does not grant the Chief FOIA Officer discretion to disregard Federal laws that require the Bureau to withhold information from public disclosure.

For example, § 1070.11(b) permits the Chief FOIA Officer to make public information that is subject only to FOIA Exemption 5, 5 U.S.C. 552(b)(5), as long as no other Federal law prohibits the Bureau from disclosing such information. However, the Chief FOIA Officer lacks discretion to disclose a trade secret that is subject to FOIA Exemption 4, 5 U.S.C. 552(b)(4), to the extent that the Trade Secrets Act, 18 U.S.C. 1905, prohibits the Bureau from publicly disclosing the trade secret.[5] In certain instances, the Privacy Act also precludes the Chief FOIA Officer from disclosing information about individuals that is subject to FOIA Exemptions 6 or 7(c), 5 U.S.C. 552(b)(6), (7)(C).

To the extent that the Chief FOIA Officer has discretion to disclose confidential supervisory information that is otherwise subject to FOIA Exemption 8, 5 U.S.C. 552(b)(8), the Bureau's ''policy is to treat information obtained in the supervisory process as confidential and privileged'' and as ''exempt from disclosure under Exemption 8 of the Freedom of Information Act.'' CFPB Bulletin 12–01 (Jan. 4, 2012).

The Bureau adopts § 1070.11(c) of the interim final rule with minor modifications. Section 1070.11(c) implements the Electronic Freedom of Information Act amendments of 1996, codified at 5 U.S.C. 552(a)(2)(D), which require each agency to make ''available for public inspection and copying * * * copies of all records, regardless of form or format, which have been released to any person * * * and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.'' The Department of Justice, in guidance it issued to Federal agencies in 2003, interprets section (a)(2)(D) of the FOIA to mean that agencies must publish records that are already or are likely to become the subject of three or more FOIA requests. *See* Department of Justice, Office of Information & Privacy, FOIA Post: ''FOIA Counselor Q&A: 'Frequently Requested' Records'' (Jul. 25, 2003), at *http://www.justice.gov/oip/foiapost/2003foiapost28.htm.* Section 1070.11(c) is consistent with this guidance and with similar provisions in other agencies' FOIA regulations.[6]

Nevertheless, the Bureau agrees to remove from § 1070.11(c) the qualifying language ''clearly of interest to the public at large.'' Such language is not part of the FOIA or the Department of Justice's FOIA guidance. The Bureau concludes that this language does not serve the Bureau's interest in promoting transparency.

Section 1070.12 Publication in the **Federal Register**

Section 1070.12 implements section (a)(1) of the FOIA, 5 U.S.C. 552(a)(1). It requires the Bureau to publish in the **Federal Register** certain details of its organization, policies, procedures, and rules, subject to the FOIA exemptions. The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule without modification.

Section 1070.13 Public Inspection and Copying

Section 1070.12(a) implements section (a)(2) of the FOIA, 5 U.S.C. 552(a)(2). Subject to the FOIA exemptions, it requires the Bureau to make available for public inspection and copying, including by posting on the Bureau's Web page, all of the Bureau's final opinions and orders, certain statements of its policies and administrative staff manuals, copies of all frequently requested records that it publishes pursuant to § 1070.11(c), and an index of such records.

Section 1070.12(b) requires the Bureau to establish an electronic FOIA reading room on its Web site to house the records that section 1070.12(a) requires it to publish. Section 1070.12(c) requires the Bureau to also make such records available at its headquarters in a physical reading room that is accessible to the public upon request.

The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule without modification, except that it updates the address of the reading room to reflect the new address of the Bureau: 1700 G Street NW., Washington, DC 20552.

Section 1070.14 Requests for CFPB Records

Section 1070.14 sets forth the basic procedural requirements for submitting a FOIA request to the Bureau.

Paragraph (a) implements section (a)(3) of the FOIA, 5 U.S.C. 552(a)(3), which establishes the basic public right to obtain access to Federal agency records, upon request, and subject to the FOIA exemptions and exclusions.

Paragraph (b) sets forth the acceptable formats for a Bureau FOIA request. It states that a FOIA request must be made in writing, labeled as such, and submitted to the Chief FOIA Officer in either paper or electronic formats.

Paragraph (c) describes the required content of a Bureau FOIA request. This content includes a reasonably specific description of the records requested, contact information for the requester, a statement of whether the requester wants to inspect or obtain a copy of the records requested, an assertion of the requester's applicable fee category, an indication of whether the requester seeks an upper limit to or a waiver or reduction of applicable fees, and an indication of whether the requester seeks expedited processing of the request.

Paragraph (d) states that the Bureau need not accept or process a FOIA request, or be bound by deadlines for responding to such a request, that does not conform to the requirements of paragraphs (b) and (c). If a request is materially deficient, then the Bureau may return it to the requester and advise the requester as to how to address the deficiency. If the requester does not

[3] Section 1070.15(b) of these rules authorizes the Bureau's Chief FOIA Officer to grant or deny all FOIA requests for Bureau records. This authority includes the power to make discretionary disclosures of information or records that are subject to FOIA requests, as set forth in section 1070.11(b). The Chief FOIA Officer exercises this authority with the input and advice of the program offices that maintain the requested information. To the extent that a business submits trade secrets or confidential commercial information to the Bureau that later becomes subject to a FOIA request, section 1070.20 of these rules requires the Chief FOIA Officer, in most cases, to obtain the input of that business before the Chief FOIA Officer decides whether to disclose the information.

[4] *See, e.g.*, 12 CFR 261.14(c) (Federal Reserve Board regulation providing for discretionary release of exempt information); 12 CFR 4.12(c) (Office of Comptroller of Currency regulation providing for the same discretionary release of exempt information).

[5] The Trade Secrets Act prohibits agencies from disclosing trade secrets except where they are authorized by law to do so. *See Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979).

[6] *See, e.g.*, 12 CFR 261.11(4) (Federal Reserve Board rule providing for the publication of frequently requested records); 12 CFR 309.4(D) (Federal Deposit Insurance Corporation rule providing for the publication of frequently requested records).

respond to notification of a material deficiency within thirty (30) days, then the Bureau will deem the deficient request to be withdrawn. A determination that a request is materially deficient does not constitute a denial of access and is not subject to appeal.

Paragraphs (e) and (f) set forth the procedure by which a requester may obtain access to Bureau records about him or herself or about another individual when requesting records on behalf of that individual.

One commenter believes that the Bureau should amend § 1070.14(c)(5), which requires FOIA requesters to seek fee waivers at the time when they file their FOIA requests, to allow requesters to seek fee waivers at any time while FOIA requests are open.

Another commenter argues that the Bureau should eliminate the portion of § 1070.14(c)(5) which states that by submitting a FOIA request, the requester agrees to pay any and all fees associated with processing the request up to $25. The commenter argues that this requirement may deter individuals from seeking information pursuant to the FOIA. Instead, the commenter argues that requesters should be able to specify that they do not want the Bureau to process the request if doing so will exceed the two free search hours and 100 free pages of duplication to which the FOIA entitles them.

Finally, one commenter argues that the Bureau should revise § 1070.14(d) to state that the failure by a requester to adhere to all of these procedural requirements—including the requirements that requests must be labeled ''Freedom of Information Act Request'' and that requesters specify an applicable fee category—will not necessarily result in the Bureau rejecting a request. The commenter also argues that this provision should require the Bureau to inform requesters when they have deemed requests to be deficient.

The Bureau modifies § 1070.14(b) of the interim final rule to reflect the new mailing address of the Bureau: 1700 G Street NW., Washington, DC 20552. The Bureau also modifies § 1070.14(c)(2) to require that a requester include his, her, or its name in addition to the other contact information that the Bureau requires a requester to provide. The Bureau imposes this change to ensure that it can make proper fee category determinations, impose fees upon the requester, and properly determine whether a request is a Privacy Act or a FOIA request.

The Bureau adopts § 1070.14(c)(5) without modification for the reasons that it discusses in the portion of the section-by-section analysis that pertains to § 1070.22 of the rule.

To address the commenter's concern that paragraph (d) authorizes the Bureau to reject requests on the basis of immaterial deficiencies, and does not require the Bureau to advise requesters as to how to correct deficiencies in their requests, the Bureau modifies § 1070.14(d) to state that it will deem itself to have received a request when it contains ''substantially'' all of the information that the Bureau requires and that it need not accept or process a request that fails to conform in any ''material'' respect to the requirements of § 1070.14.

Section 1070.15 Responsibility For Responding to Requests for CFPB Records

Section 1070.15(a) states that the Bureau will deem records to be responsive to a FOIA request only to the extent that it possesses them as of the date when the Bureau commences its records search.

Paragraph (b) states that the Bureau's Chief FOIA Officer is authorized to make determinations on behalf of the Bureau as to whether and to what extent to grant FOIA requests.

Paragraph (c) sets forth the Bureau's procedures for consulting with or referring to another agency a requested record that originated with or contains information that originated with that agency.

Paragraph (d) states that the Bureau will notify a requester whenever it refers all or part of a request to another agency.

One commenter urges the Bureau to amend § 1070.15(c), which authorizes the Bureau to consult other agencies when responding to requests for Bureau records that comprise other agencies' information, to require the Bureau to obtain the affirmative consent of such agencies, rather than merely consulting them, prior to releasing the records.

The Bureau adopts the interim final rule without modification. The interim final rule reflects the standard practice among Federal agencies for consultations. It represents sound practice in that it balances the interests of other agencies with the right of requesters to obtain requested records in a timely fashion.

Section 1070.16 Timing of Responses to Requests for CFPB Records

Section 1070.16 sets forth the order and timing of the Bureau's responses to FOIA requests.

Paragraph (a) states that, except as set forth in paragraphs (b) through (d) of this section and § 1070.17 of this subpart, the Bureau will respond to FOIA requests in the order of their receipt.

Paragraph (b) authorizes the Bureau to establish separate tracks to process simple and complex requests in the order of their respective receipt. This multi-track process allows the Bureau to respond to simple requests more quickly than it could otherwise if the Bureau processed such simple requests in a single queue behind complex requests.

Paragraph (c) establishes a twenty (20) business day deadline for the Bureau to respond to a FOIA request. The Bureau may toll this deadline once while it awaits a requester's response to a reasonable demand for clarification of a request. It may also toll the deadline while it is engaged in a dispute with a requester regarding the assessment of fees.

Paragraph (d) permits the Bureau to unilaterally extend in writing the twenty (20) business day response deadline for responding to a FOIA request or appeal by up to an additional ten (10) business days if the Bureau determines that unusual circumstances exist that preclude the Bureau from meeting the twenty (20) business day deadline. If the Bureau determines that it needs more than an additional ten (10) business days to respond, then it must notify the requester and provide the requester with an opportunity to either narrow the scope of the request or appeal in such a way that the Bureau can respond by the deadline or arrange for an alternative time frame beyond the deadline to respond to the request or appeal.

One commenter argues that § 1070.16(c) impermissibly authorizes the Bureau to toll the twenty (20) day deadline for responding to FOIA requests while the Bureau awaits clarification from a requester as to subject matter of a request or while the Bureau resolves any dispute with the requester regarding fees. The commenter argues that the FOIA states that the request response deadline commences once a request or appeal has been received.

The Bureau adopts the interim final rule without modification. The interim final rule implements section (a)(6)(A) of the FOIA, 5 U.S.C. 552(a)(6)(A), which provides that an agency may toll the response deadline once while awaiting the requester's response to a reasonable request of the agency for information about a FOIA request or as necessary while awaiting the requester's clarification of fee issues regarding the FOIA request.

Section 1070.17 Requests for Expedited Processing

Section 1070.17 establishes a procedure by which FOIA requesters may seek and the criteria by which the Bureau will grant expedited processing of FOIA requests.

Paragraph (a) states that the Bureau will grant expedited processing to requesters that demonstrate a ''compelling need'' for such processing in accordance with this section.

Paragraph (b) sets forth the form and content of requests for expedited processing and defines the term ''compelling need'' generally and with respect to requests made by persons primarily engaged in disseminating information.

Paragraph (c) requires the Bureau to respond to requests for expedited processing within ten (10) calendar dates of their receipt.

Paragraph (d) states that if granted, expedited processing entitles requesters to priority over non-expedited requests and responses as soon as practicable. It further states that the Bureau may process expedited requests on a multi-track basis and within each track, in the order of their receipt.

Paragraph (e) establishes the rights of requesters to appeal denials of requests for expedited processing in accordance with § 1070.21 of this subpart.

One commenter suggests that the Bureau should amend § 1070.17 by expanding its criteria for granting expedited processing of FOIA requests to include, in addition to instances where the requester demonstrates a ''compelling need'' for expedited process, ''other cases determined by the agency,'' which section (a)(6)(E)(i)(II) of the FOIA, 5 U.S.C. (a)(6)(E)(i)(II), authorizes. The commenter asks that these ''other cases'' include instances in which expedited processing is necessary to avoid the loss of substantial due process rights or where there is widespread and exceptional media interest in information that raises concerns about the government's integrity.

The Bureau agrees with the commenter that the FOIA grants agencies discretion to process requests on an expedited basis for reasons other than demonstration by a requester of a compelling need. The Bureau modifies the interim final rule by permitting the Bureau to process a request for expedited processing whenever a requester demonstrates a compelling need ''or in other cases that the CFPB deems appropriate.''

Section 1070.18 Responses to Requests for CFPB Records

Section 1070.18 sets forth the process by which the Bureau will acknowledge receipt of FOIA requests and communicate its initial determinations as to whether and to what extent to grant such requests. The rule also delineates information that the Bureau must include in notifications to requesters that acknowledge receipt of or determine whether and to what extent to grant FOIA requests. The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule without modification.

Section 1070.19 Classified Information

Section 1070.19 sets forth a procedure for referring requests for classified information to the agency that originated or classified it. The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule without modification.

Section 1070.20 Requests for Business Information Provided to the CFPB

Section 1070.20 requires the Bureau, under certain circumstances, to notify persons or entities that submit business information to the Bureau of its receipt of a FOIA request or appeal for such information, and to provide submitters with an opportunity to object to the Bureau's disclosure of such information on the basis of FOIA Exemption 4, 5 U.S.C. 552(b)(4). If the Bureau rejects such objections, then the rule requires the Bureau to wait a certain period of time before it discloses the information so as to afford submitters an opportunity to file suit in Federal district court to enjoin disclosure. The rule states that the Bureau will notify submitters of the receipt of FOIA requests or appeals for their information whenever the Bureau has reason to believe that the information may be subject to Exemption 4 or that submitters have marked the information as such in good faith. Notification is not required if the Bureau determines independently that the requested information is exempt from disclosure, that it is already in the public domain, that disclosure is required by statute or regulation, or the submitter's designation of the information as being subject to Exemption 4 is obviously frivolous.

Several commenters argue that the Bureau should eliminate or amend § 1070.20(c), which allows submitters of business information to designate such information as being subject to FOIA Exemption 4 for a period of ten years after the date of submission. Several commenters argue that the Bureau should double or otherwise increase the ten year time period applicable to designations of trade secrets and other confidential supervisory information.

The Bureau adopts the interim final rule without modification. The ten-year length of the business information designation period is consistent with similar rules adopted by other Federal agencies. The Bureau notes that the rule grants it discretion, upon request and with sufficient justification, to extend the length of the designation period beyond ten years. As such, the Bureau sees no reason to eliminate or extend the default length of the designation period.

Section 1070.21 Administrative Appeals

Section 1070.21 discusses administrative appeals of initial Bureau determinations regarding FOIA requests.

Paragraph (a) enumerates Bureau determinations that are subject to administrative appeal. These determinations include denial of access to records in whole or in part, assignment to the requester of a particular fee category, denial of a request for a reduction or waiver of fees, a determination that no records exist that are responsive to a request, and denial of a request for expedited processing.

Paragraph (b) establishes a forty-five (45) calendar day time frame from the date of initial determination to file administrative FOIA appeals (except for appeals of denials of expedited processing, which must be filed within ten (10) days).

Paragraph (c) sets forth the required form and content of administrative appeals.

Paragraph (d) sets forth a procedure for acknowledging the receipt of administrative appeals.

Paragraph (e) authorizes the General Counsel of the Bureau to decide whether to affirm or overturn initial determinations of the Bureau which are subject to administrative appeals. The rule requires the General Counsel to respond to appeals within twenty (20) business days after their receipt, unless that time period is extended pursuant to § 1070.16(d) of this subpart. It requires the General Counsel to notify requesters in writing of appellate determinations and, if the appeals are denied, to inform requesters of their rights to seek redress in Federal district court.

Paragraph (g) notes that an appeal ordinarily will not be adjudicated if a FOIA request becomes a matter of FOIA litigation.

One commenter suggests that the Bureau should amend § 1070.21(b), which sets forth a 45-day time limit to file a FOIA appeal that runs from the later of the date of the Bureau's decision to deny or grant the request or the date of the letter transmitting the last records released to the requester. The commenter argues that this provision should state instead that this 45-day time period should run from the later of the date of the Bureau's initial determination or the date that the last records are received by (rather than mailed to) the requester.

The Bureau declines to adopt the commenter's suggestion regarding paragraph (b) because the Bureau would have no way to know, for purposes of determining whether a requester has met the appellate filing deadline, when a requester actually receives the records it transmits. The Bureau believes that a more reliable basis for computing the appellate deadline is the date of the Bureau's transmission of such records.

The Bureau modifies § 1070.21 to add a new paragraph (e)(3) that authorizes the General Counsel, in deciding FOIA appeals, to remand FOIA requests to the Chief FOIA Officer for such further action as the General Counsel directs, including but not limited to new or modified record searches. Actions of the Chief FOIA Officer on remand will be treated once again as initial determinations of the Bureau that are subject to the regular procedures set forth in this subpart for the Bureau to process, decide, and respond to FOIA requests. For example, the Chief FOIA Officer must respond to a remanded request in accordance with the deadlines set forth in § 1070.16, which will run from the date of the Bureau's transmission of the remand notification. If a requester disagrees with the actions of the Chief FOIA Officer on remand, then the requester may file an administrative appeal of those actions in accordance with § 1070.21.

Section 1070.22 Fees for Processing Requests for CFPB Records

Section 1070.22 sets forth the criteria that the Bureau will use to determine whether and to what extent the Bureau may assess fees in connection with processing and responding to FOIA requests and appeals.

Paragraph (a) generally describes the applicable procedure for determining whether and to what extent to assess fees to a FOIA request. It also identifies a schedule of fees assessable for time spent by Bureau employees searching for and reviewing requested records and for duplicating such records for production to a requester.

Paragraph (b) describes the various categories that the Bureau will assign to each requester for the purpose of determining which types of fees apply to a request.

Paragraph (c) describes the types of fees that apply to each of the categories of fee requesters set forth in paragraph (b).

Paragraph (d) describes circumstances where the Bureau will not charge fees to requesters.

Paragraph (e) sets forth the procedure by which FOIA requesters may seek, and the criteria that the Bureau will use to determine whether to grant requests for, waivers of or reductions in applicable fees.

Paragraph (f) identifies circumstances in which the Bureau requires FOIA requesters to pre-pay fees associated with FOIA requests and in which the Bureau shall charge interest on and collect overdue fees.

One comment argues that the Bureau's FOIA fee schedule, which the Bureau references in § 1070.22(a)(1) and posts on its FOIA Web site, must go through the Administrative Procedure Act's notice and comment process.

Another comment urges the Bureau to amend § 1070.22(d)(3) to waive FOIA duplication fees for representatives of the news media in the event that the Bureau fails to comply with time limits applicable to FOIA requests.

A commenter urges the Bureau to modify § 1070.22(e) to permit requesters to seek waivers of or reductions in applicable fees at any time prior to the Bureau's response date.

Finally, a comment suggests that the Bureau should limit the circumstances under which it requires prepayment of FOIA fees pursuant to § 1070.22(f). This comment argues that requesters should not have to pay outstanding fees associated with their prior FOIA requests before the Bureau will process new requests that they submit because the FOIA entitles all requesters to a certain amount of free search time and duplication of records.

The Bureau disagrees with the comment that the Bureau's schedule of FOIA fees, which the Bureau has published on its FOIA Web page since it promulgated the interim final rule, requires further notice and comment. This fee schedule, like the rest of the interim final rule, was subject to public comment, as the CPFB referenced the schedule in the rule. The Bureau received no public comments regarding this fee schedule.

The Bureau modifies § 1070.22(a) of the interim final rule so that it now states expressly—rather than merely referencing—the fee rates that the Bureau charges requesters to duplicate, search for, and review records. The Bureau also modifies this provision to clarify the circumstances under which the Bureau will charge fees when searching for electronic records.

The Bureau modifies § 1070.22(d)(3) of the interim final rule to provide, in accordance with section (a)(4)(a)(viii), that the Bureau shall not charge FOIA duplication fees for representatives of the news media in the event that the Bureau fails to comply with time limits applicable to FOIA requests.

The Bureau declines to adopt the suggestion that it modify § 1070.22(e) so that requesters may seek waivers of or reductions in applicable fees at any time prior to the dates of the Bureau's responses to requests. By requiring requesters to state, at the time when they file their FOIA requests, whether they seek waivers of or reductions in fees, the Bureau seeks to address and resolve fee disputes at the outset of the request process and before the Bureau expends its time, resources, and funds to respond to requests. This procedure ensures that the Bureau does not perform work that the requester cannot, or does not wish to pay for, if the Bureau denies a fee waiver request.

The Bureau also declines to modify § 1070.22(f) of the interim final rule. This provision, which sets forth circumstances for requiring prepayment of fees, is consistent with guidance issued by the Office of Management and Budget for FOIA fees. *See* OMB Guidelines for FOIA Fees (1987), *available at http://www.whitehouse.gov/sites/default/files/omb/assets/omb/inforeg/foia_fee_schedule_1987.pdf.*

Section 1070.23 Authority and Responsibilities of the Chief FOIA Officer.

Section 1070.23 sets forth the various authorities and responsibilities of the Chief FOIA Officer of the Bureau. One commenter argues that § 1070.23 should include a provision that authorizes the Chief FOIA Officer to oversee the FOIA section of Bureau's Web site. The Bureau agrees with this comment and modifies the interim final rule to add a new paragraph (a)(7) that requires the Chief FOIA Officer to ''maintain and update, as necessary and in accordance with the requirements of this subpart, the CFPB's FOIA Web site, including its e-FOIA Library.''

Subpart C—Disclosure of CFPB Information in Connection With Legal Proceedings

Section 1070.30 Purpose and Scope; Definitions

Section 1070.30(a) outlines subpart C, which sets forth procedures for serving the Bureau and its employees with documents in legal proceedings, such as summonses, complaints, subpoenas, and other litigation-related requests or demands for records and information, as well as procedures and criteria for the Bureau to follow when responding to such materials. These regulations (which are sometimes referred to as *Touhy* regulations) are modeled after similar regulations of other Federal agencies.

Paragraph (b) clarifies that these procedures for serving legal documents on the Bureau do not apply to persons who seek to file FOIA requests or Privacy Act requests with the Bureau or those agencies that seek access to confidential information of the Bureau.

Paragraph (c) further clarifies that the procedures of subpart C do not apply to requests for information made in the course of adjudicating certain administrative employment actions brought by Bureau employees or applicants for employment.

Paragraph (d) notes that subpart C is not intended to, does not create, and may not be relied upon to create, any right or benefit, substantive or procedural, against the Bureau or the United States.

Paragraph (e) defines the terms ''demand,'' ''legal proceeding,'' ''official information,'' ''request,'' and ''testimony'' ''for purposes of this [subpart C] and except as the Bureau may otherwise determine in a particular case.''

One commenter argues that § 1070.30(e) is too malleable in that its definitions apply ''except as the Bureau may otherwise determine in a particular case.'' The commenter notes that this exception provides the Bureau with authority to redefine key terms as it sees fit to authorize disclosures of confidential information. The commenter suggests that the Bureau should eliminate this exception.

To eliminate any ambiguity as to the meaning of the defined terms of § 1070.30(e), the Bureau strikes the phrase ''except as the CFPB may otherwise determine in a particular case.'' The Final Rule also addresses several drafting errors and omissions.

Section 1070.31 Service of Summonses and Complaints

Section 1070.31 of the interim final rule states that only the Bureau's General Counsel is authorized to receive and accept service of process of summonses and complaints in which the Bureau or its employees (in their official capacities) are sued.

The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule with the following modification to reflect the new mailing address of the Bureau: 1700 G Street NW., Washington, DC 20552.

Section 1070.32 Service of Subpoenas, Court Orders, and Other Demands for CFPB Information or Action

Section 1070.32 of the interim final rule states that, except where the Bureau is represented by legal counsel who have entered an appearance or otherwise given notice of their representation, only the Bureau's General Counsel is authorized to receive and accept service of subpoenas, court orders, and litigation demands and requests for the production of the Bureau's records and official information that are directed to the Bureau or its employees (in their official capacities).

The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule with modifications that reflect the new mailing address of the Bureau: 1700 G Street NW., Washington, DC 20552. The final rule also clarifies certain service requirements. For example, paragraph (c) of the final rule eliminates the requirement that Bureau employees consult the General Counsel before declining to accept service of process on behalf of the Bureau. This modification simplifies the course of conduct for Bureau employees who are contacted by a process server and have no opportunity to consult with the General Counsel prior to deciding whether to decline to accept service. The final rule also corrects grammatical errors.

Section 1070.33 Testimony and Production of Documents Prohibited Unless Approved by the General Counsel

Section 1070.33 provides that no current or former Bureau employee shall provide oral or written testimony concerning any official information of the Bureau or produce any document or material acquired as part of or by virtue of his or her employment at the Bureau unless the Bureau's General Counsel authorizes the employee or former employee to do so. The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule without modification.

Section 1070.34 Procedure When Testimony or Production of Documents Is Sought; General

Section 1070.34 requires parties demanding the production of the Bureau's documents or testimony, in legal proceedings in which the United States or the Bureau are not parties, to provide the Bureau with certain information about the demand or request, including the name and forum of the proceeding, a detailed description of the nature of the information or testimony sought and its intended uses and relevance, a showing that the evidence sought through the production of the Bureau's records or testimony is not available from other sources, and, as the General Counsel deems appropriate, a statement of the party's plans to demand additional testimony or documents in the future. Unless and until a party provides this required information, the Bureau will not respond to a demand it receives. The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule without modification.

Section 1070.35 Procedure When Response To Demand Is Required Prior to Receiving Instructions

Section 1070.35 states that, whenever a response to a demand for testimony or the production of documents or materials described in § 1070.34 is due before the General Counsel renders a decision, then the Bureau will seek an extension of time to respond. If no extension is available or granted, then the Bureau will request that the court or other applicable authority stay the proceedings until such time as the General Counsel is able to respond. The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule without modification.

Section 1070.36 Procedure in the Event of an Adverse Ruling

Section 1070.36 states that, whenever a court or other applicable authority declines to stay proceedings until the General Counsel is able to respond to a demand for testimony or the production of documents or materials described in § 1070.34, or the court or other authority rules that the Bureau must comply with the demand irrespective of the General Counsel's instructions otherwise, then the employee upon whom the demand has been made shall respectfully decline

to comply with the demand citing this subpart and *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951). The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule without modification.

Section 1070.37 Considerations in Determining Whether the CFPB Will Comply With a Demand or Request

Section 1070.37 sets forth various factors that the General Counsel shall consider in deciding whether to comply with a demand or request for the production of the Bureau's records or testimony. This section also lists factors that will normally cause the Bureau to refuse compliance with such a demand or request. These factors pertain to prudential considerations and discovery privileges established by Federal statutes, rules, and case law.

Commenters argued generally that the provisions of subpart C do not do enough to protect confidential supervisory information from disclosure in a litigation context. Commenters note that the regulations of other Federal bank regulatory agencies contain provisions which state that normally, the agency will not release confidential supervisory information in response to a demand or request for such information.

Section 1070.37 of the rule reflects the Bureau's intention to protect confidential supervisory information from disclosure in a litigation context. Paragraph (b) lists several factors that if found to exist would normally preclude the Bureau from granting a demand or request for confidential supervisory information. These factors include: (b)(4) ''[c]ompliance would reveal confidential or privileged commercial or financial information or trade secrets without the owner's consent''; (b)(6) ''[c]ompliance would not be appropriate or necessary under the relevant substantive law governing privilege''; and (b)(7) ''[c]ompliance would reveal confidential information.'' Paragraph (c) of this section also provides that the Bureau may condition disclosure of confidential supervisory information pursuant to a request or demand upon the entry of an appropriate protective order.

Although the Bureau believes that these provisions adequately protect confidential supervisory information from disclosure, the Bureau nevertheless adds two new factors to paragraph (b) to bolster these protections further. The first new factor states that the Bureau will not normally grant a response to a request or demand for confidential supervisory information when doing so would compromise the Bureau's supervisory functions or programs or would undermine public confidence in supervised institutions. The second factor states that the Bureau will not normally grant a response when doing so would undermine the Bureau's ability to monitor for risks to consumers in the offering of consumer financial products or services.

Section 1070.38 Prohibition on Providing Expert or Opinion Testimony

Section 1070.38 prohibits Bureau employees or former employees from providing opinion or expert testimony based upon information (other than general expertise) which they acquired in the scope and performance of their official Bureau duties, except to the extent that they provide such testimony on behalf of the United States or a party represented by the Bureau or the Department of Justice. The General Counsel has discretion to waive this prohibition if the requestor demonstrates an exceptional need or unique circumstances and that the anticipated testimony will neither be adverse to the United States nor require the United States to pay the employee's or former employee's travel or other expenses associated with providing the requested testimony.

A commenter argues that the Bureau should eliminate § 1070.38(c), which permits Bureau employees to testify as expert witnesses under certain circumstances, because ''[g]iving free expert testimony is not among the permissible Bureau disclosures of information.''

The Bureau adopts the interim final rule without modification. Paragraph (c) is consistent with the rules of other Federal agencies and with Federal ethics regulations regarding the provision of expert testimony by Federal employees.

Subpart D—Confidential Information

Section 1070.40 Purpose and Scope

Section 1070.40 clarifies that subpart D does not apply to FOIA or Privacy Act requests or requests or demands for official information made within the context of litigation. The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule without modification.

Section 1070.41 Non-Disclosure of Confidential Information

Section 1070.41(a) generally prohibits the disclosure of confidential information by the Bureau's employees, former employees, or other persons who possess the Bureau's confidential information, to non-employees of the Bureau or to Bureau employees for whom such information is not relevant to the performance of their assigned duties. This prohibition includes disclosures made by any means (including written or oral communications) or in any format (including paper and electronic formats).

Excluded from this general prohibition are disclosures of confidential information to consultants and contractors of the Bureau who agree, in writing, to protect the confidentiality of the information in accordance with Federal law as well as any additional conditions or limitations that the Bureau may impose upon them.

Section 1070.41(c) states that the Bureau is not precluded from disclosing materials that it derives from or creates using confidential information, provided that such materials do not identify, either directly or indirectly, any particular persons to whom the confidential information pertains. This paragraph clarifies that the Bureau may create and publish reports, analyses, and other materials derived from confidential information so long as the reports, analyses, or other materials do not identify the subject of such information or discuss the information in such a way that one could infer the identity of the person it concerns. For example, the Bureau is not precluded from publishing reports that contain aggregate data derived from confidential information, provided the report cannot be used in conjunction with other publicly available information to re-identify the source of the information.

Section 1070.41(d) clarifies that nothing in subpart D requires or authorizes the Bureau to disclose confidential information that another agency has provided to the Bureau to the extent that such disclosure contravenes applicable law or the terms of any agreement that exists between the Bureau and the agency to govern the Bureau's treatment of information that the agency provides to the Bureau.

The Bureau received several comments on § 1070.41. One commenter argues that § 1070.41(a)(2), which limits the internal dissemination of confidential information to Bureau employees with a *bona fide* need to know the information to perform assigned duties, is incongruous with § 1070.41(b), which permits disclosures of confidential information to the Bureau's contractors without qualification. The commenter argues that the Bureau should either eliminate any restriction on the internal dissemination in paragraph (a) or apply

it equally to contractors in § 1070.41(b). To the extent that the Bureau chooses to do the latter, another commenter argues that the Bureau should amend § 1070.41(b) to state that disclosures to contractors or consultants may occur only as necessary to, and solely for purposes of, providing services for or rendering advice to the Bureau.

One commenter argues that the Bureau should delete § 1070.41(c), which authorizes the Bureau to disclose materials derived from confidential information so long as such materials do not identify those to whom the confidential information pertains, because the Trade Secrets Act may prohibit certain of these disclosures. Another commenter also criticizes this provision because it fails to specify criteria for determining that materials derived from confidential information do not identify, either directly or indirectly, any particular person to whom the confidential information pertains.

A commenter objects to § 1070.41(d), which states that subpart D does not require or authorize the disclosure of confidential information otherwise prohibited by applicable law or by the terms of any agreements reached with other agencies. The commenter argues that the Bureau should delete the phrase ''or the terms of any agreement that exists between the CFPB and the agency to govern the CFPB's treatment of information that the agency provides to the CFPB'' because, according to the commenter, this provision allows the Bureau to withhold information, pursuant to agreement, that other laws, such as the Freedom of Information Act, require the Bureau to disclose.

To address concerns that paragraphs (a) and (b) of § 1070.41 set forth inconsistent criteria for disclosing confidential information to Bureau employees on one hand and to Bureau contractors or consultants on the other hand, the Bureau modifies these paragraphs to provide for consistent treatment. In making these modifications, the Bureau deems it appropriate to retain restrictions in paragraph (a) on the internal dissemination of confidential information. By prohibiting the disclosure of confidential information to employees, contractors, and consultants who have no business reason to see it, the Bureau reduces the risk that such persons will misuse or inadvertently disclose the information. Such restrictions also are consistent with regulations established by other Federal agencies to protect confidential information.

The Bureau adopts paragraph (c) of the interim final rule without modification. The Bureau declines to adopt more specific or stringent standards for determining that materials it derives from confidential information do not identify any particular person to whom the information pertains. The interim final rule allows the Bureau to report on and discuss its work involving confidential information while providing reasonable assurance that when it does so, it protects the persons to whom confidential information pertains.

The interim final rule protects persons to whom confidential information pertains by allowing the Bureau to publish materials it derives from such confidential information only if the materials do not identify ''directly or indirectly'' the persons to whom it pertains. This provision precludes the Bureau from publishing materials that identify such persons expressly or that a reader could combine with materials readily available from other sources to deduce the identity of such persons.

The Bureau believes that the interim final rule strikes an appropriate balance between the need to maintain the confidentiality of proprietary or other sensitive information and the Bureau's obligations, under provisions of the Dodd-Frank Act such as sections 1021 and 1022, to inform the public about the functioning of the marketplace for consumer financial products and services.

The Bureau also concludes that it is inappropriate to specify more detailed criteria for determining when materials derived from confidential information are sufficiently anonymized for disclosure. The applicable criteria will differ significantly depending upon the type of confidential information at issue and the context in which it exists. The interim final rule offers appropriate discretion to the Bureau to make determinations based upon the facts and circumstances of each set of materials it seeks to disclose.

The Bureau adopts paragraph (d) of the interim final rule without modification. This paragraph does not authorize the Bureau, pursuant to the terms of its confidentiality agreements with other agencies, to withhold confidential information from disclosure when applicable laws, such as the FOIA, require its disclosure. Instead, this paragraph simply clarifies that subpart D does not permit or authorize the Bureau to voluntarily disclose confidential information that it obtains from other agencies, in violation of its confidentiality agreements with such agencies, where applicable law otherwise authorizes (but does not require) the Bureau to disclose the information. These agreements would not and could not preclude the disclosure of confidential information where applicable law requires the Bureau to disclose it. In this regard, the Bureau notes that § 1070.41(a) of this subpart authorizes the Bureau to disclose confidential information ''as required by law'' and that § 1070.40 states that the provisions of subpart D do not govern the Bureau's responses to FOIA requests. Finally, we note that none of the Bureau's confidentiality agreements purport to preclude the Bureau from disclosing confidential information where applicable law requires it do so.

Section 1070.42 Disclosure of Confidential Supervisory Information to and by Supervised Financial Institutions

Section 1070.42(a) of the interim final rule provides that the Bureau may, in its discretion, disclose confidential supervisory information, such as reports of examination, to supervised financial institutions to which the reports pertain. To the extent that the Bureau chooses to do so, § 1070.42(b) prohibits institutions from further disseminating the confidential information they receive except in limited circumstances. Supervised financial institutions may share confidential supervisory information with their directors, officers, and employees, and with those of their parent companies, to the extent that the disclosure of such confidential supervisory information is relevant to the performance of such individuals' assigned duties. Supervised financial institutions may also share confidential supervisory information with their (or their parent companies') outside legal counsel, certified public accountants, and consultants, provided that the supervised financial institutions take reasonable steps to ensure that such legal counsel, accountants, or consultants do not utilize, make or retain copies of, or further disclose confidential information except as is necessary to provide advice to the supervised financial institutions, their parent companies, or to their respective directors, officers, or employees. Furthermore, the institutions must keep written records of their disclosures of confidential information to their legal counsel, accountants, and consultants, along with the steps they have taken to ensure that these accountants, legal counsel, and consultants do not improperly utilize, make or retain copies of, or disclose such information. Supervised financial institutions shall

provide these written records to the Bureau, upon request or demand.

One commenter criticizes § 1070.42(b) of the interim final rule, which prohibits financial institutions in receipt of confidential information from further disclosing such information, except to its officers, directors, parents, and certain of its employees, and to its outside accountants, legal counsel, and consultants. The commenter argues that this provision is unreasonably restrictive in that financial institutions may have legitimate reasons to share confidential information with affiliates and with any manner of third-party service providers acting on their behalf. Commenters also object to the requirement of § 1070.42(b)(2)(ii) that financial institutions keep a written account of all of their disclosures of confidential information to third parties. The commenter argues that the Bureau has no authority to require such accounting to the extent that disclosures occur in a privileged context.

The Bureau modifies paragraphs (a) and (b) of the interim final rule. The final rule permits the Bureau to disclose confidential supervisory information that concerns a supervised financial institution or its service providers (as section 1002(26) of the Dodd-Frank Act defines that term) to that supervised financial institution, to its directors, officers, trustees, members, general partners, or employees, as well as to its ''affiliates'' (as section 1002(1) of the Dodd-Frank Act defines that term) and the directors, officers, trustees, members, general partners, or employees of such affiliates. The final rule also permits a supervised financial institution to further disclose confidential supervisory information that it lawfully receives from the Bureau to its directors, officers, trustees, members, general partners, and employees and to its affiliates and its affiliate's directors, officers, trustees, members, general partners, or employees, to the extent that such disclosures are relevant to the performance of these individuals' assigned duties.

Furthermore, the final rule now permits a supervised financial institution or its affiliate to further disclose confidential supervisory information that it lawfully receives from the Bureau to its certified public accountants, outside legal counsel, contractors, consultants, and service providers as well as, with the prior written authorization of the Associate Director for Supervision, Enforcement, and Fair Lending or his or her delegee, to other persons, provided that the supervised financial institution or its affiliate shall take reasonable steps to ensure that such recipients do not, without the prior written approval of the Associate Director for Supervision, Enforcement, and Fair Lending or his or her delegee, utilize, make or retain copies of, or disclose confidential supervisory information for any purpose, except as is necessary to provide advice or services to the supervised financial institution or its affiliate.

In response to the comments discussed above, the final rule deletes the disclosure accounting requirements of paragraph (b)(2)(ii) of this section. The Bureau agrees with commenters that this accounting requirement is burdensome and that the restrictions of § 1070.47 of this subpart are sufficient to protect confidential supervisory information against further disclosures.

Section 1070.43 Disclosure of Confidential Information to Law Enforcement Agencies and Other Government Agencies

Section 1070.43 sets forth circumstances under which the Bureau must or may disclose various categories of confidential information to other government agencies.

Section 1070.43(a)(1) implements sections 1022(c)(6)(C)(i) and 1025(e)(1)(C) of the Dodd-Frank Act, which require the Bureau to share with Federal and State agencies having jurisdiction over supervised financial institutions, the Bureau's reports of examination of those supervised financial institutions, including drafts thereof, final reports, and revisions to final reports, provided that the Bureau receives from the agencies reasonable assurances that they will maintain the confidentiality of the information provided.

Section 1070.43(a)(2) implements section 1013(b)(3)(D) of the Dodd-Frank Act, which requires the Bureau to share confidential consumer complaint information with Federal and State agencies, provided that the agencies first give written assurances to the Bureau that they will maintain such information in a manner that conforms to the standards that apply to Federal agencies for the protection of the confidentiality of personally identifiable information and for data security and integrity.

Section 1070.43(b)(1) of the interim final rule authorizes the Bureau to make discretionary disclosures of confidential information to Federal and State agencies under certain circumstances. For example, this provision implements section 1022(c)(6)(C)(ii) of the Dodd-Frank Act, which authorizes the Bureau, upon request, to share examination reports as well as other reports and confidential supervisory information about supervised financial institutions with Federal and State agencies having jurisdiction over those institutions. Section 1070.43(b)(1) also authorizes the Bureau, upon request, to share confidential investigatory information about supervised financial institutions with Federal and State agencies having jurisdiction over those institutions.

Section 1070.43(b)(2) sets forth procedures for Federal and State agencies to follow when requesting access to the Bureau's confidential information as set forth in section 1070.43(b)(1). The Bureau's General Counsel is responsible for acting upon such requests in consultation with the Bureau's Associate Director for Supervision, Enforcement, and Fair Lending or with other appropriate Bureau personnel. Requests must be submitted in writing by authorized officers or employees of the requesting agencies. Requests should describe the nature of the confidential information and documents sought and the purposes for which it will be used. Requests should also identify the agency's legal authority for requesting the documents and any provisions that restrict the Bureau's authority to disclose the information. Finally, the requests should certify that the requesting agency will maintain the requested confidential information in accordance with this rule and in a manner that conforms to the standards that apply to Federal agencies for the protection of the confidentiality of personally identifiable information and for data security and integrity. Moreover, the requests should certify that the agencies will adhere to any additional conditions or limitations that the Bureau, in its discretion, decides to impose.

Section 1070.43(c) clarifies that requests by State agencies for information or records of the Bureau that do not constitute confidential information must be made in accordance with the Bureau's FOIA regulations set forth in subpart B.

Sections 1070.43(d) permits the Bureau to enter into agreements with Federal and State agencies that provide for standing access to confidential information.

The majority of the comments that the Bureau received in response to the interim final rule pertain to § 1070.43.

Several commenters argue that the Bureau lacks authority under the Dodd-Frank Act to make disclosures of confidential information either at all or to the extent provided by § 1070.43.

One commenter asserts that the Dodd-Frank Act does not authorize the Bureau to disclose any confidential information to the State attorneys general or to private parties. This commenter argues that the Bureau promulgated § 1070.43(b) of the interim final rule based upon a misinterpretation of section 1022(c)(6)(C)(ii) of the Dodd-Frank Act. Section 1022(c)(6)(C)(ii) of the Dodd-Frank Act provides that, ''[i]n addition to the [examination] reports described in clause (i), the CFPB may, in its discretion, furnish to a prudential regulator or other agency having jurisdiction over a covered person or service provider any other report or other confidential supervisory information concerning such person examined by the CFPB under the authority of any other provision of Federal law.'' The commenter argues that this provision does not authorize the Bureau to disclose confidential supervisory information; rather, it authorizes the Bureau to withhold supervisory information. That is, the commenter believes that section 1022(c)(6)(C)(ii) means that the Bureau may decline to disclose confidential supervisory information to other agencies when a provision of Federal law other than section 1022(c)(6)(C)(i) authorizes the disclosure. This commenter also asserts that section 1022(c)(6)(C)(ii) of the Dodd-Frank Act permits discretionary disclosures only to a ''prudential regulatory or other agency'' and that these terms do not include State attorneys general or private parties.

Other commenters argue that the Dodd-Frank Act does not authorize the Bureau to disclose confidential information to State attorneys general for purposes unrelated to the enforcement of consumer financial law or, as stated by one commenter, for purposes unrelated to the enforcement of Federal consumer financial law.

Commenters furthermore argue that by authorizing the Bureau to share confidential information with State attorneys general in circumstances where they lack authority to enforce applicable law within the judicial process, § 1070.43(b) expands State investigative powers beyond the limits set forth in section 1047 of the Dodd-Frank Act and the Supreme Court's decision in *Cuomo* v. *Clearinghouse Ass'n, LLC,* 557 U.S. 519 (2009). Section 1047 of the Dodd-Frank Act amends the National Bank Act (NBA) and the Home Owners Loan Act (HOLA) to confirm the Supreme Court's view in *Cuomo* that the NBA's references to visitorial authority of the Office of the Comptroller of the Currency do not limit or restrict the authority of State attorneys general to enforce applicable law against national banks or Federal savings associations or to seek relief as authorized by such law. According to the commenters, the *Cuomo* decision rejects a State attorney general's authority to obtain information directly from national banks when it does so outside of the context of a judicial proceeding where it is seeking to enforce applicable law. The commenters argue that in codifying the *Cuomo* decision in section 1047 of the Dodd-Frank Act, Congress could not have intended for State attorneys general to be able to obtain from the Bureau confidential information relating to national banks that these attorneys general could not obtain directly from such banks. These commenters propose that the Bureau limit its disclosure of confidential information to State attorneys general to circumstances where the attorneys general exercise their authority to enforce applicable law within a judicial process and such disclosure relates to the exercise of that authority by the State attorneys general.

Other commenters argue that the Bureau should either prohibit outright the disclosure of confidential information to other agencies, and to State attorneys general in particular, or restrict the circumstances under which the Bureau may do so. Commenters present varied proposals for applicable disclosure standards.

One commenter proposes that the Bureau limit the disclosure of confidential information to State attorneys general to circumstances where the attorneys general demonstrate that they seek such information for purposes of enforcing consumer financial protection laws. Other commenters propose that disclosures of confidential supervisory information should be limited to agencies with financial institution supervisory authority.

Some commenters suggest that, consistent with disclosure standards promulgated by some other Federal bank regulatory agencies, the Bureau should permit discretionary disclosures of confidential supervisory information only if requesters demonstrate a substantial need for the information that outweighs the need to maintain confidentiality and only when requestors have no other means of acquiring the information directly from the financial institutions to which it pertains or otherwise.

Commenters also propose that the Bureau impose additional procedural requirements for the discretionary disclosure of confidential information. Several commenters propose that requests for confidential information should be granted only when made by senior officials of or the heads of requesting agencies. Others suggest that the Bureau should require requesters of confidential information to represent that they have implemented and maintain comprehensive information security programs to protect the confidentiality and security of the information requested. They maintain that the Bureau should take steps to confirm such representations and audit requesters' systems for maintaining the confidentiality and security of information disclosed.

Commenters furthermore argue that the Bureau should provide financial institutions with notice of third party requests for confidential information as well as opportunities to object to such disclosures unless the Bureau determines, in its discretion, that doing so would advantage or prejudice any of the parties in the matter at issue. Similarly, one commenter suggests that the Bureau should refer requests for confidential information to prudential regulators so that they can prohibit disclosure if a rational basis exists to conclude that disclosure would threaten the safety and soundness of the institutions concerned.

Finally, one commenter asks the Bureau to clarify that § 1070.43(a)(1), which requires the Bureau to disclose reports of examination to certain Federal and State agencies, pertains to examination reports of both depository and non-depository institutions.

As a preliminary matter, the Bureau affirms its authority under the Dodd-Frank Act to promulgate a rule that provides for the disclosure of confidential information to Federal and State agencies, including State attorneys general.

Section 1012 of the Dodd-Frank Act grants to the Director authority to establish rules for conducting the general business of the Bureau, to implement the Federal consumer financial laws through rules, and to perform such other functions as may be authorized or required by law. In addition, section 1022(b)(1) authorizes the Bureau to ''prescribe rules * * *, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws * * *.'' Finally, section 1022(c)(6)(A) of the Dodd-Frank Act authorizes the Bureau to ''prescribe rules regarding the confidential treatment of information obtained from persons in connection with the exercise of its authorities under Federal consumer financial law.'' These

and other provisions of the Dodd-Frank Act provide the Bureau with ample authority to prescribe rules that govern which of the information that it generates or obtains it will regard as ''confidential,'' what confidentiality means, and the terms and conditions under which the Bureau will share confidential information with other Federal or State agencies.

Furthermore, § 1070.43 implements several provisions of the Dodd-Frank Act that require or authorize the Bureau to share confidential information with Federal and State agencies.[7]

For example, section 1013 of the Dodd-Frank Act expressly requires the Bureau to route consumer complaints to Federal and State agencies as well as to share consumer complaint information with prudential regulators, the Federal Trade Commission, other Federal agencies, and State agencies, provided that such agencies protect the confidentiality of personally identifiable information associated with such complaints. Section 1070.43(a)(2) of the rule implements this provision of the Dodd-Frank Act.

Section 1022(c)(6)(C)(i) of the Dodd-Frank Act requires the Bureau to share with prudential regulators, State regulators, or any other Federal agencies having jurisdiction over a covered person or service provider ''any report of examination made by the Bureau with respect to such person, and to all revisions made to such report,'' provided that such regulators or agencies give the Bureau reasonable assurances that they will maintain the confidentiality of the information shared. Section 1070.43(a)(1) of the rule implements this provision of the Dodd-Frank Act.

In addition to requiring the Bureau to share examination reports with other regulators and Federal agencies, section 1022(c)(6)(C)(ii) of the Dodd-Frank Act permits the Bureau, ''in its discretion, [to] furnish to a prudential regulator or other agency having jurisdiction over a covered person or service provider any other report or other confidential supervisory information concerning such person examined by the Bureau under the authority of any other provision of Federal law.'' The Bureau interprets this provision as permitting it to share examination reports as well as other reports and confidential supervisory information with all prudential regulators and all agencies—including State attorneys general—that have jurisdiction over the covered persons or service providers to which the shared information pertains. Section 1070.43(b) of the rule implements this provision of the Dodd-Frank Act.

The Bureau disagrees with the commenter who argues that section 1022(c)(6)(C)(ii) of the Dodd-Frank Act should not be interpreted as a grant of discretionary authority to share confidential supervisory information with other agencies, and that it instead merely qualifies section 1022(c)(6)(C)(i) of the Dodd-Frank Act by authorizing the Bureau to withhold from other agencies reports or other confidential supervisory information that the Bureau generates or obtains pursuant to Federal laws other than the Dodd-Frank Act. The commenter's interpretation of section 1022(c)(6)(C)(ii) is contrary to what the Bureau concludes is the better meaning of the provision. Rather than use language which states or implies that section 1022(c)(6)(C)(ii) qualifies or limits the information sharing requirement of section 1022(c)(6)(C)(i), Congress began section 1022(c)(6)(C)(ii) with the language ''[i]n addition to the reports described in clause (i), the Bureau may, in its discretion, furnish * * *.'' This language suggests that Congress intended for the information sharing authority it granted in clause (ii) to be a positive grant of authority that supplements the authority it granted in clause (i). Moreover, the last portion of section 1022(c)(6)(C)(ii)—''any other report or other confidential supervisory information concerning such person examined by the Bureau under the authority of any other provision of Federal law''—suggests that in addition to the examination reports that the Bureau must share with other agencies, the Bureau may also choose to share with other agencies other reports or confidential supervisory information that it creates or obtains through its exercise of examination powers other than those that Congress describes in section 1022(c)(6)(C) of the Dodd-Frank Act.

The Bureau also disagrees with commenters that section 1022(c)(6)(C) of the Dodd-Frank Act does not permit the Bureau to share examination reports or confidential supervisory information with State attorneys general. In delineating the Bureau's responsibilities and authorities to share confidential supervisory information, section 1022(c)(6)(C) of the Dodd-Frank Act discusses sharing with a ''regulator''—a term that, when applied to the States, may include a State attorney general in certain circumstances—and sharing with an ''agency''—a broader term that, when applied to the States, encompasses State attorneys general in all circumstances. When section 1022(c)(6)(C)(i) provides that the Bureau must share examination reports with a ''prudential regulator, a State regulator, or any other Federal agency having jurisdiction over a covered person or service provider,'' the Bureau interprets the provision to require it to share such reports with State attorneys general to the extent that they regulate the covered persons or service providers to which the reports pertain, but not to require the Bureau to share these reports with State attorneys general that do not regulate such entities. Nevertheless, when section 1022(c)(6)(C)(ii) provides that the Bureau may share examination reports, as well as other reports or confidential supervisory information, with ''a prudential regulator or other agency having jurisdiction over a covered person or service provider,'' it permits the Bureau to share examination reports as well as other reports and confidential supervisory information with all Federal and State agencies, including State attorneys general, that both do and do not regulate the covered persons or service providers to which the information pertains (to the extent that such agencies have jurisdiction over such covered persons or service providers).

Although the Bureau has legal authority under the Dodd-Frank Act to promulgate § 1070.43, and to share its confidential information with other agencies, including with State attorneys general, the Bureau has made clear that it intends to exercise its discretion

[7] Section 1070.43 of the rule comports with section 1022(c)(8) of the Dodd-Frank Act. Section 1022(c)(8) of the Dodd-Frank Act requires the Bureau to ''take steps to ensure that proprietary, personal, or confidential consumer information that is protected from public disclosure under section 552(b) or 552a of title 5, United States Code, or any other provision of law, is not made public under this title.'' The Bureau interprets this provision of the Dodd-Frank Act to require the Bureau to take steps to prevent ''public'' disclosures of this information; section 1022(c)(8) does not preclude the Bureau from sharing this information with other agencies as long as the Bureau takes steps to ensure that these agencies will not make the information available to the public. If the Bureau takes such steps, then its sharing of confidential information with other agencies is not tantamount to a public disclosure.

The rule includes appropriate measures to ensure that information that the Bureau shares with other agencies will remain confidential once shared. Section 1070.43(a) requires the Bureau to share certain confidential information with State agencies only to the extent that these agencies provide assurances to the Bureau that they will maintain the information in confidence. Section 1070.43(b) authorizes the General Counsel to grant agency requests for access to confidential information only to the extent that the requesting agencies first commit to maintain the information in confidence. Furthermore, section 1070.47(a) of the rule prohibits agencies in receipt of confidential information from further disclosing such information to third parties without the prior written permission of the Bureau. Lastly, section 1070.47(c) preserves any applicable legal privileges when the Bureau shares confidential information with other agencies.

carefully. The Bureau recently articulated the following policy for sharing confidential supervisory information with law enforcement agencies:

> [T]he Bureau will not routinely share confidential supervisory information with agencies that are not engaged in supervision. Except where required by law, the Bureau's policy is to share confidential supervisory information with law enforcement agencies, including State Attorneys General, only in very limited circumstances and upon review of all of the relevant facts and considerations. The significance of the law enforcement interest at stake will be an important consideration in any such review. However, even the furtherance of a significant law enforcement interest will not always be sufficient, and the Bureau may still decline to share confidential supervisory information based upon other considerations, including the integrity of the supervisory process and the importance of preserving the confidentiality of the information. In these circumstances, the decision whether to provide confidential supervisory information to another agency will be made by the General Counsel, in consultation with appropriate Bureau personnel.

CFPB Bulletin 12–01 (Jan. 4, 2012) (footnote and citation omitted). The Bureau intends to employ this policy when it decides whether, and to what extent, to share confidential supervisory information with State attorneys general.

The Bureau also declines to incorporate into § 1070.43(b) additional procedural requirements for sharing confidential information with other agencies. Section 1070.43(b) already requires agencies that request confidential information to make formal written requests through authorized officers or employees. Such requests must describe the information requested, the purposes for which it will be used, the requesting agency's legal authority for requesting the information, and any applicable restrictions on its authority to protect the requested information. Furthermore, the requests must certify the requester's commitment to maintain the confidentiality, security, and integrity of the requested information. The General Counsel also may require the requester to certify adherence to such additional terms and conditions as she sees fit to impose. The Bureau believes that these procedures, which are largely consistent with those of other Federal bank regulatory agencies, adequately ensure that the General Counsel shares confidential information only with appropriate agencies, for appropriate purposes, and only to the extent that such agencies are willing and able to protect the confidentiality, security, and integrity of the information disclosed.

The Bureau does not deem it necessary or appropriate to impose the more stringent procedural requirements that commenters propose.

For example, the Bureau declines to seek approval of prudential regulators prior to granting requests to share its confidential information with other agencies. There is no basis in the Dodd-Frank Act for requiring such approval and in any event, there are inter-agency agreements that govern the sharing of confidential information between Federal and State regulators.

The Bureau also declines to require that only senior agency officials or agency heads may file requests for access to confidential information when it already requires that only authorized officials or employees may do so.

Furthermore, the Bureau does not deem it necessary to undertake audits of the security systems of requesting agencies to determine whether these agencies are capable of adequately safeguarding confidential information. Prior to disclosing confidential information pursuant to § 1070.43(b), the Bureau will take reasonable steps to ensure that requesting agencies are legally authorized to protect the confidentiality of the information and that they have systems in place to safeguard it from theft, loss, or unauthorized access or disclosure.

The Bureau will not revise its rules to require it to notify financial institutions when it receives requests from other agencies for confidential information or to allow financial institutions to object to its determinations to grant such requests. The Bureau shares information with other agencies typically within the context of joint supervisory examinations and law enforcement investigations. Within this context, notification could reveal prematurely plans to investigate or examine financial institutions and might compromise these joint endeavors. Similarly, financial institutions could misuse a right to object to the Bureau's information sharing determinations to obstruct or stymie or joint investigations or examinations.

Finally, the Bureau deems it unnecessary to modify § 1070.43(a)(1) to clarify that the Bureau must share with certain other agencies reports of examination of both depository and non-depository financial institutions. The definition of the phrase ''financial institution'' in § 1070.2(l) of the rule is broad and includes all manner of covered persons and service providers, including non-depository institutions.

Although the Bureau declines to supplement the procedural requirements of § 1070.43, the final rule modifies elements of that provision for purposes of clarification.

First, the Bureau modifies § 1070.43(a)(2) to clarify that the Bureau shall share confidential consumer complaint information with agencies to the extent that they provide written certifications to the Bureau that they will maintain the information in confidence, including by maintaining it in a manner that conforms to the standards that apply to Federal agencies for the protection of the confidentiality of personally identifiable information and for data security and integrity.

Second, the Bureau modifies § 1070.43(b)(2)(iv) of the interim final rule to clarify that the Bureau requires a requesting agency to identify its legal authority to protect the requested documents from public disclosure.

Third, the Bureau modifies § 1070.43(b)(2)(v) of the interim final rule to clarify that agencies seeking access to confidential information must certify that they will keep that information confidential in addition to safeguarding it ''in a manner that conforms to the standards that apply to Federal agencies for the protection of the confidentiality of personally identifiable information and for data security and integrity'' and complying with such additional conditions and limitations as the Bureau sees fit to impose. For purposes of both §§ 1070.43(a)(2) and 1070.43(b)(2)(v), the Bureau interprets the phrase ''standards that apply to Federal agencies for the protection of the confidentiality of personally identifiable information and for data security and integrity'' to mean, at a minimum, that an agency shall store confidential information in a secure environment where access is limited only to those of its employees, contractors, and agents who have a *bona fide* need for the information to perform their official duties relating to the purpose for which the information was shared. Furthermore, the Bureau requires the agency to notify the Bureau immediately of any actual or suspected security breach involving confidential information, including any theft, loss, unauthorized disclosure, or misuse of any confidential information that consists of personally-identifiable information.

Section 1070.44 Disclosure of Confidential Consumer Complaint Information.

Section 1070.44 states that nothing in this part limits the Bureau's discretion

to disclose confidential consumer complaint information, to the extent permitted by law, to the extent that such disclosure is necessary to investigate, resolve, or otherwise respond to consumer complaints or inquiries regarding financial institutions or consumer financial products and services.

One commenter argues that the Bureau should specify, in § 1070.44, the circumstances in which it intends to disclose confidential consumer complaint information. The commenter suggests that the Bureau should keep consumer complaints confidential, especially to the extent that they are unsubstantiated, to avoid harming the reputations and financial performance of financial institutions. Even where substantiated, the commenter argues that the Bureau should address complaints privately or through enforcement actions, and not through public disclosure.

The Bureau adopts the interim final rule without modification. On June 22, 2012, the Bureau published in the **Federal Register** its policy for publishing consumer complaints online. This policy addresses the commenter's concerns. *See* 77 FR 37558.

Section 1070.45 Affirmative Disclosure of Confidential Information

Section 1070.45(a) of the interim final rule permits the Bureau to affirmatively disclose confidential investigative information, such as civil investigative demand material and other confidential information that becomes part of the Bureau's investigative files, to Bureau employees, to law enforcement and other governmental agencies, in investigational hearings and witness interviews, and to either House of or a committee or subcommittee of the Congress, upon request. The Bureau may also disclose confidential information in administrative or court proceedings to which the Bureau is a party. In the case of confidential investigatory material that contains any trade secret or privileged or confidential commercial or financial information, as claimed by designation by the submitter of such material, or confidential supervisory information, the submitter may seek an appropriate protective or *in camera* order prior to disclosure of such material in a proceeding.

The Bureau received several comments regarding § 1070.45. One commenter argues that the Bureau should implement section 1052(d)(2) of the Dodd-Frank Act by amending § 1070.45(a)(2) of the interim final rule to state that the Bureau shall provide financial institutions with prior notice of its disclosures of confidential information to the Congress. Furthermore, the commenter suggests that the rule should state that the Bureau will provide information to the Congress only to the extent that it is stripped of identifying information. Finally, the commenter argues that the rule should state that the Bureau will eliminate its authorization to provide confidential information to subcommittees of Congress.

One commenter also expresses concern that § 1070.45(a)(4) of the interim final rule unfairly places the burden on financial institutions to seek a protective or *in camera* order whenever the Bureau seeks to disclose confidential investigatory material in the course of an administrative or court proceeding to which the Bureau is a party. The commenter argues that, in accordance with the practice of other Federal bank regulatory agencies, the Bureau should assert all applicable privileges and seek a protective order when using confidential information during the course of an administrative or court proceeding.

Another commenter proposes that the Bureau delete § 1070.45(a)(5), which states that Bureau may affirmatively disclose confidential information ''[t]o law enforcement and other government agencies in accordance with this subpart.'' The commenter notes that this provision seems duplicative of § 1070.43 of the interim final rule, and to the extent it is not so, it permits the disclosure of confidential supervisory information without restriction.

The Bureau implements section 1052(d)(2) of the Dodd-Frank Act by modifying section 1070.45(a)(2) of the interim final rule to state that upon receiving a request from the Congress for confidential information that a financial institution has submitted to the Bureau, the Bureau shall provide written notice to the financial institution of its receipt of the request, along with a copy of the request.

However, the Bureau declines to modify this paragraph to exclude disclosures to Congress of personally identifiable information insofar as section 1052(d)(2) of the Dodd-Frank Act expressly states that no rule of the Bureau shall prevent disclosures to the Congress of information obtained by the Bureau.

The Bureau also disagrees with the commenter that this paragraph should exclude disclosures of confidential information to Congressional subcommittees.

The Bureau declines to modify § 1070.45(a)(4) of the interim final rule to require the Bureau to assert all available objections to the disclosure of confidential information and to seek an appropriate protective or *in camera* order prior to such disclosure.

The Bureau revises § 1070.45(a)(5) of the interim final rule to clarify its intended meaning. As revised, this provision allows the Bureau, on its own initiative, to alert other agencies of its discovery of evidence that may indicate violations of laws that are subject to these agencies' jurisdiction and, to the extent the Bureau deems it necessary to alert agencies of such evidence, to summarize evidence that constitutes confidential information.

The Bureau intends for § 1070.45(a)(5) to be a precursor to but not a substitute for the procedure set forth in § 1070.43(b) of this subpart by which agencies submit to the General Counsel requests for access to full written copies of the Bureau's confidential information. For example, a Bureau employee may call a counterpart in another agency to advise the agency that, during the course of a Bureau investigation into violations of laws subject to the Bureau's jurisdiction, the Bureau uncovered evidence of conduct that may also constitute a violation of laws subject to the agency's jurisdiction. To the extent the Bureau employee deems it necessary to alert the agency of the relevant conduct, the employee may summarize to the agency counterpart the Bureau's evidence that constitutes confidential information. The Bureau employee may not, however, share with the agency counterpart a full written copy of such confidential information. To obtain a complete written copy of the confidential information, the agency must submit a request for it in accordance with section 1070.43(b) of the rule. In response to such a request, the Bureau's General Counsel will decide whether or not to grant access to the requested confidential information as set forth in § 1070.43(b) and in accordance with relevant Bureau guidance, including CFPB Bulletin 12–01.

The Bureau also notes that an agency that receives confidential information in summary form pursuant to § 1070.45(a)(5) is subject to the same Bureau prohibition against further disclosing that information that applies when it receives a complete written copy of that confidential information. *See* 12 CFR 1070.47.

Section 1070.46 Other Disclosures of Confidential Information

Section 1070.46 provides that notwithstanding the other provisions in subpart D that restrict the circumstances under which the CFPB may disclose

confidential information, the Director may authorize other disclosures of confidential information to the extent permitted by law.

Section 1070.46(b) authorizes the CFPB to provide prior written notice to the person to whom the confidential information pertains—to the extent that the CFPB deems such notice to be appropriate under the circumstances—that the CFPB intends to disclose confidential information, in accordance with this section.

Section 1070.46(c) clarifies that the authority to disclose confidential information pursuant to this section may be exercised only by the Director or by an individual acting in the capacity of the Director in the absence or unavailability of a Director, such as the Deputy Director (as set forth in section 1011(b)(5)(B) of the Dodd-Frank Act).

Several commenters also expressed concern that § 1070.46 renders meaningless the disclosure restrictions of subpart D by authorizing the Director to disclose confidential information without limitation. To address this concern, commenters propose either eliminating this provision entirely or imposing strict criteria on the Director's discretion. One commenter proposes permitting the Director to authorize discretionary disclosures only where such disclosures are expressly permitted under the Dodd-Frank Act and where there is an actual exigent need for such disclosure in order for the Bureau to perform a statutorily required duty under applicable law.

The Bureau declines to eliminate or substantially modify § 1070.46. As the CPFB noted when it published the interim final rule, the Bureau does not intend to utilize this provision routinely, or as a matter of convenience, to circumvent applicable laws or provisions of the rule that exist elsewhere in subpart D to prohibit or restrict its disclosure of confidential information. Instead, the Bureau intends to use this provision in the same way that other Federal agencies utilize similar catch-all provisions—to account for rare situations in which an unforeseen and exigent need exists to disclose confidential information for purposes or in a manner not otherwise provided for in the rule. To help ensure that the CPFB utilizes § 1070.46 as described, the rule states that the Director must personally authorize in writing disclosures of confidential information that occur pursuant to § 1070.46 and that he or she may not delegate this responsibility to subordinates.

Section 1070.47 Other Rules Regarding the Disclosure of Confidential Information

Section 1070.47(a) declares the Bureau's retained ownership of any confidential information it discloses to Federal or State agencies, to supervised financial institutions, or to other persons as provided in subpart D. It prohibits further disclosures of such information without the Bureau's prior written authorization. It directs recipients of confidential information who receive requests or demands for its further disclosure to refer such requests or demands to the Bureau, afford the Bureau an opportunity to respond or intervene, and to assert legal exemptions or privileges on the Bureau's behalf if so requested. To the extent that requests for confidential information are made pursuant to the FOIA, the Privacy Act, or State law equivalents of those statutes, § 1070.47(a)(3) requires Federal or State agency recipients to refer such requests to the Bureau for its response. As provided by § 1070.47(a)(4), nothing in this section precludes a recipient of confidential information under subpart D from disclosing such information pursuant to a valid Federal court order or a request or demand from a duly authorized committee of the United States Congress. In such cases where disclosure is compulsory, the disclosing party shall use its best efforts to secure a protective order or agreement that maintains the confidentiality of the confidential information disclosed.

Section 1070.47(b) permits the Bureau to impose any additional conditions or limitations that it deems prudent upon the use or disclosure of confidential information by agencies or persons to whom such information has been disclosed pursuant to this subpart.

After the publication of the interim final rule, the Bureau published a notice of proposed rulemaking that proposed an amendment to § 1070.47(c). *See* 77 FR 15286 (Mar. 15, 2012). The amended version of this provision provides that the Bureau's provision of privileged information to another Federal or State agency does not waive any applicable privilege, whether the privilege belongs to the Bureau or any other person.

The Bureau published its final rule on July 5, 2012. *See* 77 FR 39617. In its final rule, the Bureau addressed public comments that it received in response to the notice of proposed rulemaking. Please see that final rule for further information.

The Bureau received several comments about this provision. One commenter argues that the Bureau does not have authority to enforce this regulation to the extent that it applies to confidential information provided to other agencies. To incentivize agencies to abide by this restriction, the commenter suggests that the rule should state that if a party to whom the Bureau provides confidential information leaks it intentionally or otherwise, the Bureau will stop providing confidential information to that party.

Another commenter argues that the Bureau should require third party recipients of confidential information to comply with all applicable laws, including State laws.

To address concerns regarding the enforceability of the interim final rule with respect to State agencies, the Bureau makes several modifications in the final rule.

First, the final rule now requires, in subparagraph (a)(3)(ii), that recipients of confidential information must re-direct all third party requests for that information to the Bureau and not simply those requests filed under the FOIA, the Privacy Act, or State analogues to such laws.

Second, the Bureau modifies subparagraph (a)(3)(ii) to clarify that recipients of confidential information must provide the aforementioned instruction to third party requesters of that information only to the extent that applicable law permits them to do so.

Third, the Bureau modifies subparagraph (a)(4) of the interim final rule to state that nothing in this section precludes compliance with a legally valid and enforceable order of a court of competent jurisdiction rather than, more narrowly, an order of a United States Federal court. The Bureau makes this modification principally to clarify that if a final and enforceable order of a State court requires a recipient of confidential information to disclose that information to a third party, the rule does not preclude the recipient from complying with the order.

Fourth, the Bureau modifies subparagraphs (a)(2) and (a)(5) to make them consistent with § 1070.42 of the rule. Section 1070.42 allows financial institutions that receive copies of confidential supervisory information to further disclose that information to certain other entities and persons. Subparagraph (a)(2) of the interim final rule seemingly precludes such disclosures altogether while subparagraph (a)(5) precludes such disclosures to the extent that they involve removing confidential supervisory information from the premises of financial institutions. The final rule eliminates this unintended result by stating that, except as

otherwise permitted by subpart D—rather than by § 1070.47 only—recipients of confidential information may not further disclose confidential information, including by making personal copies of such information and by removing it from the premises of financial institutions.

Section 1070.48 Privileges Not Affected by Disclosure to the CFPB

After the publication of the interim final rule, the Bureau published a notice of proposed rulemaking that proposed to add to the interim final rule a new § 1070.48. *See* 77 FR 15286, 15286 (Mar. 15, 2012). This new section provides that the submission by any person of any information to the Bureau in the course of the Bureau's supervisory or regulatory processes will not waive or otherwise affect any privilege such person may claim with respect to such information under Federal or State law as to any other person or entity.

The Bureau published its final rule on July 5, 2012. *See* 77 FR 39617. In its final rule, the Bureau addressed public comments that it received in response to the notice of proposed rulemaking. Please see that final rule for further information.

Subpart E—The Privacy Act

Section 1070.50 Purpose and Scope; Definitions

Section 1070.50 of the interim final rule sets forth the purpose of subpart E, which is to implement the requirements of the Privacy Act of 1974, 5 U.S.C. 552a (the Privacy Act). Among other things, the Privacy Act requires Federal agencies to grant individuals access to records that agencies maintain about them in systems of records as well as the right to amend or correct such records. Section 1070.50 also defines certain terms that are used throughout subpart E. The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule without modification.

Section 1070.51 Authority and Responsibilities of the Chief Privacy Officer

Section 1070.51 of the interim final rule authorizes the Chief Privacy Officer of the Bureau to respond to public requests made under the Privacy Act for access to, accounting of, or amendments to Bureau records contained in systems of records. It also authorizes the Chief Privacy Officer to approve the publication and amendment of systems of record notices. Finally, the interim final rule authorizes the Chief Privacy Officer to file any necessary reports required by the Privacy Act. The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule without modification.

Section 1070.52 Fees

Section 1070.52 of the interim final rule identifies the fees that are associated with processing Privacy Act requests for copies of records submitted pursuant to this subpart. This provision also sets for circumstances in which the Bureau will not charge fees to process Privacy Act requests. The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule without modification except to correct a typographical error.

Section 1070.53 Requests for Access to Records

Section 1070.53(a) of the interim final rule describes how individuals may request access to Bureau records that pertain to them.

Paragraph (a) states that requests that requests may be made electronically or in paper form and submitted to designated addresses.

Paragraph (b) identifies the required content of Privacy Act requests. Such content must include, among other things, the name of the system of records that the requester believes contains the records requested, or a description of the records sought that is sufficiently specific to enable Bureau personnel to locate the applicable system of records with a reasonable amount of effort. Wherever possible, it should also contain a description of the record sought, including any information that might assist the Bureau in locating it.

Paragraph (c) requires requesters to provide proof of their identity to obtain access to Privacy Act protected records. Such proof includes a photocopy of identification cards or forms that bear the requester's photograph and signature or a statement swearing or affirming the requester's identity. Additional proof may be required in certain circumstances. For example, if a requester seeks records pertaining to another individual in the requester's capacity as that individual's guardian, then the requester must provide proof of guardianship before the Bureau will process the request.

Paragraph (d) states that an individual may request an accounting of previous disclosures of records pertaining to such individual.

The Bureau received no comments on the interim final rule. The Bureau modifies the interim final rule to reflect the new mailing address of the Bureau: 1700 G Street NW., Washington, DC 20552.

Section 1070.54 CFPB Procedures for Responding to a Request for Access

Section 1070.54 of the interim final rule sets forth procedures for the Bureau to follow in responding to a Privacy Act request for records.

Paragraph (a) provides that the Bureau will acknowledge and seek to respond to each request within twenty (20) business days of its receipt.

Paragraph (b) identifies procedures for making requested records available for inspection and copying in the Bureau reading room or mailing or emailing the records directly to the requester.

Paragraph (c) requires the Bureau to inform requesters in writing of its denials of requests. Such notification must include the reasons for denial and procedures for appealing the determination.

The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule without modification.

Section 1070.55 Special Procedures for Medical Records

Section 1070.55 of the interim final rule sets forth special procedures for the Bureau to apply when responding to Privacy Act requests for medical or psychological records. The Bureau received no comments on the interim final rule. The Bureau modifies the interim final rule to clarify that a physician or other appropriate representative whom a requester designates to receive the Bureau's medical or psychological records that pertain to the requester shall—rather than may—disclose those records to the requester, but that physician or representative may disclose such records in a manner that he or she deems appropriate to prevent or mitigate adverse effects on the requester.

Section 1070.56 Request for Amendment of Records

Section 1070.56(a) of the interim final rule comprises procedures for individuals to follow when making requests for the amendment of Bureau records that concern them. Individuals seeking amendment to a record must submit the request in writing, along with proof of identity (unless such proof was already provided in a related access or amendment request), and submit it, either in paper or electronic form, to the Chief Privacy Officer. The request must identify the relevant system of records and the portion of the record to be amended. The request also must

describe the nature and reasons for each requested amendment.

Paragraph (b) states that the requester bears the burden of proving, through relevant and convincing evidence, that the record should be amended because it is not accurate, relevant, timely or complete.

The Bureau received no comments on the interim final rule. The Bureau modifies section 1070.56(b) of the interim final rule to adopt the ''preponderance of the evidence'' standard of proof that the Office of Management and Budget prescribed in its guidance to agencies on the implementation of the Privacy Act. *See* Office of Management and Budget, Privacy Act Implementation: Guidelines and Responsibilities, 40FR 28958–28959 (Jul. 9, 1975).

Section 1070.57 CFPB Review of a Request for Amendment of Records

Section 1070.57 of the interim final rule sets forth procedures for the Bureau to follow in reviewing and responding to a request to amend records pertaining to an individual.

Paragraph (a) requires the Bureau to acknowledge such a request within ten (10) business days after its receipt. The Bureau must make its determination as to whether to grant an amendment request promptly.

Paragraph (b) requires the Bureau to respond to a request for amendment in writing by informing the requester of its determination, and if granted, the steps that it will take to amend the record. If denied, the Bureau must inform the requester of the reasons for denial and of the requester's appeal rights.

The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule without modification.

Section 1070.58 Appeal of Adverse Determination of Request for Access or Amendment

Section 1070.58 of the interim final rule sets forth procedures for filing appeals of Bureau denials of Privacy Act requests for access to or amendment of records.

Paragraph (a) establishes a requester's right to file appeals of denials of requests for record access or amendment within ten (10) business days after the Bureau notifies the requester that it has denied such requests.

Paragraph (b) requires appellants to file appeals in writing and to submit them, in paper or electronic form, to the General Counsel of the Bureau. Appeals must specify the background of the initial request and explain why the denial of access or amendment was in error.

Paragraph (c) designates the General Counsel of the Bureau to decide appeals. The General Counsel must make his or her determination within thirty (30) business days from the date of his or her receipt of the appeal, unless the General Counsel extends the time for good cause. If the General Counsel denies the appeal, the General Counsel must inform the requester in writing. The denial notification must include the General Counsel's reasons for denying the appeal and describe the requester's right to file a statement of disagreement and to have a court review the appellate determination.

Paragraph (d) sets forth the appellant's right to file a concise statement of disagreement with the General Counsel's denial of an appeal. The Bureau must maintain this statement of disagreement with the record that the requester sought to amend and any disclosure of the record must include a copy of the statement of disagreement. The Bureau also must, where practical and appropriate, provide a copy of the statement of disagreement to prior recipients of the record.

The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule without modification.

Section 1070.59 Restrictions on Disclosure

Section 1070.59 of the interim final rule states that the Bureau will not disclose any record about an individual contained in a system of records to any person or agency without the prior written consent of that individual unless the Privacy Act authorizes it to do so. Authorized disclosures include those that are compatible with so-called ''routine uses'' that the Bureau publishes in the **Federal Register** as part of its System of Records Notices. Copies of the Bureau's System of Record Notices are available on the Bureau's Web site, at *http://www.consumerfinance.gov*. The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule without modification.

Section 1070.60 Exempt Records

Section 1070.60 of the interim final rule lists certain Bureau systems of records that are exempt, pursuant to section (k)(2) of the Privacy Act, from the record access rights and certain other rights and obligations set forth in this subpart and in the Privacy Act itself. These systems of records are exempt insofar as they contain investigatory systems compiled for law enforcement purposes.

After the publication of the interim final rule, the Bureau published a notice of proposed rulemaking that proposed to add to this section of the rule a new exempt system of records: CFPB .005—Consumer Response System. *See* 77 FR 64241 (Oct. 19, 2012).

The Bureau received no comments on the interim final rule or on the notice of proposed rulemaking. The Bureau adopts the interim final rule and the proposed rule without modification except to correct a drafting error.

Section 1070.61 Training; Rules of Conduct; Penalties for Non-Compliance

Section 1070.61(a) of the interim final rule requires the Chief Privacy Officer to institute a training program to instruct Bureau employees and contractors as to their duties and responsibilities under the Privacy Act and the regulations of this subpart.

Paragraph (b) sets forth standards of conduct applicable to Bureau employees and contractors regarding compliance with the Privacy Act and the regulations of this subpart.

The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule without modification except to correct drafting and typographical errors.

Section 1070.62 Preservation of Records

Section 1070.62 of the interim final rule requires the Bureau to preserve all correspondence relating to requests received under this part, as well as records responsive to such requests, until Federal records laws or record retention schedules approved by the National Archives and Records Administration authorizes the disposition or destruction of such records. The interim final rule also instructs Bureau employees not to dispose of such records while they are the subject of a pending request, appeal, proceeding, or lawsuit.

One commenter suggests that the Bureau should modify § 1070.62 of the interim final rule to provide that records will not be disposed of ''or destroyed'' while they are subject to a pending request, appeal, proceeding, or lawsuit.

The Bureau agrees with the commenter that Bureau employees should be instructed to neither dispose of nor destroy correspondence that relates to or records that are responsive to requests that the Bureau receives under this subpart while they are subject to a pending request, appeal, proceeding, or lawsuit.

Section 1070.63 Use and Collection of Social Security Numbers

Section 1070.63 of the interim final rule requires the Bureau to inform employees that in collecting information from individuals, employees may not deny such individuals any rights, benefits, or privileges arising from such individuals' refusals to disclose social security numbers to the Bureau unless the collection of such numbers is authorized by law.

In requesting social security numbers from individuals, the Bureau must inform individuals whether the provision of such numbers is mandatory or voluntary, the legal authority that authorizes the collection of such numbers, and the uses that the Bureau will make of the numbers.

The Bureau received no comments on the interim final rule. The Bureau adopts the interim final rule without modification.

V. Section 1022(b)(2)(A) of the Dodd-Frank Act

In developing the final rule, the Bureau has considered potential benefits, costs, and impacts, and has consulted or offered to consult with the prudential regulators, including with regard to consistency with any prudential, market, or systemic objectives administered by such agencies.[8]

The analysis considers the benefits, costs, and impacts of the key provisions of the rule against a pre-statutory baseline; that is, the analysis evaluates the benefits, costs, and impacts of the relevant statutory provisions and the regulations combined.[9]

Subpart C of the final rule sets forth procedures by which the public, including consumers and covered persons, may serve summons, complaints, subpoenas, and other legal process, demands, and requests upon the Bureau. The rule imposes special procedural requirements for those who seek to serve third party subpoenas upon the Bureau in accordance with *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951). These requirements may increase the time and burden associated with obtaining records of the Bureau in response to such subpoenas.

Subpart D of the final rule, which restricts the circumstances under which the Bureau may disclose to the public or share with other agencies certain categories of confidential information, benefits consumers and covered persons to the extent that the confidential information that the rule protects is derived from or pertains to consumers or covered persons. For example, the rule protects consumers' privacy by restricting the Bureau's authority to disclose publicly personally-identifiable complaint information that consumers submit to the Bureau. The rule also protects the financial and reputational interests of covered persons by limiting the extent to which the Bureau may publicly disclose supervisory and law enforcement information about them.

To the extent that the rule requires or authorizes the Bureau to share confidential information, the rule also has benefits for consumers and covered persons. Consumers may benefit when the Bureau shares complaint information to facilitate resolution of consumer complaints. They may also benefit when the Bureau shares supervisory information with other financial regulatory agencies to promote compliance by covered persons with consumer financial laws. Similarly, consumers may benefit when the Bureau shares its investigatory information with other law enforcement agencies to aid efforts to prevent and remedy harms to consumers caused by conduct that violates consumer financial law.

There is a benefit to covered persons when the Bureau shares supervisory information with other regulatory agencies. Information exchange among regulatory agencies permits the Bureau and these agencies to conduct joint supervisory examinations of covered persons rather than separate examinations, thereby reducing regulatory burdens to covered persons.

This rule may entail certain costs to covered persons. As one commenter to the interim final rule argues, the information sharing provisions of subpart D of the rule may increase the volume and costs of litigation for covered persons whose information the Bureau will share with other agencies and which such agencies may use as bases for administrative or judicial actions against covered persons. To the extent that such costs occur, the Bureau believes that in most cases, these costs would be associated with concomitant benefits to consumers from the prevention or remedy of harms associated with violations of law by covered persons.[10]

One commenter also contends that the information sharing practices that the rule prescribes will result in a waiver of legal privileges that otherwise protect this information from disclosure to third parties, thereby rendering such information vulnerable to subpoenas and discovery requests. Although the Bureau believes that this concern is unwarranted, the Bureau has taken action since it issued the interim final rule to mitigate this potential cost. On July 5, 2012, the Bureau modified § 1070.47(c) of the interim final rule and added a new § 1070.48 to clarify that the provision by a covered person of confidential information to the Bureau and the Bureau's disclosure of such information to another agency does not waive legal privileges that otherwise protect such information from disclosure. *See* 77 FR 39617.

One commenter suggests that § 1070.46 of the rule imposes costs upon covered persons to the extent that it authorizes the Director of the Bureau to disclose their confidential information to the public notwithstanding other disclosure restrictions set forth in subpart D. To the extent that the Director exercises his authority under § 1070.46 to disclose confidential information, costs may indeed ensue to affected covered persons. However, at most only very few covered persons might actually face such a cost, because the circumstances are limited in which the Director can and will exercise this authority. To ensure that the Bureau will resort to § 1070.46 only in limited circumstances, the provision's disclosure authority is exercisable only by the Director himself. The Director does not intend to exercise his authority

[8] 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) directs the Bureau to consult, before and during the rulemaking, with appropriate prudential regulators or other Federal agencies, regarding consistency with objectives those agencies administer. The manner and extent to which these provisions apply to a rulemaking of this kind that does not establish standards of conduct, and to regulatory provisions that are compelled by statutory changes, is unclear. Nevertheless, to inform this rulemaking more fully, the Bureau performed the described analyses and consultations.

[9] The Bureau has discretion in any rulemaking to choose an appropriate scope of analysis with respect to potential benefits and costs and an appropriate baseline. The Bureau, as a matter of discretion, has chosen to describe a broader range of potential effects to more fully inform the rulemaking.

[10] The Bureau notes that it has taken steps since it issued the interim final rule to limit the circumstances in which it shares supervisory information with agencies that are not engaged in supervisory activities, including State attorneys general. In January 2012, the Bureau issued Bulletin 12–01, which states that the Bureau will not share confidential supervisory information routinely with such agencies and will only share such information after scrutinizing factors that include the significance of the law enforcement interest at stake and the impact on the integrity of the supervisory process. This Bulletin should limit litigation costs to covered persons that might otherwise arise from the final rule.

under § 1070.46 except in unforeseen and exigent circumstances. Moreover, § 1070.46 states that the Bureau may notify covered persons of the Director's intentions to disclose confidential information pursuant to 1070.46; such notice would enable covered persons to seek appropriate relief if they believe that the Director's disclosure of confidential information would be contrary to law.

The CFPB does not expect that the final rule will have an appreciable impact on consumers' access to consumer financial products or services. The final rule does not have a unique impact on rural consumers. The final rule also 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.

VI. Procedural Requirements

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (the RFA), requires each agency to consider the potential impact of its regulations on small entities, including small businesses, small governmental units, and small not-for-profit organizations, unless the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The undersigned so certifies. The rule does not impose any obligations or standards of conduct for purposes of analysis under the RFA, and it therefore does not give rise to a regulatory compliance burden for small entities.

Finally, the Bureau has determined that this final rule does not impose any new recordkeeping, reporting, or disclosure requirements on members of the public that would be collections of information requiring approval under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*

List of Subjects in 12 CFR Part 1070

Confidential business information, Consumer protection, Freedom of information, Privacy.

Authority and Issuance

For the reasons set forth in the preamble, the Bureau revises part 1070 to read as follows:

PART 1070—DISCLOSURE OF RECORDS AND INFORMATION

Subpart A—General Provisions and Definitions

Sec.

Subpart B—Freedom of Information Act

Sec.

Subpart C—Disclosure of CFPB Information in Connection With Legal Proceedings

Sec.

Subpart D—Confidential Information

Sec.

Subpart E—Privacy Act

Sec.

Authority: 12 U.S.C. 5481 et seq.; 5 U.S.C. 552; 5 U.S.C. 552a; 18 U.S.C. 1905; 18 U.S.C. 641; 44 U.S.C. ch. 30; 5 U.S.C. 301.

Subpart A—General Provisions and Definitions

§ 1070.1 Authority, purpose, and scope.

(a) *Authority.* (1) This part is issued by the Bureau of Consumer Financial Protection, an independent Bureau within the Federal Reserve System, pursuant to the Consumer Financial Protection Act of 2010, 12 U.S.C. 5481 et seq.; the Freedom of Information Act, 5 U.S.C. 552; the Privacy Act of 1974, 5 U.S.C. 552a; the Federal Records Act, 44 U.S.C. 3101; the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401; the Trade Secrets Act, 18 U.S.C. 1905; 18 U.S.C. 641; and any other applicable law that establishes a basis for the exercise of governmental authority by the CFPB.

(2) This part establishes mechanisms for carrying out the CFPB's statutory responsibilities under the statutes in paragraph (a)(1) of this section to the extent those responsibilities require the disclosure, production, or withholding of information. In this regard, the CFPB has determined that the CFPB, and its delegates, may disclose information of the CFPB, in accordance with the procedures set forth in this part, whenever it is necessary or appropriate to do so in the exercise of any of the CFPB's authority. The CFPB has determined that all such disclosures, made in accordance with the rules and procedures specified in this part, are authorized by law.

(b) *Purpose and scope.* This part contains the CFPB's rules relating to the disclosure of records and information generated by and obtained by the CFPB.

(1) Subpart A contains general provisions and definitions used in this part.

(2) Subpart B implements the Freedom of Information Act, 5 U.S.C. 552.

(3) Subpart C sets forth the procedures with respect to subpoenas, orders, or other requests for CFPB information in connection with legal proceedings.

(4) Subpart D provides for the protection of confidential information and procedures for sharing confidential information with supervised institutions, government agencies, and others in certain circumstances.

(5) Subpart E implements the Privacy Act of 1974, 5 U.S.C. 552a.

§ 1070.2 General definitions.

For purposes of this part:

(a) *Business day* means any day except Saturday, Sunday or a legal Federal holiday.

(b) *CFPB* means the Bureau of Consumer Financial Protection.

(c) *Chief FOIA Officer* means the Chief Operating Officer of the CFPB, or any CFPB employee to whom the Chief Operating Officer has delegated authority to act under this part.

(d) *Chief Operating Officer* means the Chief Operating Officer of the CFPB, or any CFPB employee to whom the Chief Operating Officer has delegated authority to act under this part.

(e) *Civil investigative demand material* means any documentary material, written report, or answers to questions, tangible thing, or transcript of oral testimony received by the CFPB in any form or format pursuant to a civil investigative demand, as those terms are set forth in 12 U.S.C. 5562, or received by the CFPB voluntarily in lieu of a civil investigative demand.

(f) *Confidential information* means confidential consumer complaint information, confidential investigative information, and confidential supervisory information, as well as any other CFPB information that may be exempt from disclosure under the Freedom of Information Act pursuant to 5 U.S.C. 552(b). Confidential information does not include information contained in records that have been made publicly available by the CFPB or information that has otherwise been publicly disclosed by an employee with the authority to do so.

(g) *Confidential consumer complaint information* means information received or generated by the CFPB, pursuant to 12 U.S.C. 5493 and 5534, that comprises or documents consumer complaints or inquiries concerning financial institutions or consumer financial products and services and responses thereto, to the extent that such information is exempt from disclosure pursuant to 5 U.S.C. 552(b).

(h) *Confidential investigative information* means:

(1) Civil investigative demand material; and

(2) Any documentary material prepared by, on behalf of, received by, or for the use by the CFPB or any other Federal or State agency in the conduct of an investigation of or enforcement action against a person, and any information derived from such documents.

(i)(1) *Confidential supervisory information* means:

(i) Reports of examination, inspection and visitation, non-public operating, condition, and compliance reports, and any information contained in, derived from, or related to such reports;

(ii) Any documents, including reports of examination, prepared by, or on behalf of, or for the use of the CFPB or any other Federal, State, or foreign government agency in the exercise of supervisory authority over a financial institution, and any information derived from such documents;

(iii) Any communications between the CFPB and a supervised financial institution or a Federal, State, or foreign government agency related to the CFPB's supervision of the institution;

(iv) any information provided to the CFPB by a financial institution to enable the CFPB to monitor for risks to consumers in the offering or provision of consumer financial products or services, or to assess whether an institution should be considered a covered person, as that term is defined by 12 U.S.C. 5481, or is subject to the CFPB's supervisory authority; and/or

(v) Information that is exempt from disclosure pursuant to 5 U.S.C. 552(b)(8).

(2) *Confidential supervisory information* does not include documents prepared by a financial institution for its own business purposes and that the CFPB does not possess.

(j) *Director* means the Director of the CFPB or his or her designee, or a person authorized to perform the functions of the Director in accordance with law.

(k) *Employee* means all current employees or officials of the CFPB, including employees of contractors and any other individuals who have been appointed by, or are subject to the supervision, jurisdiction, or control of the Director, as well as the Director. The procedures established within this part also apply to former employees where specifically noted.

(l) *Financial institution* means any person involved in the offering or provision of a ''financial product or service,'' including a ''covered person'' or ''service provider,'' as those terms are defined by 12 U.S.C. 5481.

(m) *General Counsel* means the General Counsel of the CFPB or any CFPB employee to whom the General Counsel has delegated authority to act under this part.

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

(o) *Report of examination* means the report prepared by the CFPB concerning the examination or inspection of a supervised financial institution.

(p) *State* means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, or the United States Virgin Islands or any Federally recognized Indian tribe, as defined by the Secretary of the Interior under section 104(a) of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a–1(a)), and includes any political subdivision thereof.

(q) *Supervised financial institution* means a financial institution that is or that may become subject to the CFPB's supervisory authority.

§ 1070.3 Custodian of records; certification; alternative authority.

(a) *Custodian of records.* The Chief Operating Officer is the official custodian of all records of the CFPB, including records that are in the possession or control of the CFPB or any CFPB employee.

(b) *Certification of record.* The Chief Operating Officer may certify the authenticity of any CFPB record or any copy of such record, for any purpose, and for or before any duly constituted Federal or State court, tribunal, or agency.

(c) *Alternative authority.* Any action or determination required or permitted to be done by the Chief Operating Officer may be done by any employee who has been duly designated for this purpose by the Chief Operating Officer.

§ 1070.4 Records of the CFPB not to be otherwise disclosed.

Except as provided by this part, employees or former employees of the CFPB, or others in possession of a record of the CFPB that the CFPB has not already made public, are prohibited from disclosing such records, without

authorization, to any person who is not an employee of the CFPB.

Subpart B—Freedom of Information Act

§ 1070.10 General.

This subpart contains the regulations of the CFPB implementing the Freedom of Information Act (the FOIA), 5 U.S.C. 552, as amended. These regulations set forth procedures for requesting access to records maintained by the CFPB. These regulations should be read together with the FOIA, the 1987 Office of Management and Budget Guidelines for FOIA Fees, the CFPB's Privacy Act regulations set forth in subpart E, and the FOIA Web page on the CFPB's Web site, *http://www.consumerfinance.gov,* which provide additional information about this topic.

§ 1070.11 Information made available; discretionary disclosures.

(a) *In general.* The FOIA provides for public access to information and records developed or maintained by Federal agencies. Generally, the FOIA divides agency information into three major categories and provides methods by which each category of information is to be made available to the public. The three major categories of information are as follows:

(1) Information required to be published in the **Federal Register** (see § 1070.12 of this subpart);

(2) Information required to be made available for public inspection and copying or, in the alternative, to be published and offered for sale (see § 1070.13 of this subpart); and

(3) Information required to be made available to any member of the public upon specific request (see §§ 1070.14 through 1070.22 of this subpart).

(b) *Discretionary disclosures.* Even though a FOIA exemption may apply to the information or records requested, the CFPB may, if not precluded by law, elect under the circumstances not to apply the exemption. The fact that the exemption is not applied by the CFPB in response to a particular request shall have no precedential significance in processing other requests, but is merely an indication that, in the processing of the particular request, the CFPB finds no necessity for applying the exemption.

(c) *Disclosures of records frequently requested.* Subject to the application of the FOIA exemptions and exclusions (5 U.S.C. 552(b) and (c)), the CFPB shall make publicly available, as provided by § 1070.13 of this subpart, all records regardless of form or format, which have been released previously to any person under 5 U.S.C. 552(a)(3) and §§ 1070.14 through 1070.22 of this subpart, and which the CFPB determines have become or are likely to become the subject of subsequent requests for substantially the same records. When the CFPB receives three (3) or more requests for substantially the same records, then the CFPB shall also make the released records publicly available.

§ 1070.12 Publication in the Federal Register.

(a) *Requirement.* The CFPB shall separately state, publish and maintain current in the **Federal Register** for the guidance of the public the following information:

(1) Descriptions of its central and field organization and the established place at which, the persons from whom, and the methods whereby, the public may obtain information, make submissions or requests, or obtain decisions;

(2) Statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(3) Rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(4) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the CFPB; and

(5) Each amendment, revision, or repeal of matters referred to in paragraphs (a)(1) through (4) of this section.

(b) *Exceptions.* Publication of the information under clause (a) of this subpart shall be subject to the application of the FOIA exemptions and exclusions (5 U.S.C. 552(b) and (c)) and the limitations provided in 5 U.S.C. 552(a)(1).

§ 1070.13 Public inspection and copying.

(a) *In general.* Subject to the application of the FOIA exemptions and exclusions (5 U.S.C. 552(b) and (c)), the CFPB shall, in conformance with 5 U.S.C. 552(a)(2), make available for public inspection and copying, including by posting on the CFPB's Web site, *http://www.consumerfinance.gov,* or, in the alternative, promptly publish and offer for sale the following information:

(1) Final opinions, including concurring and dissenting opinions, and orders made in the adjudication of cases;

(2) Those statements of policy and interpretations which have been adopted by the CFPB but are not published in the **Federal Register**;

(3) Its administrative staff manuals and instructions to staff that affect a member of the public;

(4) Copies of all records made publicly available pursuant to § 1070.11 of this subpart; and

(5) A general index of the records referred to in paragraph (a)(4) of this section.

(b) *Information made available online.* For records required to be made available for public inspection and copying pursuant to 5 U.S.C. 552(a)(2) (paragraphs (a)(1) through (4) of this section), as soon as practicable, the CFPB shall make such records available on its e-FOIA Library, located at *http://www.consumerfinance.gov.*

(c) *Record availability at the on-site e-FOIA Library.* Any member of the public may, upon request, access the CFPB's e-FOIA Library via a computer terminal at 1700 G Street NW., Washington, DC 20552. Such a request may be made by electronic means as set forth on the CFPB's Web site, *http://www.consumerfinance.gov,* or in writing, to the Chief FOIA Officer, Consumer Financial Protection Bureau, 1700 G Street NW., Washington, DC 20552. The request must indicate a preferred date and time for the requested access. The CFPB reserves the right to arrange a different date and time with the requester, if necessary.

(d) *Redaction of identifying details.* To prevent a clearly unwarranted invasion of personal privacy, the CFPB may redact identifying details contained in any matter described in paragraphs (a)(1) through (4) of this section before making such matters available for inspection or publication. The justification for the redaction shall be explained fully in writing, and the extent of such redaction shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in 5 U.S.C. 552(b) under which the redaction is made. If technically feasible, the extent of the redaction shall be indicated at the place in the record where the redaction is made.

§ 1070.14 Requests for CFPB records.

(a) *In general.* Subject to the application of the FOIA exemptions and exclusions (5 U.S.C. 552(b) and (c)), the CFPB shall promptly make its records available to any person pursuant to a request that conforms to the rules and procedures of this section.

(b) *Form of request.* A request for records of the CFPB shall be made in writing or by electronic means.

(1) If a request is made in writing, it shall be addressed to the Chief FOIA Officer, Consumer Financial Protection Bureau, 1700 G Street NW., Washington, DC 20552. The request shall be labeled ''Freedom of Information Act Request.''

(2) If a request is made by electronic means, it shall be submitted as set forth on the CFPB's Web site, *http://www.consumerfinance.gov.* The request shall be labeled ''Freedom of Information Act Request.''

(c) *Content of request.* (1) In order to ensure the CFPB's ability to respond in a timely manner, a FOIA request should describe the records that the requester seeks in sufficient detail to enable CFPB personnel to locate them with a reasonable amount of effort. Whenever possible, the request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record. If known, the requester should include any file designations or descriptions for the records requested. As a general rule, the more specific the requester is about the records or type of records requested, the more likely the CFPB will be able to locate those records in response to the request;

(2) In order to ensure the CFPB's ability to communicate effectively with the requester, a request should include contact information for the requester, including the name of the requester and, to the extent available, a mailing address, telephone number, and email address at which the CFPB may contact the requester regarding the request;

(3) The request should state whether the requester wishes to inspect the records or desires to receive an electronic copy or have a copy made and furnished without first inspecting the records;

(4) For the purpose of determining any fees that may apply to processing a request, a requester should indicate in the request whether the requester is a commercial user, an educational institution, non-commercial scientific institution, representative of the news media, governmental entity, or ''other'' requester, as those terms are defined in § 1070.22(b) of this subpart, and the basis for claiming that fee category. Requesters may seek assistance in determining the appropriate fee category by contacting the CFPB's FOIA Public Liaison at the telephone number listed on the CFPB's Web site, *http://www.consumerfinance.gov.* The CFPB will use any information provided to the FOIA Public Liaison solely for the purpose of determining the appropriate fee category that applies to the requester;

(5) If a requester seeks a waiver or reduction of fees associated with processing a request, then the request shall include a statement to that effect as is required by § 1070.22(e) of this subpart. Any request that does not seek a waiver or reduction of fees constitutes an agreement of the requester to pay any and all fees (of up to $25) that may apply to the request, as otherwise set forth in § 1070.22 of this subpart, except that the requester may specify in the request an upper limit (of not less than $25) that the requester is willing to pay to process the request; and

(6) If a requester seeks expedited processing of a request, then the request must include a statement to that effect as is required by § 1070.17 of this subpart.

(d) *Perfected requests; effect of request deficiencies.* For purposes of computing its deadline to respond to a request, the CFPB will deem itself to have received a request only if, and on the date that, it receives a request that contains substantially all of the information required by and that otherwise conforms with paragraphs (b) and (c) of this section. The CFPB need not accept a request, process a request, or be bound by any deadlines in this subpart for processing a request that fails to conform, in any material respect, to the requirements of paragraphs (b) and (c) of this section. If a request is deficient in any material respect, then the CFPB may return it to the requester and if it does so, it shall advise the requester in what respect the request is deficient, and what additional information is needed to respond to the request. The requester may then amend or resubmit the request. A determination by the CFPB that a request is deficient in any respect is not a denial of a request for records and such determinations are not subject to appeal. If a requester fails to respond to a CFPB notification that a request is deficient within thirty (30) days of the CFPB's notification, the CFPB will deem the request withdrawn.

(e) *Requests by an individual for CFPB records pertaining to that individual.* An individual who wishes to inspect or obtain copies of records of the Bureau that pertain to that individual shall file a request in accordance with subpart E of these rules.

(f) *Requests for CFPB records pertaining to another individual.* Where a request for records pertains to a third party, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration by that individual made in compliance with the requirements set forth in 28 U.S.C. 1746 authorizing disclosure of the records to the requester, or submits proof that the individual is deceased (e.g., a copy of a death certificate or an obituary). The CFPB may require a requester to supply additional information if necessary in order to verify that a particular individual has consented to disclosure.

§ 1070.15 Responsibility for responding to requests for CFPB records.

(a) *In general.* In determining which records are responsive to a request, the CFPB ordinarily will include only records in its possession as of the date the CFPB begins its search for them. If any other date is used, the CFPB shall inform the requester of that date.

(b) *Authority to grant or deny requests.* The Chief FOIA Officer shall be authorized to grant or deny any request for a record of the CFPB.

(c) *Consultations and referrals.* (1) When a requested record has been created by an agency other than the CFPB, the CFPB shall refer the record to the originating agency for a direct response to the requester.

(2) When a FOIA request is received for a record created by the CFPB that includes information originated by another agency, the CFPB shall consult the originating agency for review and recommendation on disclosure. The CFPB shall not release any such records without prior consultation with the originating agency.

(d) *Notice of referral.* Whenever the CFPB refers all or any part of the responsibility for responding to a request to another agency, it will notify the requester of the referral and inform the requester of the name of each agency to which the request has been referred, in whole or in part.

§ 1070.16 Timing of responses to requests for CFPB records.

(a) *In general.* Except as set forth in paragraphs (b) through (d) of this section, and § 1070.17 of this subpart, the CFPB shall respond to requests according to their order of receipt.

(b) *Multitrack processing.* (1) The CFPB may establish separate tracks to process simple and complex requests. The CFPB may assign a request to the simple or complex track(s) based on the amount of work and/or time needed to process the request. The CFPB shall process requests in each track based on the date the request was perfected in accordance with § 1070.14(d).

(2) The CFPB may provide a requester in its complex track with an opportunity to limit the scope of the request to

qualify for faster processing within the specified limits of the simple track(s).

(c) *Time period for responding to requests for records.* Ordinarily, the CFPB shall have twenty (20) business days from when a request is received by the CFPB to determine whether to grant or deny a request for records. The twenty (20) business day time period set forth in this paragraph shall not be tolled by the CFPB except that the CFPB may:

(1) Make one reasonable demand to the requester for clarifying information about the request and toll the twenty (20) business day time period while it awaits the clarifying information; or

(2) Toll the twenty (20) business day time period while it awaits clarification from or addresses any dispute with the requester regarding the assessment of fees.

(d) *Unusual circumstances.* (1) Where the CFPB determines that due to unusual circumstances it cannot respond either to a request within the time period set forth in paragraph (c) of this section or to an appeal within the time period set forth in § 1070.21 of this subpart, the CFPB may extend the applicable time periods by informing the requester in writing of the unusual circumstances and of the date by which the CFPB expects to complete its processing of the request or appeal. Any extension or extensions of time with respect to a request or an appeal shall not cumulatively total more than ten (10) business days. However, if the CFPB determines that it needs additional time beyond a ten (10) business day extension to process the request or appeal, then the CFPB shall notify the requester and provide the requester with an opportunity to limit the scope of the request or appeal or to arrange for an alternative time frame for processing the request or appeal or a modified request or appeal. The requester shall retain the right to define the desired scope of the request or appeal, as long as it meets the requirements contained in this subpart.

(2) As used in this paragraph, ''unusual circumstances'' means:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) The need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or more CFPB offices having substantial subject matter interest therein.

§ 1070.17 Requests for expedited processing.

(a) *In general.* The CFPB shall process a request on an expedited basis whenever a requester demonstrates a compelling need for expedited processing in accordance with the requirements of this paragraph or in other cases that the CFPB deems appropriate.

(b) *Form and content of a request for expedited processing.* A request for expedited processing shall be made as follows:

(1) A request for expedited processing shall be made in writing or by electronic means and submitted as part of a request for records in accordance with section 1070.14(b). When a request for records includes a request for expedited processing, the request shall be labeled ''Expedited Processing Requested.''

(2) A request for expedited processing shall contain a statement that demonstrates a compelling need for the requester to obtain expedited processing of the requested records. A ''compelling need'' is defined as follows:

(i) Failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual. The requester shall fully explain the circumstances warranting such an expected threat so that the CFPB may make a reasoned determination that a delay in obtaining the requested records could pose such a threat; or

(ii) With respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal government activity. A person ''primarily engaged in disseminating information'' does not include individuals who are engaged only incidentally in the dissemination of information. The standard of ''urgency to inform'' requires that the records requested pertain to a matter of current exigency to the American public and that delaying a response to a request for records would compromise a significant recognized interest to and throughout the American general public. The requester must adequately explain the matter or activity and why the records sought are necessary to be provided on an expedited basis.

(3) The requester shall certify the written statement that purports to demonstrate a compelling need for expedited processing to be true and correct to the best of the requester's knowledge and belief. The certification must be in the form prescribed by 28 U.S.C. 1746: ''I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on [date].'' The requester shall mail or submit electronically a copy of such written certification to the Chief FOIA Officer as set forth in § 1070.14(b) of this subpart. The CFPB may waive this certification requirement in appropriate circumstances.

(c) *Determinations of requests for expedited processing.* Within ten (10) calendar days of its receipt of a request for expedited processing, the CFPB shall decide whether to grant it and shall notify the requester of the determination in writing.

(d) *Effect of granting requests for expedited processing.* If the CFPB grants a request for expedited processing, then the CFPB shall give the expedited request priority over non-expedited requests and shall process the expedited request as soon as practicable. The CFPB may assign expedited requests to their own simple and complex processing tracks based upon the amount of work and/or time needed to process them. Within each such track, an expedited request shall be processed in the order of its receipt.

(e) *Appeals of denials of requests for expedited processing.* If the CFPB denies a request for expedited processing, then the requester shall have the right to submit an appeal of the denial determination in accordance with § 1070.21 of this subpart. The CFPB shall communicate this appeal right as part of its written notification to the requester denying expedited processing. The requester shall label its appeal request ''Appeal for Expedited Processing.'' The CFPB shall act expeditiously upon an appeal of a denial of a request for expedited processing.

§ 1070.18 Responses to requests for CFPB records.

(a) *Acknowledgements of requests.* Upon receipt of a perfected request, the CFPB will assign to the request a unique tracking number. The CFPB will send an acknowledgement letter to the requester by mail or email within ten (10) calendar days of receipt of the request. The acknowledgment letter will contain the following information:

(1) The applicable request tracking number;

(2) The date of receipt of the request, as determined in accordance with section 1070.14(d) of this subpart, as well as the date when the requester may expect a response;

(3) A brief statement identifying the subject matter of the request; and

(4) A confirmation, with respect to any fees that may apply to the request pursuant to § 1070.22 of this subpart, that the requester has sought a waiver or reduction in such fees, has agreed to pay any and all applicable fees, or has specified an upper limit (of not less than $25) that the requester is willing to pay in fees to process the request.

(b) *Initial determination to grant or deny a request.* (1) The officer designated in § 1070.15(b) to this subpart, or his or her delegate, shall make initial determinations either to grant or to deny in whole or in part requests for records.

(2) If the request is granted in full or in part, and if the requester requests a copy of the records requested, then a copy of the records shall be mailed or emailed to the requester in the requested format, to the extent the records are readily producible in the requested format. The CFPB shall also send the requester a statement of the applicable fees, either at the time of the determination or shortly thereafter.

(3) In the case of a request for inspection, the requester shall be notified in writing of the determination, when and where the requested records may be inspected, and of the fees incurred in complying with the request. The CFPB shall then promptly make the records available for inspection at the time and place stated, in a manner that will not interfere with CFPB's operations and will not exclude other persons from making inspections. The requester shall not be permitted to remove the records from the room where inspection is made. If, after making inspection, the requester desires copies of all or a portion of the requested records, copies shall be furnished upon payment of the established fees prescribed by § 1070.22 of this subpart. Fees may be charged for search and review time as stated in § 1070.22 of this subpart.

(4) If it is determined that the request for records should be denied in whole or in part, the requester shall be notified by mail or by email. The letter of notification shall:

(i) State the exemptions relied upon in denying the request;

(ii) If technically feasible, indicate the amount of information deleted and the exemptions under which the deletion is made at the place in the record where such deletion is made (unless providing such indication would harm an interest protected by the exemption relied upon to deny such material);

(iii) Set forth the name and title or position of the responsible official;

(iv) Advise the requester of the right to administrative appeal in accordance with § 1070.21 of this subpart; and

(v) Specify the official or office to which such appeal shall be submitted.

(5) If it is determined, after a reasonable search for records, that no responsive records have been found to exist, the requester shall be notified in writing or by email. The notification shall also advise the requester of the right to administratively appeal the CFPB's determination that no responsive records exist (*i.e.,* to challenge the adequacy of the CFPB's search for responsive records) in accordance with § 1070.21 of this subpart. The response shall specify the official or office to which the appeal shall be submitted for review.

§ 1070.19 Classified information.

Whenever a request is made for a record containing information that another agency has classified, or which may be appropriate for classification by another agency under Executive Order 13526 or any other executive order concerning the classification of information, the CFPB shall refer the responsibility for responding to the request to the classifying or originating agency, as appropriate.

§ 1070.20 Requests for business information provided to the CFPB.

(a) *In general.* Business information provided to the CFPB by a business submitter shall not be disclosed pursuant to a FOIA request except in accordance with this section.

(b) *Definitions.* For purposes of this section:

(1) *Business information* means commercial or financial information obtained by the CFPB from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(2) *Submitter* means any person from whom the CFPB obtains business information, directly or indirectly. The term includes, without limitation, corporations, State, local, and tribal governments, and foreign governments.

(c) *Designation of business information.* A submitter of business information will use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4 of the FOIA. These designations will expire ten (10) years after the date of the submission unless the submitter requests otherwise and provides justification for, a longer designation period.

(d) *Notice to submitters.* The CFPB shall provide a submitter with prompt written notice of receipt of a request or appeal encompassing its business information whenever required in accordance with paragraph (e) of this section. Such written notice shall either describe the exact nature of the business information requested or provide copies of the records or portions of records containing the business information. When notification of a voluminous number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish it.

(e) *When notice is required.* (1) The CFPB shall provide a submitter with notice of receipt of a request or appeal whenever:

(i) The information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(ii) The CFPB has reason to believe that the information may be protected from disclosure under Exemption 4.

(2) The notice requirements of this paragraph shall not apply if:

(i) The CFPB determines that the information is exempt under the FOIA;

(ii) The information lawfully has been published or otherwise made available to the public;

(iii) Disclosure of the information is required by statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600 (3 CFR, 1988 Comp., p. 235); or

(iv) The designation made by the submitter under paragraph (e)(1)(i) of this section appears obviously frivolous, except that, in such a case, the CFPB shall, within a reasonable time prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information.

(f) *Opportunity to object to disclosure.* (1) Through the notice described in paragraph (d) of this section, the CFPB shall afford a submitter ten (10) business days from the date of the notice to provide the CFPB with a detailed statement of any objection to disclosure. Such statement shall specify all grounds for withholding any of the information under any exemption of the FOIA and, in the case of Exemption 4, shall demonstrate why the information is considered to be a trade secret or commercial or financial information that is privileged or confidential. In the event that a submitter fails to respond to the notice within the time specified in it, the submitter shall be considered to have no objection to disclosure of the information. Information provided by a

submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(2) When notice is given to a submitter under this section, the requester shall be advised that such notice has been given to the submitter. The requester shall be further advised that a delay in responding to the request may be considered a denial of access to records and that the requester may proceed with an administrative appeal or seek judicial review, if appropriate. However, the requester will be invited to agree to a voluntary extension of time so that the CFPB may review the submitter's objection to disclose, if any.

(g) *Notice of intent to disclose.* The CFPB shall consider carefully a submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose business information. Whenever the CFPB decides to disclose business information over the objection of a submitter, the CFPB shall forward to the submitter a written notice which shall include:

(1) A statement of the reasons for which the submitter's disclosure objections were not sustained;

(2) A description of the business information to be disclosed; and

(3) A specified disclosure date which is not less than ten (10) business days after the notice of the final decision to release the requested information has been mailed to the submitter. Except as otherwise prohibited by law, a copy of the disclosure notice shall be forwarded to the requester at the same time.

(h) *Notice to submitter of FOIA lawsuit.* Whenever a requester brings suit seeking to compel disclosure of business information, the CFPB shall promptly notify the submitter of that business information of the existence of the suit.

(i) *Notice to requester of business information.* The CFPB shall notify a requester whenever it provides the submitter with notice and an opportunity to object to disclosure; whenever it notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

§ 1070.21 Administrative appeals.

(a) *Grounds for administrative appeals.* A requester may appeal an initial determination of the CFPB, including for the following reasons:

(1) To deny access to records in whole or in part (as provided in § 1070.18(b) of this subpart);

(2) To assign a particular fee category to the requestor (as provided in § 1070.22(b) of this subpart);

(3) To deny a request for a reduction or waiver of fees (as provided in § 1070.22(e) of this subpart);

(4) That no records exist that are responsive to the request (as provided in § 1070.18(b) of this subpart); or

(5) To deny a request for expedited processing (as provided in § 1070.17(e) of this subpart).

(b) *Time limits for filing administrative appeals.* An appeal, other than an appeal of a denial of expedited processing, must be postmarked or submitted electronically on a date that is within forty-five (45) calendar days of the date of the initial determination or the date of the letter transmitting the last records released, whichever is later. An appeal of a denial of expedited processing must be made within ten (10) days of the date of the initial determination letter to deny expedited processing (see § 1070.17 of this subpart).

(c) *Form and content of administrative appeals.* In order to ensure a timely response to an appeal, the appeal shall be made in writing or by electronic means as follows:

(1) If appeal is made in writing, it shall be addressed to and submitted to the officer specified in paragraph (e) of this section at the address set forth in § 1070.14(b) of this subpart. The appeal shall be labeled ''Freedom of Information Act Appeal.''

(2) If an appeal is made by electronic means, it shall be addressed to the officer specified in paragraph (e) of this section and submitted as set forth on the CFPB's Web site, *http://www.consumerfinance.gov.* The appeal shall be labeled ''Freedom of Information Act Appeal.''

(3) The appeal shall set forth contact information for the requester, including, to the extent available, a mailing address, telephone number, or email address at which the CFPB may contact the requester regarding the appeal; and

(4) The appeal shall specify the applicable request tracking number, the date of the initial request, and the date of the letter of initial determination, and, where possible, enclose a copy of the initial request and the initial determination being appealed.

(d) *Processing of administrative appeals.* Appeals will be stamped with the date of their receipt by the FOIA response office, and will be processed in the order of their receipt. The receipt of the appeal will be acknowledged by the CFPB and the requester will be advised of the date the appeal was received, the appeal tracking number, and the expected date of response.

(e) *Determinations to grant or deny administrative appeals.* The General Counsel is authorized to and shall decide whether to affirm the initial determination (in whole or in part) or to reverse the initial determination (in whole or in part) and shall notify the requester of this decision in writing within twenty (20) business days after the date of receipt of the appeal, unless extended pursuant to § 1070.16(d) of this subpart.

(1) If it is decided that the appeal is to be denied (in whole or in part) the requester shall be:

(i) Notified in writing of the denial;

(ii) Notified of the reasons for the denial, including which of the FOIA exemptions were relied upon;

(iii) Notified of the name and title or position of the official responsible for the determination on appeal;

(iv) Provided with a statement that judicial review of the denial is available in the United States District Court for the judicial district in which the requester resides or has a principal place of business, the judicial district in which the requested records are located, or the District of Columbia in accordance with 5 U.S.C. 552(a)(4)(B); and

(v) Provided with notification that mediation services are available to the requester as a non-exclusive alternative to litigation through the Office of Government Information Services in accordance with 5 U.S.C. 552(h)(3).

(2) If the initial determination is reversed on appeal, the requester shall be so notified and the request shall be processed promptly in accordance with the decision on appeal.

(3) If the initial determination is remanded on appeal to the Chief FOIA Officer for further action, the requester shall be so notified and the request shall be processed in accordance with the decision on appeal. The remanded request shall be treated as a new request received by the CFPB as of the date when the General Counsel transmits the remand notification to the requester. The procedures and deadlines set forth in this subpart for processing, deciding, responding to, and filing administrative appeals of new FOIA requests shall apply to the remanded request.

(f) *Adjudication of administrative appeals of requests in litigation.* An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation.

§ 1070.22 Fees for processing requests for CFPB records.

(a) *In general.* The CFPB shall determine whether and to what extent to charge a requester fees for processing a FOIA request, for the services and in the amounts set forth in this paragraph, by determining an appropriate fee category for the requester (as set forth in paragraph (b) of this section) and then by charging the requester those fees applicable to the assigned category (as set forth in paragraph (c) of this section), unless circumstances exist (as described in paragraph (d) of this section) that render fees inapplicable or inadvisable or unless the requester has requested and the CFPB has granted a reduction in or waiver of fees (as set forth in paragraph (e) of this section).

(1) The CFPB shall charge a requester fees for the cost of copying or printing records at the rate of $0.10 per page.

(2) The CFPB shall charge a requester for all time spent by its employees searching for records that are responsive to a request. The CFPB shall charge the requester fees for search time as follows:

(i) The CFPB shall charge for search time at the salary rate(s) (basic pay plus sixteen (16) percent) of the employee(s) who conduct the search. However, the CFPB shall charge search fees at the rate of $9.00 per fifteen (15) minutes of search time whenever only administrative/clerical employees conduct a search and at the rate of $23.00 per fifteen (15) minutes of search time whenever only professional/executive employees conduct a search. Search charges shall also include transportation of employees and records necessary to the search at actual cost. Fees may be charged for search time even if the search does not yield any responsive records, or if records are exempt from disclosure.

(ii) The CFPB shall charge the requester for the actual direct costs of conducting an electronic records search, including computer search time, runs, and output. The CFPB shall also charge for time spent by computer operators or programmers (at the rates set forth in paragraph (a)(2)(i) of this section) who conduct or assist in the conduct of an electronic records search.

(3) The CFPB shall charge a requester for time spent by its employees examining responsive records to determine whether any portions of such record are exempt from disclosure, pursuant to the FOIA exemptions of 5 U.S.C. 552(b). The CFPB shall also charge a requester for time spent by its employees redacting any such exempt information from a record and preparing a record for release to the requester. The CFPB shall charge a requester for time spent reviewing records at the salary rate(s) (*i.e.,* basic pay plus sixteen (16) percent) of the employees who conduct the review. However, the CFPB shall charge review fees at the rate of $9.00 per fifteen (15) minutes of search time whenever only administrative/clerical employees review records and at the rate of $23.00 per fifteen (15) minutes of search time whenever only professional/executive employees review records. Fees shall be charged for review time even if records ultimately are not disclosed.

(4) Fees for all services provided shall be charged whether or not copies are made available to the requester for inspection. However, no fee shall be charged for monitoring a requester's inspection of records.

(5) Other services and materials requested which are not covered by this part nor required by the FOIA are chargeable at the actual cost to the CFPB. This includes, but is not limited to:

(i) Certifying that records are true copies; or

(ii) Sending records by special methods such as express mail, etc.

(b) *Categories of requesters.* (1) For purposes of assessing fees as set forth in this section, each requester shall be assigned to one of the following categories:

(i) *Commercial user* refers to one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation. The CFPB may determine from the use specified in the request that the requester is a commercial user.

(ii) *Educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(iii) *Non-commercial scientific institution* refers to an institution that is not operated on a ''commercial user'' basis as that term is defined in paragraph (b)(2)(i) of this section, and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(iv) *Representative of the news media* refers to any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this paragraph, the term 'news' means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of 'news') who make their products available for purchase by or subscription by or free distribution to the general public. Other examples of news media entities include online publications and Web sites that regularly deliver news content to the public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the CFPB may also consider the past publication record of the requester in making such a determination.

(v) *''Other'' requester* refers to a requester who does not fall within any of the previously described categories.

(2) Within twenty (20) calendar days of its receipt of a request, the CFPB shall make a determination as to the proper fee category to apply to a requester. The CFPB shall inform the requester of the determination in the request acknowledgment letter, or if no such letter is required, in writing. The CFPB shall base its determination upon a review of the requester's submission and the CFPB's own records. Where the CFPB has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, the CFPB should seek additional clarification before assigning the request to a specific category.

(3) If the CFPB assigns to a requester a fee category, then the requester shall have the right to submit an appeal of the CFPB's determination in accordance with § 1070.21 of this subpart. The CFPB shall communicate this appeal right as part of its written notification to the requester of an adverse fee category determination. The requester shall label its appeal request ''Appeal of Fee Category Determination.''

(c) *Fees applicable to each category of requester.* The following fee schedule applies uniformly throughout the CFPB to requests processed under the FOIA. Specific levels of fees are prescribed for each category of requester defined in paragraph (b) of this section.

(1) Commercial users shall be charged the full direct costs of searching for, reviewing, and duplicating the records they request. Moreover, when a request is received for disclosure that is primarily in the commercial interest of the requester, the CFPB is not required to consider a request for a waiver or reduction of fees based upon the assertion that disclosure would be in the public interest. The CFPB may recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records or no records are located.

(2) Educational and non-commercial scientific institution requesters shall be charged only for the cost of duplicating the records they request, except that the CFPB shall provide the first one hundred (100) pages of duplication free of charge. To be eligible, requesters must show that the request is made under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research. These categories do not include requesters who want records for use in meeting individual academic research or study requirements.

(3) Representatives of the news media shall be charged only for the cost of duplicating the records they request, except that the CFPB shall provide them with the first one hundred (100) pages of duplication free of charge.

(4) Other requesters who do not fit any of the categories described above shall be charged the full direct cost of searching for and duplicating records that are responsive to the request, except that the CFPB shall provide the first one hundred (100) pages of duplication and the first two hours of search time free of charge. The CFPB may recover the cost of searching for records even if there is ultimately no disclosure of records, or no records are located. Requests from persons for records about themselves filed in the CFPB's systems of records shall continue to be treated under the fee provisions of the Privacy Act of 1974, 5 U.S.C. 552a, which permit fees only for duplication, after the first one hundred (100) pages are furnished free of charge.

(d) *Other circumstances when fees are not charged.* Notwithstanding paragraphs (b) and (c) of this section, the CFPB may not charge a requester a fee for processing a FOIA request if any of the following applies:

(1) The cost of collecting a fee would be equal to or greater than the fee itself;

(2) The fees were waived or reduced in accordance with paragraph (e) of this section;

(3) If the CFPB fails to comply with any time limit under §§ 1070.15 or 1070.21 of this subpart, and no unusual circumstances (as that term is defined in § 1070.16(d)) or exceptional circumstances apply to the processing of the request, then the CFPB shall not assess search fees, or if the requester is a representative of the news media or an educational or noncommercial scientific institution, then the CFPB shall not assess duplication fees. The term ''exceptional circumstances'' does not include a delay that results from a predictable CFPB workload of requests, unless the CFPB demonstrates reasonable progress in reducing its backlog of pending requests; or

(4) If the CFPB determines, as a matter of administrative discretion, that waiving or reducing the fees would serve the interest of the United States Government.

(e) *Waiver or reduction of fees.* (1) A requester shall be entitled to receive from the CFPB a waiver or reduction in the fees otherwise applicable to a FOIA request whenever the requester:

(i) Requests such waiver or reduction of fees in writing or by electronic means as part of the FOIA request;

(ii) Labels the request for waiver or reduction of fees ''Fee Waiver or Reduction Requested'' on the FOIA request; and

(iii) Demonstrates that the fee reduction or waiver request that a waiver or reduction of the fees is in the public interest because:

(A) Furnishing the information is likely to contribute significantly to public understanding of the operations or activities of the government; and

(B) Furnishing the information is not primarily in the commercial interest of the requester.

(2) To determine whether the requester has satisfied the requirements of paragraph (e)(1)(ii)(A), the CFPB shall consider the following factors:

(i) The subject of the requested records must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, and not remote or attenuated.

(ii) The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be ''likely to contribute'' to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially similar form, is not as likely to contribute to the public's understanding.

(iii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

(iv) The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent.

(3) To determine whether the requester has satisfied the requirements of paragraph (e)(1)(ii)(B), the CFPB shall consider the following factors:

(i) The CFPB shall consider any commercial interest of the requester (with reference to the definition of ''commercial user'' in (b)(1)(i) of this section), or of any person on whose behalf the requester may be acting, that would be furthered by the requested disclosure. Requesters shall be given an opportunity in the administrative process to provide explanatory information regarding this consideration.

(ii) A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. The CFPB ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

(4) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted for those records.

(5) The CFPB shall decide whether to grant or deny a request to reduce or waive fees prior to processing a request. The CFPB shall notify the requester of the determination in writing.

(6) If the CFPB denies a request to reduce or waive fees, then the CFPB shall advise the requester, in the denial notification letter, that the requester may incur fees if the CFPB proceeds to process the request. The notification letter shall also advise the requester that the CFPB will not proceed to process the request further unless the requester, in writing, directs the CFPB to do so and either agrees to pay any fees that may apply to processing the request or specifies an upper limit (of not less than $25) that the requester is willing to pay to process the request. If the CFPB does not receive this written direction and agreement/specification within thirty (30) calendar days of the date of the denial notification letter, then the CFPB shall deem the request to be withdrawn.

(7) If the CFPB denies a request to reduce or waive fees, then the requester shall have the right to submit an appeal of the denial determination in accordance with section 1070.21 of this subpart. The CFPB shall communicate this appeal right as part of its written notification to the requester denying the fee reduction or waiver request. The requester should label its appeal request ''Appeal for Fee Reduction/Waiver.''

(f) *Advance notice and prepayment of fees.* (1) When the CFPB estimates the fees for processing a request to exceed the limit set by the requester, and that amount is less than $250, or the requester did not specify a limit and the amount is less than $250, the requester shall be notified of the estimated fees, and provided a breakdown of the fees attributable to search, review, and duplication, respectively. The requester must provide an agreement to pay the estimated fees; however, the requester shall also be given an opportunity to reformulate the request in an attempt to reduce fees.

(2) If the requester has failed to state a limit and the fees are estimated to exceed $250, the requester shall be notified of the estimated fees and provided a breakdown of the fees attributable to search, review, and duplication, respectively. The requester must pre-pay such amount prior to the processing of the request, or provide satisfactory assurance of full payment if the requester has a history of prompt payment of FOIA fees. The requester shall also be given an opportunity to reformulate the request in such a way as to lower the applicable fees.

(3) The CFPB reserves the right to request prepayment after a request is processed and before documents are released.

(4) If a requester has previously failed to pay a fee within thirty (30) calendar days of the date of the billing, the requester shall be required to pay the full amount owed plus any applicable interest and to make an advance payment of the full amount of the estimated fee before the CFPB begins to process a new request or the pending request.

(5) When the CFPB acts under paragraphs (f)(1) through (4) of this section, the statutory time limits of twenty (20) days (excluding Saturdays, Sundays, and legal public holidays) from receipt of initial requests or appeals, plus extensions of these time limits, shall begin only after fees have been paid, a written agreement to pay fees has been provided, or a request has been reformulated.

(g) *Form of payment.* Payment may be tendered as set forth on the CFPB's Web site, *http://www.consumerfinance.gov.*

(h) *Charging interest.* The CFPB may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the date of the billing until payment is received by the CFPB. The CFPB will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97–365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(i) *Aggregating requests.* Where the CFPB reasonably believes that a requester or a group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, the CFPB may aggregate those requests and charge accordingly. The CFPB may presume that multiple requests of this type made within a thirty (30) day period have been made in order to avoid fees. Where requests are separated by a longer period, the CFPB will aggregate them only where there exists a solid basis for determining that aggregation is warranted under all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

§ 1070.23 Authority and responsibilities of the Chief FOIA Officer.

(a) *Chief FOIA Officer.* The Director authorizes the Chief FOIA Officer to act upon all requests for agency records, with the exception of determining appeals from the initial determinations of the Chief FOIA Officer, which will be decided by the General Counsel. The Chief FOIA officer shall, subject to the authority of the Director:

(1) Have CFPB-wide responsibility for efficient and appropriate compliance with the FOIA;

(2) Monitor implementation of the FOIA throughout the CFPB and keep the Director, the General Counsel, and the Attorney General appropriately informed of the CFPB's performance in implementing the FOIA;

(3) Recommend to the Director such adjustments to agency practices, policies, personnel and funding as may be necessary to improve the Chief FOIA Officer's implementation of the FOIA;

(4) Review and report to the Attorney General, through the Director, at such times and in such formats as the Attorney General may direct, on the CFPB's performance in implementing the FOIA;

(5) Facilitate public understanding of the purposes of the statutory exemptions of the FOIA by including concise descriptions of the exemptions in both the CFPB's handbook and the CFPB's annual report on the FOIA, and by providing an overview, where appropriate, of certain general categories of CFPB records to which those exemptions apply;

(6) Designate one or more FOIA Public Liaisons; and

(7) Maintain and update, as necessary and in accordance with the requirements of this subpart, the CFPB's FOIA Web site, including its e-FOIA Library.

(b) *FOIA Public Liaisons.* FOIA Public Liaisons shall report to the Chief FOIA Officer and shall serve as supervisory officials to whom a requester can raise concerns about the service the requester has received from the CFPB's FOIA office, following an initial response from the FOIA office staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

Subpart C—Disclosure of CFPB Information in Connection With Legal Proceedings

§ 1070.30 Purpose and scope; definitions.

(a) This subpart sets forth the procedures to be followed with respect to:

(1) Service of summonses and complaints directed to the CFPB, the Director, or to any CFPB employee in connection with Federal or State litigation arising out of or involving the performance of official activities of the CFPB; and

(2) Subpoenas, court orders, or other requests or demands for any CFPB information, whether contained in the files of the CFPB or acquired by a CFPB employee as part of the performance of

that employee's duties or by virtue of employee's official status.

(b) This subpart does not apply to requests for official information made pursuant to subparts B, D, and E of this part.

(c) This subpart does not apply to requests for information made in the course of adjudicating claims against the CFPB by CFPB employees (present or former) or applicants for CFPB employment for which jurisdiction resides with the U.S. Equal Employment Opportunity Commission, the U.S. Merit Systems Protection Board, the Office of Special Counsel, the Federal Labor Relations Authority, or their successor agencies, or a labor arbitrator operating under a collective bargaining agreement between the CFPB and a labor organization representing CFPB employees.

(d) This subpart is intended only to inform the public about CFPB procedures concerning the service of process and responses to subpoenas, summons, or other demands or requests for official information or action and is not intended to and does not create, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the CFPB or the United States.

(e) For purposes of this subpart:

(1) *Demand* means a subpoena or order for official information, whether contained in CFPB records or through testimony, related to or for possible use in a legal proceeding.

(2) *Legal proceeding* encompasses all pre-trial, trial, and post-trial stages of all judicial or administrative actions, hearings, investigations, or similar proceedings before courts, commissions, boards, grand juries, arbitrators, or other judicial or quasi-judicial bodies or tribunals, whether criminal, civil, or administrative in nature, and whether foreign or domestic. This phrase includes all stages of discovery as well as formal or informal requests by attorneys or others involved in legal proceedings.

(3) *Official Information* means all information of any kind, however stored, that is in the custody and control of the CFPB or was acquired by CFPB employees, or former employees as part of their official duties or because of their official status while such individuals were employed by or served on behalf of the CFPB. Official information also includes any information acquired by CFPB employees or former employees while such individuals were engaged in matters related to consumer financial protection functions prior to the employees' transfer to the CFPB pursuant to Subtitle F of the Consumer Financial Protection Act of 2010.

(4) *Request* means any request for official information in the form of testimony, affidavits, declarations, admissions, responses to interrogatories, document production, inspections, or formal or informal interviews, during the course of a legal proceeding, including pursuant to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or other applicable rules of procedure.

(5) *Testimony* means a statement in any form, including personal appearances before a court or other legal tribunal, interviews, depositions, telephonic, televised, or videographed statements or any responses given during discovery or similar proceeding in the course of litigation.

§ 1070.31 Service of summonses and complaints.

(a) Only the General Counsel is authorized to receive and accept summonses or complaints sought to be served upon the CFPB or CFPB employees sued in their official capacity. Such documents should be served upon the General Counsel, Consumer Financial Protection Bureau, 1700 G Street NW., Washington, DC 20552. This authorization for receipt shall in no way affect the requirements of service elsewhere provided in applicable rules and regulations.

(b) If, notwithstanding paragraph (a) of this section, any summons or complaint described in that paragraph is delivered to an employee of the CFPB, the employee shall decline to accept the proffered service and may notify the person attempting to make service of the regulations set forth herein. If, notwithstanding this instruction, an employee accepts service of a document described in paragraph (a) of this section, the employee shall immediately notify and deliver a copy of the summons and complaint to the General Counsel.

(c) When a CFPB employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the CFPB (whether or not the officer or employee is also sued in an official capacity), the employee by law is to be served personally with process. *See* Fed. R. Civ. P. 4(i)(3). An employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the CFPB shall immediately notify, and deliver a copy of the summons and complaint to, the General Counsel.

(d) The CFPB will only accept service of process for an employee sued in his or her official capacity. Documents for which the General Counsel accepts service in official capacity shall be stamped ''Service Accepted in Official Capacity Only.'' Acceptance of service shall not constitute an admission or waiver with respect to jurisdiction, propriety of service, improper venue, or any other defense in law or equity available under applicable laws or rules.

§ 1070.32 Service of subpoenas, court orders, and other demands for CFPB information or action.

(a) Except in cases in which the CFPB is represented by legal counsel who have entered an appearance or otherwise given notice of their representation, only the General Counsel is authorized to receive and accept subpoenas or other demands or requests directed to the CFPB or its employees, whether civil or criminal in nature, for:

(1) Records of the CFPB;

(2) Official information including, but not limited to, testimony, affidavits, declarations, admissions, responses to interrogatories, or informal statements, relating to material contained in the files of the CFPB or which any CFPB employee acquired in the course and scope of the performance of his or her official duties;

(3) Garnishment or attachment of compensation of current or former employees; or

(4) The performance or non-performance of any official CFPB duty.

(b) Documents described in paragraph (a) of this section should be served upon the General Counsel, Consumer Financial Protection Bureau, 1700 G Street NW., Washington, DC 20552. Service must be effected as provided in applicable rules and regulations governing service in Federal judicial and administrative proceedings. Acceptance of such documents by the General Counsel does not constitute a waiver of any defense that might otherwise exist with respect to service under the Federal Rules of Civil or Criminal Procedure or other applicable laws or regulations.

(c) In the event that any demand or request described in paragraph (a) of this section is sought to be delivered to a CFPB employee other than in the manner prescribed in paragraph (b) of this section, such employee shall decline service and direct the server of process to these regulations. If the demand or request is nonetheless delivered to the employee, the employee shall immediately notify, and deliver a copy of that document to, the General Counsel.

(d) Except as otherwise provided in this subpart, the CFPB is not an agent for service for, or otherwise authorized to accept on behalf of its employees, any subpoenas, orders, or other demands or requests, which are not related to the employees' official duties except upon the express, written authorization of the individual CFPB employee to whom such demand or request is directed.

(e) Copies of any subpoenas, orders, or other demands or requests that are directed to former employees of the CFPB in connection with the performance of official CFPB duties shall also be served upon the General Counsel. The CFPB shall not, however, serve as an agent for service for the former employee, nor is the CFPB otherwise authorized to accept service on behalf of its former employees. If the demand involves their official duties as CFPB employees, former employees who receive subpoenas, orders, or similar compulsory process should also notify, and deliver a copy of the document to, the General Counsel.

§ 1070.33 Testimony and production of documents prohibited unless approved by the General Counsel.

(a) Unless authorized by the General Counsel, no employee or former employee of the CFPB shall, in response to a demand or a request provide oral or written testimony by deposition, declaration, affidavit, or otherwise concerning any official information.

(b) Unless authorized by the General Counsel, no employee or former employee shall, in response to a demand or request, produce any document or any material acquired as part of the performance of that employee's duties or by virtue of that employee's official status.

§ 1070.34 Procedure when testimony or production of documents is sought; general.

(a) If, as part of a proceeding in which the United States or the CFPB is not a party, official information is sought through a demand for testimony, CFPB records, or other material, the party seeking such information must (except as otherwise required by Federal law or authorized by the General Counsel) set forth in writing:

(1) The title and forum of the proceeding, if applicable;

(2) A detailed description of the nature and relevance of the official information sought;

(3) A showing that other evidence reasonably suited to the requester's needs is not available from any other source; and

(4) If testimony is requested, the intended use of the testimony, a general summary of the desired testimony, and a showing that no document could be provided and used in lieu of testimony.

(b) To the extent he or she deems necessary or appropriate, the General Counsel may also require from the party seeking such information a plan of all reasonably foreseeable demands, including but not limited to the names of all employees and former employees from whom discovery will be sought, areas of inquiry, expected duration of proceedings requiring oral testimony, identification of potentially relevant documents, or any other information deemed necessary to make a determination. The purpose of this requirement is to assist the General Counsel in making an informed decision regarding whether testimony or the production of documents or material should be authorized.

(c) The General Counsel may consult or negotiate with an attorney for a party, or the party if not represented by an attorney, to refine or limit a request or demand so that compliance is less burdensome.

(d) The General Counsel will notify the CFPB employee and such other persons as circumstances may warrant of his or her decision regarding compliance with the request or demand.

§ 1070.35 Procedure when response to demand is required prior to receiving instructions.

(a) If a response to a demand described in section 1070.34 of this subpart is required before the General Counsel renders a decision, the CFPB will request that the appropriate CFPB attorney or an attorney of the Department of Justice, as appropriate, take steps to stay, postpone, or obtain relief from the demand pending decision. If necessary, the attorney will:

(1) Appear with the employee upon whom the demand has been made;

(2) Furnish the court or other authority with a copy of the regulations contained in this subpart;

(3) Inform the court or other authority that the demand has been, or is being, as the case may be, referred for the prompt consideration of the appropriate CFPB official; and

(4) Respectfully request the court or authority to stay the demand pending receipt of the requested instructions.

(b) In the event that an immediate demand for production or disclosure is made in circumstances which would preclude the proper designation or appearance of an attorney of the CFPB or the Department of Justice on the employee's behalf, the employee, if necessary, shall respectfully request from the demanding court or authority a reasonable stay of proceedings for the purpose of obtaining instructions from the General Counsel.

§ 1070.36 Procedure in the event of an adverse ruling.

If a stay or, or other relief from, the effect of a demand made pursuant to sections 1070.34 and 1070.35 of this subpart is declined or not obtained, or if the court or other judicial or quasi-judicial authority declines to stay the effect of the demand made pursuant to sections 1070.34 and 1070.35 of this subpart, or if the court or other authority rules that the demand must be complied with irrespective of the General Counsel's instructions not to produce the material or disclose the information sought, the employee upon whom the demand has been made shall respectfully decline to comply with the demand citing this subpart and *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951).

§ 1070.37 Considerations in determining whether the CFPB will comply with a demand or request.

(a) In deciding whether to comply with a demand or request, CFPB officials and attorneys shall consider, among other pertinent considerations:

(1) Whether such compliance would be unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rules of procedure governing the case or matter in which the demand arose;

(2) Whether the number of similar requests would have a cumulative effect on the expenditure of CFPB resources;

(3) Whether compliance is appropriate under the relevant substantive law concerning privilege or disclosure of information;

(4) The public interest;

(5) The need to conserve the time of CFPB employees for the conduct of official business;

(6) The need to avoid spending time and money of the United States for private purposes;

(7) The need to maintain impartiality between private litigants in cases where a substantial government interest is not implicated;

(8) Whether compliance would have an adverse effect on performance by the CFPB of its mission and duties;

(9) The need to avoid involving the CFPB in controversial issues not related to its mission;

(10) Compliance would interfere with supervisory examinations, compromise the CFPB's supervisory functions or programs, or undermine public confidence in supervised financial institutions; and

(11) Compliance would interfere with the CFPB's ability to monitor for risks to consumers in the offering or provision of consumer financial products and services.

(b) Among those demands and requests in response to which compliance will not ordinarily be authorized are those with respect to which any of the following factors, inter alia, exist:

(1) Compliance would violate a statute or applicable rule of procedure;

(2) Compliance would violate a specific regulation or Executive order;

(3) Compliance would reveal information properly classified in the interest of national security;

(4) Compliance would reveal confidential or privileged commercial or financial information or trade secrets without the owner's consent;

(5) Compliance would compromise the integrity of the deliberative processes of the CFPB;

(6) Compliance would not be appropriate or necessary under the relevant substantive law governing privilege;

(7) Compliance would reveal confidential information; or

(8) Compliance would interfere with ongoing investigations or enforcement proceedings, compromise constitutional rights, or reveal the identity of a confidential informant.

(c) The CFPB may condition disclosure of official information pursuant to a request or demand on the entry of an appropriate protective order.

§ 1070.38 Prohibition on providing expert or opinion testimony.

(a) Except as provided in this section, and subject to 5 CFR 2635.805, CFPB employees or former employees shall not provide opinion or expert testimony based upon information which they acquired in the scope and performance of their official CFPB duties, except on behalf of the CFPB or the United States or a party represented by the CFPB, or the Department of Justice, as appropriate.

(b) Any expert or opinion testimony by a former employee of the CFPB shall be excepted from paragraph (a) of this section where the testimony involves only general expertise gained while employed at the CFPB.

(c) Upon a showing by the requestor of exceptional need or unique circumstances and that the anticipated testimony will not be adverse to the interests of the United States, the General Counsel may, consistent with 5 CFR 2635.805, exercise his or her discretion to grant special, written authorization for CFPB employees, or former employees, to appear and testify as expert witnesses at no expense to the United States.

(d) If, despite the final determination of the General Counsel, a court of competent jurisdiction or other appropriate authority orders the appearance and expert or opinion testimony of a current or former CFPB employee, that person shall immediately inform the General Counsel of such order. If the General Counsel determines that no further legal review of or challenge to the court's order will be made, the CFPB employee, or former employee, shall comply with the order. If so directed by the General Counsel, however, the employee, or former employee, shall respectfully decline to testify.

Subpart D—Confidential Information

§ 1070.40 Purpose and scope.

This subpart does not apply to requests for official information made pursuant to subparts B, C, or E of this part.

§ 1070.41 Non-disclosure of confidential information.

(a) *Non-disclosure.* Except as required by law or as provided in this part, no current or former employee or contractor or consultant of the CFPB, or any other person in possession of confidential information, shall disclose such confidential information by any means (including written or oral communications) or in any format (including paper and electronic formats), to:

(1) Any person who is not an employee, contractor, or consultant of the CFPB; or

(2) Any CFPB employee, contractor, or consultant when the disclosure of such confidential information to that employee, contractor, or consultant is not relevant to the performance of the employee's, contractor's, or consultant's assigned duties.

(b) *Disclosures to contractors and consultants.* CFPB contractors or consultants may receive confidential information only if such contractors or consultants certify in writing to treat such confidential information in accordance with these rules, Federal laws and regulations that apply to Federal agencies for the protection of the confidentiality of personally identifiable information and for data security and integrity, as well as any additional conditions or limitations that the CFPB may impose.

(c) *Disclosure of materials derived from confidential information.* Nothing in this subpart shall limit the discretion of the CFPB to disclose materials that it derives from or creates using confidential information to the extent that such materials do not identify, either directly or indirectly, any particular person to whom the confidential information pertains.

(d) *Disclosability of confidential information provided to the CFPB by other agencies.* Nothing in this subpart requires or authorizes the CFPB to disclose confidential information that another agency has provided to the CFPB to the extent that such disclosure contravenes applicable law or the terms of any agreement that exists between the CFPB and the agency to govern the CFPB's treatment of information that the agency provides to the CFPB.

§ 1070.42 Disclosure of confidential supervisory information to supervised financial institutions and their affiliates and by supervised financial institutions and their affiliates to others.

(a) *Discretionary disclosure of confidential supervisory information to supervised financial institutions and their affiliates.* The CFPB may, in its discretion, and to the extent consistent with applicable law, disclose confidential supervisory information concerning a supervised financial institution or its service providers to that supervised financial institution or to its affiliates.

(b) *Disclosure of confidential supervisory information by a supervised financial institution or its affiliates.* Unless directed otherwise by the Associate Director for Supervision, Enforcement, and Fair Lending or by his or her delegee:

(1) Any supervised financial institution lawfully in possession of confidential supervisory information of the CFPB pursuant to this section may disclose such information, or portions thereof, to its affiliates and to the following individuals to the extent that the disclosure of such confidential supervisory information is relevant to the performance of such individuals' assigned duties:

(i) The directors, officers, trustees, members, general partners, or employees of the supervised financial institution; and

(ii) The directors, officers, trustees, members, general partners, or employees of the affiliates of the supervised financial institution.

(2) Any supervised financial institution or affiliate thereof that is lawfully in possession of confidential supervisory information of the CFPB pursuant to this section may disclose such information, or portions thereof, to:

(i) Its certified public accountant, legal counsel, contractor, consultant, or service provider; or

(ii) Another person, with the prior written approval of the Associate Director for Supervision, Enforcement, and Fair Lending or his or her delegee.

(3) Where a supervised financial institution or its affiliate discloses confidential supervisory information pursuant to this paragraph (b) of this section:

(i) The recipient of such confidential supervisory information shall not, without the prior written approval of the Associate Director for Supervision, Enforcement, and Fair Lending or his or her delegee, utilize, make, or retain copies of, or disclose confidential supervisory information for any purpose, except as is necessary to provide advice or services to the supervised financial institution or its affiliate; and

(ii) The supervised financial institution or affiliate disclosing the confidential supervisory information shall take reasonable steps to ensure that the recipient complies with paragraph (b)(3)(i) of this section.

§ 1070.43 Disclosure of confidential information to law enforcement agencies and other government agencies.

(a) *Required disclosure of confidential information to government agencies.* The CFPB shall:

(1) Disclose a draft of a report of examination of a supervised financial institution prior to its finalization, in accordance with 12 U.S.C. 5515(e)(1)(C), and disclose a final report of examination, including any and all revisions made to such a report, to a Federal or State agency with jurisdiction over that supervised financial institution, provided that the CFPB receives from the agency reasonable assurances as to the confidentiality of the information disclosed; and

(2) Disclose confidential consumer complaint information to a Federal or State agency to facilitate preparation of reports to Congress required by 12 U.S.C. 5493(b)(3)(C) and to facilitate the CFPB's supervision and enforcement activities and its monitoring of the market for consumer financial products and services, provided that the agency shall first give written assurance to the CFPB that it will maintain such information in confidence, including in a manner that conforms to the standards that apply to Federal agencies for the protection of the confidentiality of personally identifiable information and for data security and integrity.

(b) *Discretionary disclosure of confidential information to government agencies.*

(1) Upon receipt of a written request that contains the information required by paragraph (b)(2) of this section, the CFPB may, in its sole discretion, disclose confidential information to a Federal or State agency to the extent that the disclosure of the information is relevant to the exercise of the agency's statutory or regulatory authority or, with respect to the disclosure of confidential supervisory information, to a Federal or State agency having jurisdiction over a supervised financial institution.

(2) To obtain access to confidential information pursuant to paragraph (b)(1) of this section, an authorized officer or employee of the agency shall submit a written request to the General Counsel, who shall act upon the request in consultation with the CFPB's Associate Director for Supervision, Enforcement, and Fair Lending or other appropriate CFPB personnel. The request shall include the following:

(i) A description of the particular information, kinds of information, and where possible, the particular documents to which access is sought;

(ii) A statement of the purpose for which the information will be used;

(iii) A statement certifying and identifying the agency's legal authority for requesting the documents;

(iv) A statement certifying and identifying the agency's legal authority for protecting the requested information from public disclosure; and

(v) A certification that the agency will maintain the requested confidential information in confidence, including in a manner that conforms to the standards that apply to Federal agencies for the protection of the confidentiality of personally identifiable information and for data security and integrity, as well as any additional conditions or limitations that the CFPB may impose.

(c) *State requests for information other than confidential information.* A request or demand by a State agency for information or records of the CFPB other than confidential information shall be made and considered in accordance with the rules set forth elsewhere in this part.

(d) *Negotiation of standing requests.* The CFPB may negotiate terms governing the exchange of confidential information with Federal or State agencies on a standing basis, as appropriate.

§ 1070.44 Disclosure of confidential consumer complaint information.

Nothing in this part shall limit the discretion of the CFPB, to the extent permitted by law, to disclose confidential consumer complaint information as it deems necessary to investigate, resolve, or otherwise respond to consumer complaints or inquiries concerning financial institutions or consumer financial products and services.

§ 1070.45 Affirmative disclosure of confidential information.

(a) The CFPB may disclose confidential investigative information and other confidential information, in accordance with applicable law, as follows:

(1) To a CFPB employee, as that term is defined in § 1070.2 of this part and in accordance with § 1070.41 of this subpart;

(2) To either House of the Congress or to an appropriate committee or subcommittee of the Congress, as set forth in 12 U.S.C. 5562(d)(2), provided that, upon the receipt by the CFPB of a request from the Congress for confidential information that a financial institution submitted to the CFPB along with a claim that such information consists of a trade secret or privileged or confidential commercial or financial information, or confidential supervisory information, the CFPB shall notify the financial institution in writing of its receipt of the request and provide the institution with a copy of the request;

(3) In investigational hearings and witness interviews, as is reasonably necessary, at the discretion of the CFPB;

(4) In an administrative or court proceeding to which the CFPB is a party. In the case of confidential investigatory material that contains any trade secret or privileged or confidential commercial or financial information, as claimed by designation by the submitter of such material, or confidential supervisory information, the submitter may seek an appropriate protective or *in camera* order prior to disclosure of such material in a proceeding;

(5) To law enforcement agencies and other government agencies in summary form to the extent necessary to notify such agencies of potential violations of laws subject to their jurisdiction; or

(6) As required under any other applicable law.

§ 1070.46 Other disclosures of confidential information.

(a) To the extent permitted by law and as authorized by the Director in writing, the CFPB may disclose confidential information other than as set forth in this subpart.

(b) Prior to disclosing confidential information pursuant to paragraph (a) of this section, the CFPB may, as it deems

appropriate under the circumstances, provide written notice to the person to whom the confidential information pertains that the CFPB intends to disclose its confidential information in accordance with this section.

(c) The authority of the Director to disclose confidential information pursuant to paragraph (a) shall not be delegated. However, a person authorized to perform the functions of the Director in accordance with law may exercise the authority of the Director as set forth in this section.

§ 1070.47 Other rules regarding the disclosure of confidential information.

(a) *Further disclosure prohibited.* (1) All confidential information made available under this subpart shall remain the property of the CFPB, unless the General Counsel provides otherwise in writing.

(2) Except as set forth in this subpart, no supervised financial institution, Federal or State agency, any officer, director, employee or agent thereof, or any other person to whom the confidential information is made available under this subpart, may further disclose such confidential information without the prior written permission of the General Counsel.

(3) A supervised financial institution, Federal or State agency, any officer, director, employee or agent thereof, or any other person to whom the CFPB's confidential information is made available under this subpart, that receives from a third party a legally enforceable demand or request for such confidential information (including but not limited to, a subpoena or discovery request or a request made pursuant to the Freedom of Information Act, 5 U.S.C. 552, the Privacy Act of 1974, 5 U.S.C. 552a, or any State analogue to such statutes) should:

(i) Inform the General Counsel of such request or demand in writing and provide the General Counsel with a copy of such request or demand as soon as practicable after receiving it;

(ii) To the extent permitted by applicable law, advise the requester that:

(A) The confidential information sought may not be disclosed insofar as it is the property of the CFPB; and

(B) Any request for the disclosure of such confidential information is properly directed to the CFPB pursuant to its regulations set forth in this part.

(iii) Consult with the General Counsel before complying with the request or demand, and to the extent applicable:

(A) Give the CFPB a reasonable opportunity to respond to the demand or request;

(B) Assert all reasonable and appropriate legal exemptions or privileges that the CFPB may request be asserted on its behalf; and

(C) Consent to a motion by the CFPB to intervene in any action for the purpose of asserting and preserving any claims of confidentiality with respect to any confidential information.

(4) Nothing in this section shall prevent a supervised financial institution, Federal or State agency, any officer, director, employee or agent thereof, or any other person to whom the information is made available under this subpart from complying with a legally valid and enforceable order of a court of competent jurisdiction compelling production of the CFPB's confidential information, or, if compliance is deemed compulsory, with a request or demand from either House of the Congress or a duly authorized committee of the Congress. To the extent that compulsory disclosure of confidential information occurs as set forth in this paragraph, the producing party shall use its best efforts to ensure that the requestor secures an appropriate protective order or, if the requestor is a legislative body, use its best efforts to obtain the commitment or agreement of the legislative body that it will maintain the confidentiality of the confidential information.

(5) No person obtaining access to confidential information pursuant to this subpart may make a personal copy of any such information, and no person may remove confidential information from the premises of the institution or agency in possession of such information except as permitted under this subpart or by the CFPB.

(b) *Additional conditions and limitations.* The CFPB may impose any additional conditions or limitations on disclosure or use under this subpart that it determines are necessary.

(c) *Non-waiver.* (1) In General. The CFPB shall not be deemed to have waived any privilege applicable to any information by transferring that information to, or permitting that information to be used by, any Federal or State agency.

(2) *Rule of Construction.* Paragraph (c)(1) of this section shall not be construed as implying that any person waives any privilege applicable to any information because paragraph (c)(1) of this section does not apply to the transfer or use of that information.

§ 1070.48 Privileges not affected by disclosure to the CFPB.

(a) *In General.* The submission by any person of any information to the CFPB for any purpose in the course of any supervisory or regulatory process of the CFPB shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than the CFPB.

(b) *Rule of Construction.* Paragraph (a) of this section shall not be construed as implying or establishing that—

(1) Any person waives any privilege applicable to information that is submitted or transferred under circumstances to which paragraph (a) of this section does not apply; or

(2) Any person would waive any privilege applicable to any information by submitting the information to the CFPB but for this section.

Subpart E—The Privacy Act

§ 1070.50 Purpose and scope; definitions.

(a) This subpart implements the provisions of the Privacy Act of 1974, 5 U.S.C. 552a (the Privacy Act). The regulations apply to all records maintained by the CFPB and which are retrieved by an individual's name or personal identifier. The regulations set forth the procedures for requests for access to, or amendment of, records concerning individuals that are contained in systems of records maintained by the CFPB. These regulations should be read in conjunction with the Privacy Act, which provides additional information about this topic.

(b) For purposes of this subpart, the following definitions apply:

(1) The term *Chief Privacy Officer* means the Chief Information Officer of the CFPB or any CFPB employee to whom the Chief Information Officer has delegated authority to act under this part;

(2) The term *guardian* means the parent of a minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction;

(3) *Individual* means a citizen of the United States or an alien lawfully admitted for permanent residence;

(4) *Maintain* includes maintain, collect, use, or disseminate;

(5) *Record* means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voiceprint or a photograph;

(6) *Routine use* means the disclosure of a record that is compatible with the purpose for which it was collected;

(7) *System of records* means a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual; and

(8) *Statistical record* means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by 13 U.S.C. 8.

§ 1070.51 Authority and responsibilities of the Chief Privacy Officer.

The Chief Privacy Officer is authorized to:

(a) Respond to requests for access to, accounting of, or amendment of records contained in a system of records maintained by the CFPB;

(b) Approve the publication of new systems of records and amend existing systems of record; and

(c) File any necessary reports related to the Privacy Act.

§ 1070.52 Fees.

(a) *Copies of records.* The CFPB shall provide the requester with copies of records requested pursuant to § 1070.53 of this subpart at the same cost charged for duplication of records under § 1070.22 of this part.

(b) *No fee.* The CFPB will not charge a fee if:

(1) Total charges associated with a request are less than $5, or

(2) The requester is a CFPB employee or former employee, or an applicant for employment with the CFPB, and the request pertains to that employee, former employee, or applicant.

§ 1070.53 Request for access to records.

(a) *Procedures for making a request for access to records.* An individual's requests for access to records that pertain to that individual (or to the individual for whom the requester serves as guardian) may be submitted to the CFPB in writing or by electronic means.

(1) If submitted in writing, the request shall be labeled ''Privacy Act Request'' and shall be addressed to the Chief Privacy Officer, Consumer Financial Protection Bureau, 1700 G Street NW., Washington, DC 20552.

(2) If submitted by electronic means, the request shall be labeled ''Privacy Act Request'' and the request shall be submitted as set forth at the CFPB's Web site, *http://www.consumerfinance.gov.*

(b) *Content of a request for access to records.* A request for access to records shall include:

(1) A statement that the request is made pursuant to the Privacy Act;

(2) The name of the system of records that the requester believes contains the record requested, or a description of the nature of the record sought in detail sufficient to enable CFPB personnel to locate the system of records containing the record with a reasonable amount of effort;

(3) Whenever possible, a description of the nature of the record sought, the date of the record or the period in which the requester believes that the record was created, and any other information that might assist the CFPB in identifying the record sought (e.g., maiden name, dates of employment, account information, etc.).

(4) Information necessary to verify the requester's identity pursuant to paragraph (c) of this section;

(5) The mailing or email address where the CFPB's response or further correspondence should be sent.

(c) *Verification of identity.* To obtain access to the CFPB's records pertaining to a requester, the requester shall provide proof to the CFPB of the requester's identity as provided below.

(1) In general, the following will be considered adequate proof of a requester's identity:

(i) A photocopy of two forms of identification, including one form of identification that bears the requester's photograph, and one form of identification that bears the requester's signature;

(ii) A photocopy of a single form of identification that bears both the requester's photograph and signature; or

(iii) A statement swearing or affirming the requester's identity and to the fact that the requester understands the penalties provided in 5 U.S.C. 552a(i)(3).

(2) Notwithstanding paragraph (c)(1) of this section, a designated official may require additional proof of the requester's identity before action will be taken on any request, if such official determines that it is necessary to protect against unauthorized disclosure of information in a particular case. In addition, if a requester seeks records pertaining to an individual in the requester's capacity as that individual's guardian, the requester shall be required to provide adequate proof of the requester's legal relationship before action will be taken on any request.

(d) *Request for accounting of previous disclosures.* An individual may request an accounting of previous disclosures of records pertaining to that individual in a system of records as provided in 5 U.S.C. 552a(c). Such requests should conform to the procedures and form for requests for access to records set forth in paragraphs (a) and (b) of this section.

§ 1070.54 CFPB procedures for responding to a request for access.

(a) *Acknowledgment and response.* The CFPB will provide written acknowledgement of the receipt of a request within twenty (20) business days from the receipt of the request and will, where practicable, respond to each request within that twenty (20) day period. When a full response is not practicable within the twenty (20) day period, the CFPB will respond as promptly as possible.

(b) *Disclosure.* (1) When the CFPB discloses information in response to a request, the CFPB will make the information available for inspection and copying during regular business hours as provided in § 1070.13 of this part, or the CFPB will mail it or email it the requester, if feasible, upon request.

(2) The requester may bring with him or her anyone whom the requester chooses to see the requested material. All visitors to the CFPB's buildings must comply with the applicable security procedures.

(c) *Denial of a request.* If the CFPB denies a request made pursuant to § 1070.53 of this subpart, it will inform the requester in writing of the reason(s) for denial and the procedures for appealing the denial.

§ 1070.55 Special procedures for medical records.

If an individual requests medical or psychological records pursuant to § 1070.53 of this subpart, the CFPB will disclose them directly to the requester unless the CFPB determines that such disclosure could have an adverse effect on the requester. If the CFPB makes that determination, the CFPB shall provide the information to a licensed physician or other appropriate representative that the requester designates, who shall disclose those records to the requester in a manner he or she deems appropriate.

§ 1070.56 Request for amendment of records.

(a) *Procedures for making request.* (1) If an individual wishes to amend a record that pertains to that individual in a system of records, that individual may submit a request in writing or by electronic means to the Chief Privacy Officer, as set forth in § 1070.53(a). The request shall be labeled ''Privacy Act Amendment Request.''

(2) A request for amendment of a record must:

(i) Identify the system of records containing the record for which amendment is requested;

(ii) Specify the portion of that record requested to be amended; and

(iii) Describe the nature and reasons for each requested amendment.

(3) When making a request for amendment of a record, the CFPB will require a requester to verify his or her identity under the procedures set forth in § 1070.53(c) of this subpart, unless the requester has already done so in a related request for access or amendment.

(b) *Burden of proof.* In a request for amendment of a record, the requester bears the burden of proving by a preponderance of the evidence that the record is not accurate, relevant, timely, or complete.

§ 1070.57 CFPB review of a request for amendment of records.

(a) *Time limits.* The CFPB will acknowledge a request for amendment of records within ten (10) business days after it receives the request. In the acknowledgment, the CFPB may request additional information necessary for a determination on the request for amendment. The CFPB will make a determination on a request to amend a record promptly.

(b) *Contents of response to a request for amendment.* When the CFPB responds to a request for amendment, the CFPB will inform the requester in writing whether the request is granted or denied, in whole or in part. If the CFPB grants the request, it will take the necessary steps to amend the record and, when appropriate and possible, notify prior recipients of the record of its action. If the CFPB denies the request, in whole or in part, it will inform the requester in writing:

(1) Why the request (or portion of the request) was denied;

(2) That the requester has a right to appeal; and

(3) How to file an appeal.

§ 1070.58 Appeal of adverse determination of request for access or amendment.

(a) *Appeal.* A requester may appeal a denial of a request made pursuant to §§ 1070.53 or 1070.56 of this subpart within ten (10) business days after the CFPB notifies the requester that it has denied the request.

(b) *Content of Appeal.* A requester may submit an appeal in writing or by electronic means as set forth in § 1070.53(a). The appeal shall be addressed to the General Counsel and labeled ''Privacy Act Appeal.'' The appeal must also:

(1) Specify the background of the request; and

(2) Provide reasons why the requester believes the denial is in error.

(c) *Determination.* The General Counsel will make a determination as to whether to grant or deny an appeal within thirty (30) business days from the date it is received, unless the General Counsel extends the time for good cause.

(1) If the General Counsel grants an appeal regarding a request for amendment, he or she will take the necessary steps to amend the record and, when appropriate and possible, notify prior recipients of the record of its action.

(2) If the General Counsel denies an appeal, he or she will inform the requester of such determination in writing, including the reasons for the denial, and the requester's right to file a statement of disagreement and to have a court review its decision.

(d) *Statement of disagreement.* (1) If the General Counsel denies an appeal regarding a request for amendment, a requester may file a concise statement of disagreement with the denial. The CFPB will maintain the requester's statement with the record that the requester sought to amend and any disclosure of the record will include a copy of the requester's statement of disagreement.

(2) When practicable and appropriate, the CFPB will provide a copy of the statement of disagreement to any prior recipients of the record.

§ 1070.59 Restrictions on disclosure.

The CFPB will not disclose any record about an individual contained in a system of records to any person or agency without the prior written consent of that individual unless the disclosure is authorized by 5 U.S.C. 552a(b). Disclosures authorized by 5 U.S.C. 552a(b) include disclosures that are compatible with one or more routine uses that are contained within the CFPB's Systems of Records Notices, which are available on the CFPB's Web site, at *http://www.consumerfinance.gov*.

§ 1070.60 Exempt records.

(a) *Exempt systems of records.* Pursuant to 5 U.S.C. 552a(k)(2), the CFPB exempts the systems of records listed below from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G)–(H), and (f), and §§ 1070.53 through 1070.59 of this subpart, to the extent that such systems of records contain investigatory materials compiled for law enforcement purposes, provided, however, that if any individual is denied any right, privilege, or benefit to which he or she would otherwise be entitled under Federal law, or for which he or she would otherwise be eligible as a result of the maintenance of such material, such material shall be disclosed to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the CFPB under an express promise that the identity of the source would be held in confidence:

(1) CFPB.002 Depository Institution Supervision Database

(2) CFPB.003 Non-Depository Institution Supervision Database

(3) CFPB.004 Enforcement Database

(4) CFPB.005 Consumer Response System

(b) *Information compiled for civil actions or proceedings.* This subpart does not permit an individual to have access to any information compiled in reasonable anticipation of a civil action or proceeding.

§ 1070.61 Training; rules of conduct; penalties for non-compliance.

(a) *Training.* The Chief Privacy Officer shall institute a training program to instruct CFPB employees and employees of Government contractors covered by 5 U.S.C. 552a(m), who are involved in the design, development, operation, or maintenance of any CFPB system of records, on a continuing basis with respect to the duties and responsibilities imposed on them and the rights conferred on individuals by the Privacy Act, the regulations in this subpart, and any other related regulations. Such training shall provide suitable emphasis on the civil and criminal penalties imposed on the CFPB and the individual employees by the Privacy Act for non-compliance with specified requirements of the Act as implemented by the regulations in this subpart.

(b) *Rules of conduct.* The following rules of conduct are applicable to employees of the CFPB (including, to the extent required by the contract or 5 U.S.C. 552a(m), Government contractors and employees of such contractors), who are involved in the design, development, operation or maintenance of any system of records, or in maintain any records, for or on behalf of the CFPB.

(1) The head of each office of the CFPB shall be responsible for assuring that employees subject to such official's supervision are advised of the provisions of the Privacy Act, including the criminal penalties and civil liabilities provided therein, and the regulations in this subpart, and that such employees are made aware of their individual and collective responsibilities to protect the security of personal information, to assure its

accuracy, relevance, timeliness and completeness, to avoid unauthorized disclosure either orally or in writing, and to insure that no system of records is maintained without public notice.

(2) Employees of the CFPB involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record shall:

(i) Collect no information of a personal nature from individuals unless authorized to collect it to achieve a function or carry out a responsibility of the CFPB;

(ii) Collect information, to the extent practicable, directly from the individual to whom it relates;

(iii) Inform each individual asked to supply information, on the form used to collect the information or on a separate form that can be retained by the individual of—

(A) The authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) The principal purpose or purposes for which the information is intended to be used;

(C) The routine uses which may be made of the information, as published pursuant to 5 U.S.C. 552a(e)(4)(D); and

(D) The effects on the individual, if any, of not providing all or any part of the requested information.

(iv) Not collect, maintain, use or disseminate information concerning an individual's religious or political beliefs or activities or membership in associations or organizations, unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(v) Advise their supervisors of the existence or contemplated development of any record system which is capable of retrieving information about individuals by individual identifier;

(vi) Assure that no records maintained in a CFPB system of records are disseminated without the permission of the individual about whom the record pertains, except when authorized by 5 U.S.C. 552a(b);

(vii) Maintain and process information concerning individuals with care in order to insure that no inadvertent disclosure of the information is made either within or without the CFPB;

(viii) Prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to 5 U.S.C. 552a(b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes; and

(ix) Assure that an accounting is kept in the prescribed form, of all dissemination of personal information outside the CFPB, whether made orally or in writing, unless disclosed under 5 U.S.C. 552 or subpart B of this part.

(3) The head of each office of the CFPB shall, at least annually, review the record systems subject to their supervision to insure compliance with the provisions of the Privacy Act of 1974 and the regulations in this subpart.

§ 1070.62 Preservation of records.

The CFPB will preserve all correspondence pertaining to the requests that it receives under this part, as well as copies of all requested records, until disposition or destruction is authorized by title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule 14. Records will not be disposed of or destroyed while they are the subject of a pending request, appeal, proceeding, or lawsuit.

§ 1070.63 Use and collection of social security numbers.

The CFPB will ensure that employees authorized to collect information are aware:

(a) That individuals may not be denied any right, benefit, or privilege as a result of refusing to provide their social security numbers, unless the collection is authorized either by a statute or by a regulation issued prior to 1975; and

(b) That individuals requested to provide their social security numbers must be informed of:

(1) Whether providing social security numbers is mandatory or voluntary;

(2) Any statutory or regulatory authority that authorizes the collection of social security numbers; and

(3) The uses that will be made of the numbers.

Dated: January 15, 2013.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

[FR Doc. 2013–01737 Filed 2–14–13; 8:45 am]

BILLING CODE 4810–AM–P

Summary of Key Changes in the Final Rule on Disclosure of Records and Information

Published 02.15.13, Effective 03.18.13

Part A: Definitions
This part contains general provisions and definitions used in the rule. The only changes are minor modifications to the definitions of state, confidential supervisory information, and supervised financial institution.

Part B: FOIA Policy
This is the section of the rule that implements the Bureau's procedures with regard to the Freedom of Information Act, 5 U.S.C. § 552. The changes to this portion of the rule are largely technical in nature.

Part C: Disclosure of CFPB Information in Legal Proceedings (the Bureau's *Touhy* regulations)
Part C of the rule sets out the procedures the Bureau will follow with respect to subpoenas, orders or other requests for Bureau information (or testimony) in connection with legal proceedings. For the most part, the final rule only makes minor changes to drafting errors and omissions and updates address information.

The most significant change is the added protection for confidential supervisory information in 12 C.F.R. § 1070.37(a). This portion of the rule delineates the factors that the Bureau will consider when determining whether CSI will be disclosed in response to a subpoena or other demand. We added to the list two new considerations to the list. First, would compliance interfere with supervisory examinations, compromise the Bureau's supervisory functions or programs, or undermine public confidence in supervised financial institutions? Second, would compliance interfere with the Bureau's ability to monitor for risks to consumers in the offering or provision of consumers financial products and services?

Part D: Protection and Disclosure of CFPB Material
This is the portion of the rule that likely has the most impact on our work. It provides for the protection of confidential information and procedures for sharing confidential information with supervised institutions, government agencies, and others. The majority of the comments concerned this section of the rule, largely due to concerns regarding sharing information with state AGs. The changes to this part that are most important to us are as follows:

- Discretionary Information-Sharing, 12 C.F.R. § 1070.43(b)
  - Commenters questioned our ability to share information at all, to certain parties, or as to certain areas. They also proposed we adopt a variety of required inter-agency approvals, institution notifications, and pre-sharing audits before sharing information.
  - The rule affirms our ability to share information, although it does qualify the sharing of CSI in accordance with our January 2012 bulletin (CSI will only be shared with state AGs "in very limited circumstances and upon review of all of the relevant facts and considerations.").
  - The final rule clarifies some of the requirements prior to discretionary information-sharing, specifically that requesting agencies identify the FOIA exemption that will protect the information from public disclosure and maintain the information in confidence.
  - Our access request letter policy flows from this section of the rule. Agencies can seek access to confidential Bureau information by sending a letter to the Legal Division stating the information sought, what purpose it will be used for, the legal authority for that purpose, the

FOIA exemption that will protect the information from disclosure, and the safeguards the agency will use to keep the information safe and secure.

- Affirmative Information-Sharing, 12 C.F.R. § 1070.45(b)
  - We had a bit of a catch-22 in the initial rule as to sharing information on our own initiative. The provision that provided for the information-sharing in 12 C.F.R. § 1070.45(a)(5) referred back to the procedure in subpart D, which arguably necessitated a request letter before sharing (which the agency would not know to send us unless we shared information in the first place).
  - The revised rule clarifies that we can share information "[t]o law enforcement and other government agencies in summary form to the extent necessary to notify such agencies of potential violation of laws subject to their jurisdiction."
  - In other words, subject to certain restrictions, we can reach out to another agency and share confidential information in order to discuss a matter with the agency that it might be interested in or find out if the agency has information that would be helpful to us.
- Procedures for Responding to Requests for CFPB Information, 12 C.F.R. § 1070.47
  - This section requires agencies that receive our information obtain permission before using it, and sets out the process agencies should follow if they receive third party requests for our information.
  - The revisions to this section clarify that agencies need only follow our process for handling third party requests to the extent permitted by applicable law. If a state FOIA law does not permit a state to follow some aspect of the process, for example, the state does not have to choose between complying with our rule or state law.
  - In addition, the section makes clear that agencies can comply with orders from a court of competent jurisdiction. Previously, this section only provided an exemption from compliance to an agency with a federal court order. With the change, a state agency is not required to choose between complying with our rule or being in contempt of court.
  - A new section in the rule states that the Bureau does not waive any privilege by transferring information to a federal or state agency. This echoes the recent amendment to 12 U.S.C. § 1821(t) in Pub. L. No. 122-215 that the Bureau does not waive any applicable privilege by transferring information to another federal agency.
- Protection of Attorney-Client Privilege, 12 C.F.R. § 1070.48
  - This section is a new addition to the rule and provides that submitting information to the Bureau in the course of supervisory or regulatory processes will not waive or otherwise affect any privilege that might be claimed under federal or state law.

Part E: the Privacy Act

This part implements the Privacy Act, 5 U.S.C. § 552a, which requires federal agencies to grant individuals access to records maintained about them in systems of records, as well as the right to correct or amend those records. There were only minor changes in this section to correct drafting errors and clarify procedures.

Rules Related to Investigations

Final Rule

Revised 06.29.12

The Bureau's Rules of Investigation as they appear in the Federal Register are on the next page.

A copy of these rules should be included with every Civil Investigative Demand, along with the Document Submission Standards and Notice to Persons Form.

§ 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]

BILLING CODE 4810–AM–P

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 contumacious 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.

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

[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.

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.

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.

[FR Doc. 2012–14047 Filed 6–28–12; 8:45 am]

BILLING CODE 4810–AM–P

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.

Rules Related to Adjudicative Proceedings

Final Rule

The Bureau's Rules of Practice for Adjudication Proceedings as they appear in the Federal Register are on the next page.

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Part III

Bureau of Consumer Financial Protection

12 CFR Part 1071, 1080, 1081, *et al.*
Rules of Practice for Adjudication Proceedings

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Part 1081

[Docket No. CFPB–2011–0006]

RIN 3170–AA05

Rules of Practice for Adjudication Proceedings

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Final rule.

SUMMARY: The Dodd-Frank Wall Street Reform and Consumer Protection Act requires the Bureau of Consumer Financial Protection (Bureau) to prescribe rules establishing procedures for the conduct of adjudication proceedings. On July 28, 2011, the Bureau published an interim final rule establishing these procedures with a request for comment. This final rule responds to the comments received by the Bureau and amends the Bureau's regulations accordingly.

DATES: This final rule is effective on June 29, 2012.

FOR FURTHER INFORMATION CONTACT: John R. Coleman, Office of the General Counsel, Consumer Financial Protection Bureau, 1700 G Street NW., Washington, DC 20552, (202) 435–5724.

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 to regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws. On July 28, 2011, the Bureau promulgated its Rules of Practice Governing Adjudication Proceedings (Interim Final Rule), pursuant to section 1053(e) of the Dodd-Frank Act, 12 U.S.C. 5563(e). The Bureau promulgated the Interim Final Rule with a request for comment at 76 FR 45338. The comment period on the Interim Final Rule ended on September 26, 2011. After reviewing and considering the issues raised by the comments, the Bureau is now promulgating, in final form, its Rules of Practice Governing Adjudication Proceedings (Final Rule) establishing procedures for the conduct of adjudication proceedings conducted pursuant to section 1053 of the Dodd-Frank Act. 12 U.S.C. 5563.

Section 1053 of the Dodd-Frank Act authorizes the Bureau to conduct administrative adjudications to ensure or enforce compliance with (a) the provisions of Title X of the Dodd-Frank Act, (b) the rules prescribed by the Bureau under Title X of the Dodd-Frank Act, and (c) any other Federal law or regulation that the Bureau is authorized to enforce. 12 U.S.C. 5563(a). The Final Rule does not apply to proceedings governing the issuance of a temporary order to cease and desist pursuant to section 1053(c) of the Dodd-Frank Act. 12 U.S.C. 5563(c). As discussed in greater detail below, the Bureau currently intends to address such proceedings in a future rulemaking.

II. Summary of the Final Rule

Like the Interim Final Rule, the Final Rule is modeled on the uniform rules and procedures for administrative hearings adopted by the prudential regulators pursuant to section 916 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 56 FR 38024 (Aug. 9, 1991) (Uniform Rules);[1] the Rules of Practice for Adjudicative Proceedings adopted by the Federal Trade Commission, 16 CFR part 3 (FTC Rules); and the Rules of Practice adopted by the Securities and Exchange Commission (SEC), 17 CFR part 201 (SEC Rules). The Bureau also considered the Model Adjudication Rules (MARs) prepared by the Administrative Conference of the United States. *See* Michael P. Cox, The Model Adjudication Rules (MARs), 11 T.M. Cooley L. Rev. 75 (1994).

In drafting the Final Rule, the Bureau endeavored to create an adjudicatory process that provides for the expeditious resolution of claims while ensuring that parties who appear before the Bureau receive a fair hearing. Notably, in the last several decades, both the SEC and the FTC revised their rules of practice relating to administrative proceedings to make the adjudicatory process more efficient. In 1990, the SEC created a task force ''to review the rules and procedures relating to [SEC] administrative proceedings, to identify sources of delay in those proceedings and to recommend steps to make the adjudicatory process more efficient and effective.'' 60 FR 32738 (June 23, 1995). The result was a comprehensive revision of the SEC Rules in 1995. *See id.* Similarly, when the FTC proposed revisions to the FTC Rules in 2008, the FTC's Notice of Proposed Rulemaking stated: ''In particular, the [FTC's] Part 3 adjudicatory process has long been criticized as being too protracted * * *. The [FTC] believes that these comprehensive proposed rule revisions would strike an appropriate balance between the need for fair process and quality decision-making, the desire for efficient and speedy resolution of matters, and the potential costs imposed on the Commission and the parties.'' 73 FR 58832–58833 (Oct. 7, 2008).

In drafting the Final Rule, the Bureau considered and attempted to improve upon these and other agencies' efforts to streamline their processes while protecting parties' rights to fair and impartial proceedings. The following discussion outlines some significant aspects of the Final Rule.

Like the Interim Final Rule, the Final Rule adopts a decision-making procedure that incorporates elements of the SEC Rules, the FTC Rules, and the Uniform Rules. The Final Rule implements a procedure, like that in the Uniform Rules, whereby a hearing officer will issue a recommended decision in each administrative adjudication. Like the FTC Rules, the Final Rule provides any party the right to contest the recommended decision by filing a notice of appeal and perfecting the appeal by later filing an opening brief. In the event a party fails to timely file a notice of appeal or perfect an appeal, the Director may either adopt the recommended decision as the Bureau's final decision or order further briefing with respect to any findings of fact or conclusions of law contained in the recommended decision. The Bureau believes this approach best balances the need for expeditious decision-making with the parties' right to ultimate consideration of a matter by the Director.

In keeping with this approach, the Final Rule also provides that the hearing officer will decide dispositive motions in the first instance, subject to the same right of review provided for recommended decisions in the event that the ruling upon such a motion disposes of the case. Again, the Bureau has adopted this model because it provides for the most expeditious resolution of matters while preserving all parties' rights to review by the Director.

The Final Rule sets deadlines for both the recommended decision of the hearing officer and the final decision of the Director. The Bureau has adopted an approach, similar to that used by the SEC, wherein the hearing officer is

[1] The ''prudential regulators'' are defined by section 1002(24) of the Dodd-Frank Act as the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), the former Office of Thrift Supervision (OTS), and the National Credit Union Administration (NCUA). 12 U.S.C. 5481(24). For ease of reference, citations to the Uniform Rules herein are to the Uniform Rules as adopted by the OCC, which are codified at 12 CFR part 19, subpart A.

permitted a specified period of time—300 days from service of the notice of charges or 90 days after briefing is complete—to issue a recommended decision. The Final Rule also requires the hearing officer to convene a scheduling conference soon after the respondent files its answer to craft a schedule appropriate to the particular proceeding. This construct gives the hearing officer considerable discretion in conducting proceedings and flexibility to respond to the nuances of individual matters while ensuring that each case concludes within a fixed number of days. The Final Rule permits the hearing officer to request an extension of the 300-day deadline, but the Bureau's intent is that such extensions will be requested by hearing officers and granted by the Director only in rare circumstances.

The section of the Final Rule governing the timing of the Director's decision on appeal or review is consistent with the language of section 1053 of the Dodd-Frank Act. If a recommended decision is appealed to the Director, or the Director orders additional briefing regarding the recommended decision, the Final Rule provides that the Office of Administrative Adjudication must notify the parties that the case has been submitted for final Bureau decision at the expiration of the time permitted for filing reply briefs with the Director. The Director then must issue his or her final decision within 90 days. *See* 12 U.S.C. 5563(b)(3). To further the goal of providing for the expeditious resolution of claims, the Final Rule also adopts the SEC's standard governing extensions of time, which makes clear that such extensions are generally disfavored.

The Bureau has adopted the SEC's affirmative disclosure approach to fact discovery in administrative adjudications. *See* 17 CFR 201.230. Thus, the Final Rule provides that the Office of Enforcement will provide any party in an adjudication proceeding an opportunity to inspect and copy certain categories of documents obtained by the Office of Enforcement from persons not employed by the Bureau, as that term is defined in the Final Rule, in connection with the investigation leading to the institution of the proceedings, and certain categories of documents created by the Bureau, provided such material is not privileged or otherwise protected from disclosure. The Office of Enforcement's obligation under the Final Rule relates only to documents obtained by the Office of Enforcement; documents located only in the files of other divisions or offices of the Bureau are beyond the scope of the affirmative disclosure obligation. As set forth in greater detail in the section-by-section analysis below, the Bureau has modified the SEC Rules slightly by eliminating any reference to *Brady* v. *Maryland* while retaining a general obligation to turn over material exculpatory information in the Office of Enforcement's possession, by providing that nothing in paragraph (a) of § 1081.206 shall require the Office of Enforcement to provide reports of examination to parties if they are not the subject of the report, and by providing an exception for information provided by another government agency upon condition that it not be disclosed.

The goal in adopting the SEC's basic approach is to ensure that respondents have prompt access to the non-privileged documents underlying enforcement counsel's decision to commence enforcement proceedings, while eliminating much of the expense and delay often associated with pre-trial discovery in civil matters. Recognizing that administrative adjudications will take place after a Bureau investigation intended to gather relevant evidence, and in light of the affirmative obligation that the Final Rule places on enforcement counsel to provide access to materials gathered in the course of the investigation, the Final Rule does not provide for certain other traditional forms of pre-trial discovery, such as interrogatories and discovery depositions. The Final Rule does provide for the deposition of witnesses unavailable for trial, the use of subpoenas to compel the production of documentary or tangible evidence, and in appropriate cases, expert discovery, thus ensuring that respondents have an adequate opportunity to marshal evidence in support of their defense. The Bureau believes this approach will promote the fair and speedy resolution of claims while ensuring that parties have access to the information necessary to prepare a defense.

III. Public Comment on the Interim Final Rule

In response to the Interim Final Rule, the Bureau received seven comment letters. Four letters were received from trade associations representing sectors of the financial industry, one letter was received from a mortgage company, and two letters were received from individual consumers.

Trade associations' comments generally fell into several categories. Several comments suggested that the Bureau revisit the deadlines contained in the Interim Final Rule. Two trade association comment letters objected to the affirmative disclosure approach to discovery, and requested that the Bureau allow respondents to conduct additional forms of traditional civil discovery. Two trade associations requested that the Bureau adopt a process to notify potential respondents that the Bureau is contemplating an enforcement action, similar to the Wells Notice process used by the SEC. One trade association commenter expressed concern about the confidentiality of adjudication proceedings and filings. Trade associations made other specific comments as well, all of which are addressed in part V below in connection with the section of the Interim Final Rule to which they pertain.

The comment letter received from the mortgage company related to the Rules Relating to Investigations, *see* 12 CFR part 1080, not the Interim Final Rule. The comment letter is addressed in the Final Rule establishing part 1080.

The comment letters from consumers did not contain any specific comments or suggestions pertaining to the Interim Final Rule.

In part IV of this preamble, the Bureau addresses general comments that were not directly related to particular sections of the Interim Final Rule. In part V, the Bureau describes each section of the Interim Final Rule, responds to significant issues raised by the comments pertaining to each section, and explains any changes made to the Interim Final Rule that are reflected in the Final Rule. Many sections of the Interim Final Rule received no comment and, as noted, are being finalized without change.

IV. General Comments

The Bureau received several comments that were not directed at specific sections of the Interim Final Rule. Those comments are addressed here.

Two commenters suggested that the Bureau adopt a process for a prospective respondent to be given the opportunity to respond to the Bureau's allegations before an action is filed or a notice of charges is issued, similar to the Wells Process adopted by the SEC.

The Bureau announced on November 7, 2011 that it has adopted a process similar to the Wells Process.[2] The process will allow the subject of an investigation, in most cases, to respond to any potential legal violations that Bureau enforcement counsel believe have been committed before the Bureau decides whether to initiate an

[2] See *www.consumerfinance.gov/pressrelease/consumer-financial-protection-bureau-plans-to-provide-early-warning-of-possible-enforcement-actions.*

enforcement proceeding. The Bureau's process for providing advance notice of a possible legal action is not required by law, but the Bureau believes it will promote even-handed enforcement of Federal consumer financial law.

The Bureau received several comments raising concern about the disclosure of confidential material contained in administrative filings.

The Final Rule provides that filings containing confidential information subject to a protective order or a pending motion for a protective order may not be published or otherwise disclosed. In addition, the Bureau will adopt a policy providing for a ten-day delay before publishing filings, in order to allow any party an opportunity to object to the disclosure of allegedly confidential information contained within such filings. This policy is intended to protect confidential information from inadvertent disclosure in public documents. The comments regarding the Bureau's treatment of confidential information are addressed in more detail below in connection with the specific rules to which they were directed.

One commenter asked the Bureau to identify the official authorized to initiate enforcement proceedings in the absence of a Bureau Director. This commenter also suggested that once a Director is in place, only the Director should be authorized to initiate enforcement proceedings.

The President appointed a Director to the Bureau on January 4, 2012. The Director, or any official to whom the Director has delegated his authority pursuant to section 1012 of the Dodd-Frank Act, 12 U.S.C. 5492(b), will authorize the initiation of enforcement proceedings through the issuance of a notice of charges.

One commenter asserted that section 1052(c)(1) of the Dodd-Frank Act prohibits the Bureau from issuing civil investigative demands after the institution of any proceedings under a Federal consumer financial law, including proceedings initiated by a State or a private party. 12 U.S.C. 5562(c)(1). The commenter argued that a civil investigative demand should be accompanied by a certification that the demand will have no bearing on any proceeding then in process.

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 related to the investigation that results in the proceeding. It does not limit the Bureau's authority to issue civil investigative demands based upon the commencement of a proceeding by other parties, such as a State or a private party. Nor does it limit the Bureau's authority to issue civil investigative demands to investigate potential violations of Federal consumer law not at issue in a pending proceeding.

In addition, the Bureau notes that any limitations placed upon it by section 1052(c)(1) of the Dodd-Frank Act are incorporated in 12 CFR 1080.6, which provides that civil investigative demands will be issued in accordance with section 1052(c) of the Dodd-Frank Act, 12 U.S.C. 5562(c).

One commenter argued the Right to Financial Privacy Act (RFPA), 12 U.S.C. 3401 *et seq.,* limits the Bureau's ability to bring administrative enforcement proceedings without a Director. The commenter contended RFPA restricts the Bureau's authority to share information protected under RFPA with the Secretary of the Treasury. The commenter therefore recommended that the Bureau revise the Interim Final Rule to provide that, until the Bureau has a Director, the Bureau will not commence or continue adjudication proceedings in cases where material information includes information that RFPA purportedly does not permit to be disclosed to the Secretary of the Treasury.

As noted above, the President appointed a Director to the Bureau on January 4, 2012. The Bureau will comply with RFPA, but the commenters' particular concern about the sharing of information with the Secretary of the Treasury is moot.

V. Section-by-Section Analysis

Subpart A—General Rules

Section 1081.100 Scope of the Rules of Practice

This section of the Interim Final Rule sets forth the scope of the Interim Final Rule and states that it applies to adjudication proceedings brought under section 1053 of the Dodd-Frank Act. The Interim Final Rule does not apply to Bureau investigations, rulemakings, or other proceedings. As drafted and pursuant to the definition of the term ''*adjudication proceeding*'' in § 1081.103, the Interim Final Rule does not apply to the issuance, pursuant to section 1053(c) of the Dodd-Frank Act, of a temporary order to cease-and-desist pending completion of the underlying cease-and-desist proceedings.

The Bureau invited comments as to whether special rules governing such proceedings are necessary and, if so, what the rules should provide. One commenter recommended that the Bureau undertake a new rulemaking to promulgate rules governing temporary cease-and-desist proceedings initiated pursuant to section 1053(c) of the Dodd-Frank Act and suggested that such proceedings should be based on findings made on specific criteria. The commenter pointed to the Federal Deposit Insurance Corporation's rules governing temporary cease-and-desist proceedings, 12 CFR 308.131, as an example of such rules.

The Bureau agrees that there should be specific rules governing temporary cease-and-desist proceedings initiated pursuant to section 1053(c) of the Dodd-Frank Act, and currently intends to issue separate rules governing such proceedings.

One commenter also sought clarification as to whether the Interim Final Rule was intended to apply to proceedings in which the Bureau is seeking civil money penalties available under section 1055(c) of the Dodd-Frank Act. 12 U.S.C. 5565(c). The commenter noted that in many instances, the Bureau is likely to seek both an order to cease-and-desist and a civil money penalty based on the same facts. The commenter stated it would be more efficient to have both hearings combined into one hearing on the record.

To provide further guidance to covered persons, the Bureau clarifies that it will rely on the Final Rule when seeking civil money penalties in adjudication proceedings. The Bureau agrees with the commenter that there will be many instances where the Bureau will simultaneously seek civil money penalties, a cease-and-desist order, and potentially other available remedies. The Bureau will periodically be reviewing its experience under the Final Rule to consider whether additional changes may be warranted, including whether additional rules governing the imposition of civil money penalties pursuant to section 1055(c) of the Dodd-Frank Act would be beneficial.

With the exception of a technical change in the citation to the Dodd-Frank Act, the Bureau adopts § 1081.100 of the Interim Final Rule without change in the Final Rule.

Section 1081.101 Expedition and Fairness of Proceedings

This section of the Interim Final Rule, which is modeled on the FTC Rules, 16 CFR 3.1, sets forth the Bureau's policy

to avoid delays in any stage of an adjudication proceeding while still ensuring fairness to all parties. It permits the hearing officer or the Director to shorten time periods established by the Interim Final Rule with the parties' consent. This authority could be used in proceedings where expedited hearings would serve the public interest or where the issues do not require expert discovery or extended evidentiary hearings.

One commenter noted its strong support for fair and impartial adjudication proceedings, but indicated that whether such proceedings should also be ''expeditious'' depends on the meaning of that term, and on the facts and circumstances of individual cases. The Bureau notes that expeditious proceedings are contemplated under section 1053(b) of the Dodd-Frank Act, 12 U.S.C. 5563(b), which requires that the hearing be held no earlier than 30 days nor later than 60 days after the date of service of the notice of charges, unless an earlier or later date is set by the Bureau at the request of any party so served. The Bureau believes that, in drafting the Interim Final Rule, it created a process that simultaneously provides for the prompt and efficient resolution of claims and ensures that parties who appear before the Bureau receive a fair hearing.

The Bureau adopts § 1081.101 of the Interim Final Rule without change in the Final Rule.

Section 1081.102 Rules of Construction

This section of the Interim Final Rule, drawn from the Uniform Rules, 12 CFR 19.2, makes clear that the use of any term in the Interim Final Rule includes either its singular or plural form, as appropriate, and that the use of the masculine, feminine, or neuter gender shall, if appropriate, be read to encompass all three. This section also explicitly states that, unless otherwise indicated, any action required to be taken by a party to a proceeding may be taken by the party's counsel. Finally, this section to the Final Rule provides that terms not otherwise defined by § 1081.103 should be defined in accordance with section 1002 of the Dodd-Frank Act, 12 U.S.C. 5481; the Interim Final Rule did not specifically reference section 1002.

The Bureau adopts § 1081.102 of the Interim Final Rule with the changes discussed above.

Section 1081.103 Definitions

This section of the Interim Final Rule sets forth definitions of certain terms used in the Interim Final Rule.

This section defines ''*adjudication proceeding*'' to include any proceeding conducted pursuant to section 1053 of the Dodd-Frank Act, except for proceedings related to the issuance of a temporary order to cease and desist pursuant to section 1053(c) of the Dodd-Frank Act. As previously noted, the Bureau currently intends to issue rules governing the issuance of temporary orders to cease and desist in the future.

The Bureau intends for the term ''*counsel*'' to include any individual representing a party, including, as appropriate, an individual representing himself or herself. The term ''*Director*'' has been defined to include the Director, as well as any person authorized to perform the functions of the Director in accordance with the law. This is intended to allow the Deputy Director, or a delegee of the Director, as appropriate, to perform the functions of the Director. The term ''*person employed by the Bureau*'' is defined to include Bureau employees and contractors as well as others working under the direction of Bureau personnel, and is intended to encompass, among other things, consulting experts.

On its own initiative, the Bureau replaced the defined term ''*Act,*'' which had been defined as the Consumer Financial Protection Act of 2010, with the defined term ''*Dodd-Frank Act*'' and defined ''*Dodd-Frank Act*'' to mean the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

On its own initiative, the Bureau has included a new definition in the Final Rule for the ''*Office of Administrative Adjudication*.'' The Interim Final Rule provided that the receipt of filings and certain other administrative tasks related to the Director's review of recommended decisions would be performed by the Bureau's Executive Secretary. After publication of the Interim Final Rule, the Bureau formed an Office of Administrative Adjudication to perform these functions. The Final Rule has been amended to reflect the creation of the Office of Administrative Adjudication and the transfer of the Executive Secretary's duties in adjudication proceedings to this Office. The defined term ''*Executive Secretary*'' has been removed from § 1081.103 as unnecessary.

On its own initiative, the Bureau also amended the definitions of ''*party*'' and ''*respondent*'' to account for persons that intervene in a proceeding for the limited purpose of seeking a protective order pursuant to amended § 1081.119(a).

Finally, the Bureau changed the term ''*Division of Enforcement*'' to ''*Office of Enforcement*'' to accurately reflect the Bureau's organizational nomenclature.

The Bureau adopts § 1081.103 of the Interim Final Rule with the changes discussed above.

Section 1081.104 Authority of the Hearing Officer

This section of the Interim Final Rule enumerates powers granted to the hearing officer subsequent to appointment. The hearing officer has the powers specifically enumerated in paragraph (b) of this section, as well as the power to take any other action necessary and appropriate to discharge the duties of a presiding officer. All powers granted by this provision are intended to further the Bureau's goal of an expeditious, fair, and impartial hearing process. The powers set forth in this section are generally drawn from the Administrative Procedure Act (APA), 5 U.S.C. 556, 557, and are similar to the powers granted to hearing officers and administrative law judges under the Uniform Rules, the SEC Rules, and the FTC Rules.

This section provides the hearing officer with the explicit authority to issue sanctions against parties or their counsel as may be necessary to deter sanctionable conduct, provided that any person to be sanctioned first has an opportunity to show cause as to why no sanction should issue. The Bureau believes such authority is included within the hearing officer's authority to regulate the course of the hearing, 5 U.S.C. 556(c)(5), but considers it appropriate to explicitly authorize the exercise of such authority in the Final Rule. The Bureau notes that the MARs provide adjudicators with the authority ''to impose appropriate sanctions against any party or person failing to obey her/his order, refusing to adhere to reasonable standards of orderly and ethical conduct, or refusing to act in good faith.'' *See* MARs, 11 T. M. Cooley L. Rev. at 83.

One commenter recommended that this section be revised to make clear that the hearing officer has the authority to provide a person requesting confidential treatment of information the time to come into compliance with applicable requirements before making a determination regarding confidentiality. The commenter expressed concern that the section as drafted authorized the hearing officer to immediately make public purportedly confidential material if the applicable requirements were not met.

The Bureau believes that the section as drafted adequately addresses this

circumstance. The hearing officer is authorized to ''deny confidential status to documents and testimony *without prejudice* until a party complies with all relevant rules'' (emphasis added). The inclusion of the ''without prejudice'' language authorizes the hearing officer to treat material as confidential while the party attempts to comply with the relevant rules. It also provides the hearing officer the authority to deny confidential status to documents when appropriate; for example, if a party repeatedly and/or willfully fails to comply with the requirements of the Final Rule.

The section permits the hearing officer to deny confidential status without prejudice until a party complies with ''all relevant rules.'' The commenter stated that the reference to ''all relevant rules'' is vague because the adjudication proceeding could be based on a respondent's alleged noncompliance with other rules. The commenter questioned whether the respondent would have to comply with those other rules before the hearing officer will treat material as confidential for the purposes of the adjudication proceeding.

The Bureau does not anticipate that the hearing officer will confuse the substantive rules the respondent is alleged to have violated with the procedural rules governing the treatment of purportedly confidential material. In light of this comment, however, and in the interest of providing covered persons additional guidance, the Bureau directs parties to §§ 1081.111, 1081.112, and 1081.119, as well as any applicable orders of the Director or hearing officer and any guidance issued by the Office of Administrative Adjudication, as the relevant rules with which persons seeking confidential treatment of material must comply.

Finally, the commenter stated that the hearing officer's authority to ''reject written submissions that fail to comply with the requirements of this part, and to deny confidential status to documents and testimony without prejudice until a party complies with all relevant rules'' was unclear. The commenter suggested that the hearing officer should only be permitted to reject filings that ''materially'' fail to comply with applicable requirements, so as not to elevate form over substance.

The Bureau has revised the Interim Final Rule to address this comment. Rejection of submissions merely because they fail to comply with this part in an immaterial fashion would be inconsistent with the Bureau's policy of encouraging fair and expeditious proceedings. Accordingly, the Bureau has revised § 1081.104(b)(6). The Final Rule provides that the hearing officer has the authority to ''reject written submissions that materially fail to comply with the requirements of this part.'' The Bureau adopts § 1081.104 of the Interim Final Rule with the changes discussed above.

Section 1081.105 Assignment, Substitution, Performance, Disqualification of Hearing Officer

This section of the Interim Final Rule is modeled on the FTC and the SEC Rules setting forth the process for assigning hearing officers in the event that more than one hearing officer is available to the Bureau. *See* 16 CFR 3.42(b), (e); 17 CFR 201.110, 201.112, 201.120. Consistent with 5 U.S.C. 3105, hearing officers will be ''assigned to cases in rotation so far as practicable.'' This section also sets forth the process by which hearing officers may be disqualified from presiding over an adjudication proceeding. The APA, 5 U.S.C. 556(b), provides that a hearing officer may disqualify himself or herself at any time. The standard for making a motion to disqualify requires that the movant have a reasonable, good faith basis for the motion. This standard is intended to emphasize that there must be an objective reason to seek a disqualification, not just a subjective, though sincerely held, belief. If a hearing officer does not withdraw in response to a motion for withdrawal, the motion is certified to the Director for his or her review in accordance with the Interim Final Rule's interlocutory review provision. Finally, this section provides the procedure for reassignment of a proceeding in the event a hearing officer becomes unavailable.

No comments were received specifically relating to this section, but commenters strongly supported a policy that adjudications should be fair and impartial. To that end, the Bureau has amended § 1081.201 of the Interim Final Rule by adding a new paragraph (e), which will require respondents, nongovernmental amici, and nongovernmental intervenors under § 1081.119(a) to file a disclosure statement and notification of financial interest. This disclosure statement and notification, discussed in more detail below, will provide the hearing officer and the parties with information to determine actual or potential bases for financial disqualification of the hearing officer early in the proceeding.

The Bureau adopts § 1081.105 of the Interim Final Rule without change in the Final Rule.

Section 1081.106 Deadlines

This section of the Interim Final Rule provides that deadlines for action by the hearing officer established by the Interim Final Rule do not confer any substantive rights on respondents. The SEC Rules, 17 CFR 201.360(a)(2), contain similar language regarding the timelines set out for certain hearing officer actions in SEC proceedings.

The Bureau received no comment on § 1081.106 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.107 Appearance and Practice in Adjudication Proceedings

This section of the Interim Final Rule is largely based on the Uniform Rules, 12 CFR 19.6, and prescribes who may act in a representative capacity for parties in adjudication proceedings. A notice of appearance is required to be filed by an individual representing any party, including an individual representing the Bureau, simultaneously with or before the submission of papers or other act of representation on behalf of a party. Any counsel filing a notice of appearance is deemed to represent that he or she agrees and is authorized to accept service on behalf of the represented party. The section also sets forth the standards of conduct expected of attorneys and others practicing before the Bureau. It provides that counsel may be excluded or suspended from proceedings, or disbarred from practicing before the Bureau, for engaging in sanctionable conduct during any phase of the adjudication proceeding.

The Bureau received no comments on § 1081.107, and the Final Rule is substantially similar to the Interim Final Rule. On the Bureau's own initiative, however, the Bureau amended § 1081.107(a)(1) to clarify that an attorney who is currently suspended or debarred from practicing in any jurisdiction may not appear before the Bureau or a hearing officer. This clarification is consistent with the SEC Rules, 17 CFR 201.102(e)(2), which provide for the suspension of any attorney who has been suspended or debarred by a court of the United States or of any State, and is designed to prohibit the appearance before the Bureau by a person who is authorized to practice in one State, but has been debarred or suspended in another jurisdiction.

The Bureau adopts § 1081.107 of the Interim Final Rule with the changes discussed above.

Section 1081.108 Good Faith Certification

This section of the Interim Final Rule is based on the Uniform Rules, 12 CFR 19.7, and requires that all filings and submissions be signed by at least one counsel of record, or the party if appearing on his or her own behalf. This section provides that, by signing a filing or submission, the counsel or party certifies and attests that the document has been read by the signer, and, to the best of his or her knowledge, is well grounded in fact and is supported by existing law or a good faith argument for the extension or modification of the existing law. In addition, the certification attests that the filing or submission is not for purposes of unnecessary delay or any improper purpose. Oral motions or arguments are also subject to the good faith certification: The act of making the oral motion or argument constitutes the required certification. Finally, this section makes clear that a violation of the good faith certification requirement would be grounds for sanctions under § 1081.104(b)(13). This section, which also mirrors the requirements of Federal Rule of Civil Procedure 11, is intended to ensure that parties and their counsel do not abuse the administrative process by making filings that are factually or legally unfounded or intended simply to delay or obstruct the proceeding.

The Bureau received no comment on § 1081.108 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.109 Conflict of Interest

This section of the Interim Final Rule provides that, in general, conflicts of interest in representing parties to adjudication proceedings are prohibited. The hearing officer is empowered to take corrective steps to eliminate such conflicts. If counsel represents more than one party to a proceeding, counsel is required to file at the time he or she files his or her notice of appearance a certification that: (1) The potential for possible conflicts of interest has been fully discussed with each such party; and (2) the parties individually waive any right to assert any conflicts of interest during the proceeding. This approach is modeled after the Uniform Rules, 12 CFR 19.8, which were based upon the Model Code of Conduct for attorneys and the District of Columbia Ethics Rule. *See* 56 FR 27790, 27793 (June 17, 1991).

The Bureau received no comment on § 1081.109 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.110 Ex Parte Communication

This section of the Interim Final Rule implements the APA's prohibition on ex parte communications. *See* 5 U.S.C. 554(d)(1), 557(d)(1). Paragraphs (a)(1), (a)(2), and (b) are based on the Uniform Rules, 12 CFR 19.9(a), (b), and prohibit an ex parte communication relevant to the merits of an adjudication proceeding between a person not employed by the Bureau and the Director, hearing officer, or any decisional employee during the pendency of an adjudication proceeding. Paragraph (a)(3) defines the term ''*pendency of an adjudication proceeding,*'' and provides that if the person responsible for the communication has knowledge that a notice of charges will or is likely to be issued, the pendency of an adjudication shall be deemed to have commenced at the time of his or her acquisition of such knowledge. This provision implements 5 U.S.C. 557(d)(1)(E).

Consistent with the MARs and the practice of other agencies, communications regarding the status of the proceeding are expressly excluded from the definition of ex parte communications. *See* MARs, 11 T.M. Cooley L. Rev. at 87; 12 CFR 19.9(a)(2); 16 CFR 4.7(a). If an ex parte communication does occur, the document itself, or if oral, a memorandum describing the substance of the communication must be placed in the record. All other parties to the proceeding may have the opportunity to respond to the prohibited communication, and such response may include a recommendation for sanctions. The hearing officer or the Director, as appropriate, may determine whether sanctions are appropriate.

Finally, paragraph (e) of this section provides that the hearing officer is not permitted to consult an interested person or a party on any matter relevant to the merits of the adjudication, except to the extent required for the disposition of ex parte matters. Consistent with 5 U.S.C. 554(d), this paragraph also provides that Bureau employees engaged in an investigational or prosecutorial function, other than the Director, may not participate in the decision-making function in the same or a factually related matter.

The Bureau received several comments regarding this section. One commenter expressed the concern that it may be difficult to determine whether a notice of charges ''will be'' or is ''likely to be'' issued for the purpose of determining when the prohibition on ex parte communications begins. The commentator stated that, because an individual makes the final decision to issue a notice of charges and the individual's thinking could change unexpectedly, anything short of respondent's actual knowledge that a notice of charges has actually been issued should be insufficient to begin the prohibition on ex parte communications. The commentator stated that it would not be appropriate to sanction someone for an ex parte communication when the person does not know whether a notice of charges has been issued. The commenter proposed that the Bureau revise this section of the Interim Final Rule to begin the ban on ex parte communications upon notice of actual issuance and service of a notice of charges, regardless of whether the person has knowledge that a notice of charges will be issued. Similarly, in cases in which a court has vacated a final decision and order and remanded a matter for further adjudication proceedings, the commenter proposed that this section of the Interim Final Rule be revised to prohibit ex parte communications after remand beginning when the party actually knows the Bureau will not file an appeal because the time for filing an appeal has lapsed and the party has not been served with a notice of appeal.

The Bureau has revised the section after considering these comments. The APA provides that the prohibition on ex parte communications ''shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.'' 5 U.S.C. 557(d)(1)(E). The APA does not, however, prohibit ex parte communications from the time a party knows a proceeding ''is likely to be'' issued. Accordingly, the Bureau has struck the phrase ''is likely to be'' from § 1081.110(a)(3).

The Bureau has also revised § 1081.110(a)(3) with respect to the timing of the respondent's knowledge of whether the Bureau will file an appeal. The Final Rule removes that provision of the Interim Final Rule stating that ''an order of remand by a court of competent jurisdiction shall be deemed to become effective when the Bureau determines not to file an appeal or a petition for a writ of certiorari,'' and slightly revises the rest of the section to reflect the fact that review of an appellate court's decision may only be had upon the grant of a petition for rehearing by the

panel or an en banc panel, or the grant of a petition for a writ of certiorari. This amendment responds to the commenter's concern that a respondent will not know whether the Bureau intends to appeal until the Bureau provides notice of its intention.

Finally, paragraph (e) provides that Bureau employees engaged in an investigational or prosecutorial function, other than the Director, may not participate in the decision-making function in the same or a factually related matter. The commenter expressed concern that this section would permit the Director to engage in ex parte communications with Bureau enforcement counsel regarding the decision, recommended decision, or agency review of the recommended decision in the same or factually related case. The commenter therefore recommended that this section be revised to prohibit enforcement counsel from communicating with the Director under these circumstances.

The Bureau notes that, while this section of the Interim Final Rule does not bar enforcement counsel from communicating with the Director regarding matters unrelated to the Director's adjudicatory functions, this section expressly prohibits enforcement counsel from participating or advising in the decision, recommended decision, or agency review of the recommended decision, except as witness or counsel in a public proceeding. The Bureau believes that these prohibitions are consistent with the separation of functions provision of the APA, 5 U.S.C. 554(d), and address the commenter's concern. Accordingly, the Bureau declines to revise paragraph (e).

The Bureau adopts § 1081.110 of the Interim Final Rule with the changes discussed above.

Section 1081.111 Filing of Papers

This section of the Interim Final Rule requires the filing of papers in an adjudication proceeding. It specifies the papers that must be filed and addresses the time and manner of filing. The Bureau received no comments regarding this section. In the interest of clarity and to provide further guidance to parties, however, the Bureau has amended the Interim Final Rule in several respects.

First, the Final Rule makes technical revisions to paragraph (a) to require the filing of the disclosure statement and notification of financial interest required under the new § 1081.201(e). The Final Rule also includes a slight revision to paragraph (a) intended to clarify that the Bureau must file the proof of service of the notice of charges. Among other things, the filing of the proof of service will provide notice of the beginning of the ten-day period after which the Bureau will publish the notice of charges under § 1081.200(c).

The Final Rule makes non-substantive changes to paragraph (b) of the Interim Final Rule to make uniform the references to the United States Postal Service and the different mail services. The Bureau also revised paragraph (b) to reflect the transfer of certain authorities to the newly-created Office of Administrative Adjudication. As a result, the section provides for filing by electronic transmission upon the conditions specified by the Office of Administrative Adjudication, recognizing that while the Bureau anticipates the development of an electronic filing system, it may adopt other means of electronic filing in the interim (*e.g.*, email transmission). The section authorizes other methods of filing if a respondent demonstrates, in accordance with guidance issued by the Office of Administrative Adjudication, that filing via electronic transmission is not practical.

Finally, the Bureau added a new paragraph (c), providing that unless otherwise ordered by the Bureau or the hearing officer, or in the absence of a pending motion seeking such an order, all papers filed in connection with an adjudication proceeding are presumed to be open to the public. This paragraph is consistent with the Bureau's commitment to making adjudication proceedings as transparent as reasonably possible, as reflected in §§ 1081.119(c) and 1081.300, which both recognize a presumption that documents and testimony in adjudication hearings are public.

The Bureau adopts § 1081.111 of the Interim Final Rule with the changes discussed above.

Section 1081.112 Formal Requirements as to Papers Filed

This section of the Interim Final Rule sets forth the formal requirements for papers filed in adjudication proceedings. It sets forth formatting requirements, requires that all documents be signed in accordance with § 1081.108, and requires the redaction of sensitive personal information from filings where the filing party determines that such information is not relevant or otherwise necessary for the conduct of the proceeding. This section also sets forth the method of filing documents containing information for which confidential treatment has been granted or is sought, and requires that in addition to filing the confidential information under seal, an expurgated copy of the filing be made on the public record. Section 1081.119 governs the filing of motions seeking confidential treatment of information and sets forth the standard to be applied by the hearing officer in determining whether to grant such treatment.

One commenter suggested that the Bureau remove the requirement in paragraph (e) that sensitive personal information be redacted from filings. The commenter believed that this requirement was not workable because the Interim Final Rule did not define ''sensitive personal information'' and only provided examples of such information. The commenter also pointed out that the Uniform Rules and the SEC Rules do not require the redaction of sensitive personal information.

The Bureau declines to omit the requirement that sensitive personal information be redacted from filings. The Bureau continues to believe that it is improper to file Social Security numbers, financial account numbers, and other sensitive personal information in an adjudication proceeding where the information is not relevant or otherwise necessary for the conduct of the proceeding. The Bureau notes that this section is modeled on the FTC Rules, 16 CFR 3.45(b), and is also similar to Federal Rule of Civil Procedure 5.2, which require filers to redact certain personal information, including Social Security numbers and financial account numbers, from filings. The Bureau agrees, however, that the term ''sensitive personal information'' should be defined and has therefore revised paragraph (e) to define that term.

The commenter also recommended the removal of paragraph (f)(2), which requires a party seeking confidential treatment of information in a filing to file an expurgated copy of the filing with the allegedly confidential material redacted. Specifically, the commenter stated that paragraph (f)(2)'s requirement that the redacted version show the size and location of the redactions could, in effect, disclose what was redacted and may be impractical when redactions are made electronically. The commenter stated that the SEC Rules and Uniform Rules do not include this requirement. The Bureau notes that paragraph (f)(2) is modeled on the FTC Rules, 16 CFR 3.45(e), and that the commenter did not identify how this redaction requirement could disclose confidential information or would be impractical. Accordingly, the Bureau declines to omit this requirement.

Section 1081.112(e) has been revised to include a definition of sensitive personal information, and to clarify the

obligations of a party filing a document containing sensitive personal information. Section 1081.112(f) has been revised to clarify the obligation of parties to comply with any applicable order of the hearing officer or the Director when seeking confidential treatment of information in a filing.

The Bureau adopts § 1081.112 of the Interim Final Rule with the changes discussed above.

Section 1081.113 Service of Papers

This section of the Interim Final Rule requires that every paper filed in a proceeding be served on all other parties to the proceeding in the manner set forth in this section. Service by electronic transmission is encouraged, but is conditioned upon the consent of the parties. The section also sets forth specific methods for the Bureau to serve notices of charges, as well as recommended decisions and final orders. In this regard, the section provides that such service cannot be made by First Class mail, but also provides that service may be made on authorized agents for service of process.

The section also provides that the Bureau may serve persons at the most recent business address provided to the Bureau in connection with a person's registration with the Bureau. Although no such registration requirements currently exist, the Bureau has included this provision to account for any such requirements in the future. In the event that a party is required to register with the Bureau and maintain the accuracy of such registration information, the Bureau should be entitled to rely upon such information for service of process. This provision is modeled on the SEC Rules, 17 CFR 201.141(a)(2)(iii).

The Bureau did not receive comments specifically related to § 1081.113. However, the Bureau made technical revisions to clarify and make this section of the Final Rule consistent with other sections of the Final Rule. The Bureau revised paragraph (d)(1)(v), which requires the Bureau to maintain a record of service of the notice of charges on parties, to also require the Bureau to file the certificate of service consistent with revised § 1081.111(a) to give notice of the beginning of the ten-day period after which the Bureau will publish the notice of charges under § 1081.200(c).

In addition, the Bureau revised paragraph (a) of this section to make it clear that the parties must comply with any applicable order of the hearing officer or the Director governing the service of papers.

Finally, as it did with § 1081.111(b), the Bureau made non-substantive changes to paragraphs (c) and (d) to make uniform the references to the United States Postal Service and the different mail services.

The Bureau adopts § 1081.113 of the Interim Final Rule with the changes discussed above.

Section 1081.114 Construction of Time Limits

This section of the Interim Final Rule provides for the manner of computing time limits, taking into account the effect of weekends and holidays on time periods that are ten days or less. This section also sets forth when filing or service is effective. With regard to time limits for responsive pleadings or papers, this section incorporates a three-day extension for mail service, similar to the Federal Rules of Civil Procedure, and a one-day extension for overnight delivery, as contained in some agencies' existing rules. A one-day extension for service by electronic transmission is consistent with the Uniform Rules and reflects that electronic transmission may result in delays in actual receipt by the person served.

Although the Bureau did not receive comments specifically related to § 1081.114, the Bureau made technical, non-substantive revisions to this section. As it did with §§ 1081.111 and 1081.113, the Bureau made non-substantive changes to make uniform the references to the United States Postal Service and the different mail services.

The Bureau adopts § 1081.114 of the Interim Final Rule with the changes discussed above.

Section 1081.115 Change of Time Limits

This section of the Interim Final Rule is modeled on the SEC Rules, 17 CFR 201.161, and is intended to limit extensions of time to those necessary to prevent substantial prejudice. The section is intended to further the Bureau's goal of ensuring the timely conclusion of adjudication proceedings. The section generally provides the hearing officer and the Director the authority to extend the time limits prescribed by the Interim Final Rule in certain defined circumstances. In keeping with the goal of expeditious resolution of proceedings, this section provides that motions for extension of time are strongly disfavored and may only be granted after consideration of various enumerated factors, provided that the requesting party makes a strong showing that denial of the motion would substantially prejudice its case. The section also provides that any extension of time shall not exceed 21 days unless the hearing officer or Director, as appropriate, states on the record or in a written order the reasons why a longer extension of time is necessary. Finally, the section provides that the granting of a motion for an extension of time does not affect the deadline for the recommended decision of the hearing officer, which must be filed no later than the earlier of 300 days after the filing of the notice or charges or 90 days after the end of post-hearing briefing (unless separately extended by the Director as provided for in § 1081.400).

Commenters expressed concern over paragraph (b) of this section, which sets forth a policy strongly disfavoring motions for extensions of time. The commenters recommended that the Bureau delete paragraph (b).

The Bureau believes the policy reflected in paragraph (b) ensures fairness to both the parties and the hearing officer by allowing an administrative matter to proceed within the timeframes provided by the Interim Final Rule, which were designed to provide sufficient time to both the litigants and the hearing officer. The Bureau believes that mandatory deadlines for the completion of certain stages of administrative proceedings, and a policy strongly disfavoring extensions, postponements or adjournments, is necessary to ensure that these proceedings are expeditious and fair.

The Bureau notes that the SEC amended its rules in 2003 to improve the timeliness of its administrative proceedings. The SEC Rules, 17 CFR 201.161, on which this section is modeled, were revised in 2003 to incorporate a policy strongly disfavoring extensions, postponements or adjournments except in circumstances where the requesting party makes a strong showing that the denial of the request or motion would substantially prejudice its case. The SEC stated that this provision was necessary in light of another amendment to the SEC Rules that changed the suggested guidelines for completion of administrative matters to mandatory deadlines. *See* 68 FR 35787 (June 17, 2003). The Bureau finds the SEC's experience instructive, and declines to delete paragraph (b) of this section.

The Bureau adopts § 1081.115 of the Interim Final Rule without change in the Final Rule.

Section 1081.116 Witness Fees and Expenses

This section of the Interim Final Rule provides that fees and expenses for non-party witnesses subpoenaed pursuant to

the Interim Final Rule shall be the same as for witnesses in United States district courts.

The Bureau received no comment on § 1081.116 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.117 Bureau's Right To Conduct Examination, Collect Information

This section of the Interim Final Rule, which is modeled on the Uniform Rules, 12 CFR 19.16, states that nothing contained in the Interim Final Rule shall be construed to limit the right of the Bureau to conduct examinations or visitations of any person, or the right of the Bureau to conduct any form of investigation authorized by law, or to take other actions the Bureau is authorized to take outside the context of conducting adjudication proceedings. This section is intended to clarify that the pendency of an adjudication proceeding with respect to a person shall not affect the Bureau's authority to exercise any of its powers with respect to that person.

One commenter asserted that section 1052(c)(1) of the Dodd-Frank Act prohibits the Bureau from issuing civil investigative demands after the institution of any proceedings under Federal consumer financial law, including proceedings initiated by a State law enforcement agency or a private party. The commenter asked the Bureau to amend the Interim Final Rule to require every civil investigative demand to be accompanied by a certification that the demand will have no bearing on any proceeding then in process.

This comment arguably should have been directed to the Rules of Investigation, 12 CFR part 1080, but the Bureau addresses it here. The Bureau notes that this section of the Interim Final Rule did not purport to implement or interpret section 1052(c)(1) of the Dodd-Frank Act. Rather, it states that nothing within ''this part'' (*i.e.,* the Interim Final Rule) should be construed as limiting the Bureau's supervisory, investigatory, or other authority to gather information in accordance with law. The Bureau does not agree with the commenter's interpretation of section 1052(c)(1) of the Dodd-Frank Act, but notes that any limitations placed upon it by that section are incorporated in 12 CFR 1080.6, which provides that civil investigative demands will be issued in accordance with section 1052(c) of the Dodd-Frank Act.

The Bureau adopts § 1081.117 of the Interim Final Rule without change in the Final Rule.

Section 1081.118 Collateral Attacks on Adjudication Proceedings

This section of the Interim Final Rule, which is modeled on the Uniform Rules, 12 CFR 19.17, is intended to preclude the use of collateral attacks to circumvent or delay the administrative process.

The Bureau received no comment on § 1081.118 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.119 Confidential Information; Protective Orders

This section of the Interim Final Rule sets forth the means by which a party or another person may seek a protective order shielding confidential information. While generally modeled on the SEC Rules, 17 CFR 201.322, this section of the Interim Final Rule adopts the substantive standard set forth in the FTC Rules, 16 CFR 3.45(b), which provides that the hearing officer may grant a protective order only upon a finding that public disclosure will likely result in a clearly defined, serious injury to the person requesting confidential treatment, or after finding that the material constitutes sensitive personal information. The Bureau adopted the FTC's standard in order to provide as much transparency in the adjudicative process as possible, while also protecting confidential business information or other sensitive information of parties appearing before the Bureau or third parties whose information may be introduced into evidence. The Bureau expects that the standard set forth in this section will be met in cases where the disclosure of trade secrets or other information to the public or to parties is likely to result in harm, but that the standard will not be met simply because the information at issue is deemed ''confidential'' or ''proprietary'' by the movant. To the extent that a movant can identify a clearly defined, serious injury likely to result from the disclosure of such particular information, it will be protected; generalized claims of competitive or other injury generally will not suffice. This section provides that documents subject to a motion for confidential treatment will be maintained under seal until the motion is decided.

One commenter expressed concern that the Interim Final Rule may not accommodate a situation where the person seeking confidential treatment is not the same as the person who would be harmed by the disclosure of the material. In order to clarify the rights of third parties whose confidential information may be disclosed during the adjudicative process, the Bureau added a new paragraph (a), providing that a party may not disclose confidential information obtained from a third party without providing the third party at least ten days notice prior to the disclosure. In response to this notice, the third party has the option to consent to the disclosure of such information, which may be conditioned on the entry of a protective order, or may intervene in the proceeding for the limited purpose of moving for a protective order pursuant to this section. The new paragraph (a) further provides that a party must certify that proper notice was provided for any written filing or oral motion or argument that contains confidential information obtained from a third party.

In order to streamline the process for disclosing confidential information obtained from third parties, the Bureau revised paragraph (b) of the Interim Final Rule (paragraph (c) of the Final Rule) to provide for the mandatory entry of a stipulated protective order that has been agreed to by all parties, including third parties to the extent their information is at issue. However, the Office of Enforcement reserves the right to refuse to stipulate to a protective order that does not meet the substantive standards set forth in this section.

One commenter recommended that the Bureau adopt the SEC's standard for granting a protective order and revise paragraph (b) of the Interim Final Rule to provide that a ''motion for a protective order shall be granted only upon a finding that the harm resulting from disclosure would outweigh the benefits of disclosure.''

As noted above, the Bureau considered the SEC's standard, but ultimately decided to adopt the FTC's standard because it comports with the Bureau's goals of providing transparency in the adjudicative process while also protecting confidential business information or other sensitive information. The Bureau believes the standard it adopts in this section serves the public interest by balancing the need for a public understanding of the Bureau's adjudication proceedings with the interests of respondents in avoiding competitive injury from public disclosure of information. *See In re Gen. Foods Corp.,* 95 F.T.C. 352 (1980).

The commenter raised a number of specific concerns regarding the Bureau's adoption of the FTC's standard. First, the commenter stated that the standard prevents a financial institution from seeking confidential treatment of its customers' personal information. However, the Interim Final Rule

provides that a protective order shall be issued after finding that the material constitutes sensitive personal information. There is no prohibition on persons seeking confidential treatment of sensitive personal information of other persons. On the contrary, the Bureau contemplates that the sensitive personal information of consumers will regularly be protected under §§ 1081.112(e) and 1081.119(b), whether because of a motion for a protective order filed by a person other than the consumer or stipulated to by the parties, or because of the requirement that sensitive personal information generally be redacted under § 1081.112(e).

The commenter also objected to this standard because it does not define the terms ''serious injury,'' ''likely,'' or ''clearly defined.'' The commenter identified the unpredictable possibility of identity theft as a possibility of injury that may not be ''likely.'' The Bureau believes that the commenter's concerns regarding potential identity theft should be addressed by § 1081.112(e), which generally requires the redaction of sensitive personal information. The Bureau reiterates that it anticipates that sensitive personal information of consumers will regularly be protected from public disclosure. The Bureau again notes that § 1081.112(e) is based on the FTC Rules, 16 CFR 3.45(b), and that the FTC has significant experience applying these standards in many types of cases. The Bureau believes leaving these terms undefined provides the hearing officer with the necessary flexibility to address confidentiality concerns on a case-by-case basis based on the relevant facts and circumstances. At the same time, this standard is consistent with the Bureau's goal of transparency and avoids granting confidential status based on unsupported and generalized claims of competitive or other injury.

The commenter also stated that the Interim Final Rule does not accommodate the possibility that the public disclosure of information may be illegal under laws unrelated to the adjudication proceeding. The Bureau agrees and has therefore revised paragraph (b) of this section (now paragraph (c)) to break up the bases for issuance of protective orders into subsections and to include a new subsection making clear that the hearing officer shall grant a protective order where public disclosure is prohibited by law.

Finally, consistent with the Bureau's commitment to transparency and open government, the Bureau clarified paragraph (b) of the Interim Rule (paragraph (c) of the Final Rule) to recognize that documents and testimony filed in connection with an adjudication proceeding are presumed to be public. This clarification is consistent with § 1081.300 and the revised § 1081.111(c), both of which recognize a presumption that documents, testimony, and hearings are public.

The Bureau adopts § 1081.119 of the Interim Final Rule with the changes discussed above.

Section 1081.120 Settlement

This section of the Interim Final Rule is based on the SEC Rules, 17 CFR 201.240. The Bureau on its own initiative revised this section to make it consistent with § 1081.100 of this part regarding the scope of the Interim Final Rule. Section 1081.100 makes clear that the Interim Final Rule applies only to adjudication proceedings authorized by section 1053 of the Dodd-Frank Act and not to Bureau investigations, investigational hearings or other proceedings that do not arise from proceedings after the issuance of a notice of charges. As revised, this section governs only offers of settlement made after the institution of adjudication proceedings under this part. Under this section, any respondent in a proceeding may make an offer of settlement in writing at any time. Any settlement offer shall be presented to the Director with a recommendation, except that, if the recommendation is unfavorable, the offer shall not be presented to the Director unless the person making the offer so requests.

The section requires that each offer of settlement recite or incorporate as part of the offer the provisions of paragraphs (c)(3) and (4). Because certain facts necessary for the Director to make a reasoned judgment as to whether a particular settlement offer is in the public interest will often be available only to the Bureau employee that negotiated the proposed settlement, paragraph (c)(4)(i) requires waiver of any provisions, under the Interim Final Rule or otherwise, that may be construed to prohibit ex parte communications regarding the settlement offer between the Director and Bureau employee involved in litigating the proceeding. Paragraph (c)(4)(ii) requires waiver of any right to claim bias or prejudgment by the Director arising from the Director's consideration or discussions concerning settlement of all or any part of the proceeding. If the Director rejects the offer of settlement, the person making the offer shall be notified of the Director's action. The rejection of the offer of settlement shall not affect the continued validity of the waivers pursuant to paragraph (c)(4).

The Bureau also revised this section to include a new paragraph (d) governing the content of stipulations and consent orders and providing a process for resolving an adjudication proceeding through a consent order. This process requires the respondent and the Bureau to reduce the terms of any settlement into a written stipulation and consent order memorializing the terms of the settlement and including certain required provisions. The Bureau will then issue an order with the consent of the respondent.

The Bureau adopts § 1081.120 of the Interim Final Rule with the changes discussed above.

Section 1081.121 Cooperation With Other Agencies

This section of the Interim Final Rule sets forth the Bureau's policy to cooperate with other governmental agencies to avoid unnecessary overlapping or duplication of regulatory functions.

The Bureau received no comment on § 1081.121 of the Interim Final Rule and adopts it without change in the Final Rule.

Subpart B—Initiation of Proceedings and Prehearing Rules

Section 1081.200 Commencement of Proceedings and Contents of Notice of Charges

This section of the Interim Final Rule, similar to the comparable section of the Uniform Rules, 12 CFR 19.18, contains the requirements relating to the initiation of adjudication proceedings, including the required content of a notice of charges initiating a hearing. In provisions modeled on the MARs and the Federal Rules of Civil Procedure, *see* MARs, 11 T.M. Cooley L. Rev. at 96; Fed. R. Civ. P. 41(a), this section also sets forth the circumstances under which the Bureau may voluntarily dismiss an adjudication proceeding, either on its own motion before the respondent(s) serve an answer, or by filing a stipulation of dismissal signed by all parties who have appeared. Unless the notice or stipulation of dismissal states otherwise, a dismissal pursuant to this section is without prejudice. In keeping with the principle that Bureau proceedings are presumed to be public, this section also provides that a notice of charges shall be released to the public after affording the respondent or others an opportunity to seek a protective order to shield confidential information.

On its own initiative, the Bureau amended this section to include a new

paragraph (d) to conform with the revisions made to § 1081.120 and to provide a procedural mechanism to commence an adjudication proceeding to effectuate a settlement agreed to before the filing of a notice of charges. As noted above, § 1081.120 has been revised to clarify that the settlement procedure laid out in that section applies only after a notice of charges has been issued. The Bureau recognizes, however, that settlement negotiations may commence prior to the filing of a notice of charges. In those circumstances, the Bureau may determine that an adjudication proceeding—rather than litigation elsewhere—is the most appropriate forum in which to enter a consent order. New paragraph (d) therefore provides that, where the parties agree to settlement before the filing of a notice of charges, a proceeding may be commenced by filing a stipulation and a consent order concluding the proceeding. Paragraph (d) also requires that certain information be included in the stipulation, tracking the information required under § 1081.120(d). Finally, in the interest of transparency, paragraph (d) requires that the consent order set forth the legal authority for the proceeding and for the Bureau's jurisdiction over the proceeding, and a statement of the matters of fact and law showing that the Bureau is entitled to relief. *See* § 1081.200(b)(1) and (2).

The Bureau adopts § 1081.200 of the Interim Final Rule with the changes discussed above.

Section 1081.201 Answer and Disclosure Statement and Notification of Financial Interest

This section of the Interim Final Rule requires a respondent to file an answer in all cases. The Bureau considered, but rejected, the approach set forth in the SEC Rules, 17 CFR 201.220(a), whereby an answer is required only if specified in the notice of charges. The Bureau believes that an answer can help focus and narrow the matters at issue.

Pursuant to paragraph (a) of this section, respondents must file an answer within 14 days of service of the notice of charges. The 14-day time period is adopted from the FTC Rules, 16 CFR 3.12. Two commenters requested that paragraph (a) of this section be amended to provide 20 days from service of the notice of charges, rather than 14 days, to file an answer. One commenter stated that it takes a considerable amount of time to review the notice of charges, investigate the factual and legal allegations, determine the appropriate response, and draft an answer. That commenter also stated that more than 14 days will be necessary to prepare an answer because the Bureau is not required to provide affirmative disclosures pursuant to § 1081.206(d) until seven days after service of the notice of charges. Both commenters note that the Federal banking agencies and the SEC allow 20 days to file an answer. Finally, one commentator stated that the 14-day requirement may cause respondents to answer with repeated assertions that they lack information, leading to fewer stipulations, and undercutting the Bureau's goal of timely adjudications.

The Bureau declines to amend the Interim Final Rule as requested. The statutory requirement that a hearing be held between 30 to 60 days after the service of the notice of charges, unless an earlier date is set at the request of any party so served, necessitates a compressed timeline for litigating adjudication proceedings. The Bureau is not alone in setting a 14-day deadline for an answer. As noted above, the FTC requires respondents in administrative proceedings to file an answer within 14 days of service of the complaint.

Further, as noted above, the Bureau has adopted a policy pursuant to which it will generally provide advance notice of a possible enforcement action to prospective respondents before filing a notice of charges. Recipients of such notices will have an opportunity to submit a response in writing. As a result, many respondents will have considered and responded to most or all of the Bureau's allegations before receiving the notice of charges. The advance notice will also give respondents a prior opportunity to identify facts to which they may stipulate, addressing the expressed concern that a 14-day deadline to answer may lead to fewer factual stipulations.

Likewise, the Bureau is not persuaded that respondents need additional time to answer after receiving the Bureau's affirmative disclosure documents. In typical civil litigation, and in administrative proceedings before the prudential regulators and the FTC, respondents file an answer before conducting any discovery. The Bureau's affirmative disclosure obligation will be triggered before a respondent's answer is due. Thus, respondents will have access to more information prior to filing an answer than is available to most respondents in other civil and administrative proceedings.

Finally, pursuant to § 1081.115, a respondent may ask for an extension of time to file an answer. While such extensions are strongly disfavored, they may be granted if the respondent makes a strong showing that the denial of its motion for an extension of time would substantially prejudice its case. For all of these reasons, the Bureau declines to amend the deadline for filing an answer contained in paragraph (a) of § 1081.201 of the Interim Final Rule.

As in the Uniform Rules, 12 CFR 19.19(c), paragraph (d) of this section provides that failure to file a timely answer is deemed to be a waiver of the right to appear and a consent to the entry of an order granting the relief sought by the Bureau in the notice of charges. This section provides that in the case of default, the hearing officer is authorized, without further proceedings, to find the facts to be as alleged in the notice of charges and to enter a recommended decision containing appropriate findings and conclusions.

Paragraph (d)(2) of this section adopts the procedure from the SEC Rules for a motion to set aside a default, 17 CFR 201.155. It also provides that the hearing officer, prior to the filing of the recommended decision, or the Director, at any time, may set aside a default for good cause shown.

In the discussion of § 1081.105 above, the Bureau noted the addition of a new § 1081.201(e) requiring the filing of a disclosure statement and notification of financial interest. Consistent with the Bureau's goal of an expeditious, fair, and impartial hearing process, the Bureau seeks to provide the parties and the hearing officer with information to identify potential or actual bases for disqualification early in the process. Section 1081.201(e) is modeled on the disclosure statements required under Federal Rule of Civil Procedure 7.1, Federal Rule of Appellate Procedure 26.1, Third Circuit Local Appellate Rule 26.1.1, and Sixth Circuit Rule 26.1. This disclosure is calculated to reach a majority of the circumstances that are likely to call for disqualification on the basis of financial information that a hearing officer may not know or recollect; however, the disclosure does not cover all of the circumstances that may call for disqualification. In addition to requiring a respondent, a nongovernmental amicus, or a nongovernmental intervenor to identify any parent corporation or any publicly owned corporation owning 10% or more of its stock, § 1081.201(e) also requires the identification of ''any publicly owned corporation not a party to the proceeding that has a financial interest in the outcome of the proceeding and the nature of that interest.'' The types of financial interests that must be disclosed under this section include, for example, insurance, franchise, or indemnity agreements giving a publicly

owned corporation a financial interest in the outcome of the proceeding. *See, e.g.,* Sixth Circuit Rule 26.1(b)(2).

The Bureau adopts § 1081.201 of the Interim Final Rule with the changes discussed above.

Section 1081.202 Amended Pleadings

This section of the Interim Final Rule provides that a notice of charges or an answer may be amended or supplemented as a matter of course at any stage of the proceeding.

The Bureau did not receive comment on § 1081.202, but the Bureau has amended paragraph (a) of this section on its own initiative to require a party who wishes to amend a pleading to obtain the consent of the other party or leave of the hearing officer. By requiring written consent or leave of the hearing officer to amend pleadings, the revised section encourages parties to plead their case fully, as opposed to reserving claims and defenses for last minute amendments. This section continues to reflect a liberal standard of permitting amendments of pleadings, but implements an appropriate limit for amendments that are unduly prejudicial.

The Bureau adopts paragraph (b) of § 1081.202 of the Interim Final Rule without change. As a result, when a party seeks to introduce evidence at a hearing that is outside the scope of matters raised in the notice of charges or answer, the hearing officer may admit the evidence when admission is likely to assist in adjudicating the merits of the action unless the objecting party demonstrates that admission of such evidence would unfairly prejudice that party's action or defense upon the merits.

The Bureau adopts § 1081.202 of the Interim Final Rule with the changes discussed above.

Section 1081.203 Scheduling Conference

Section 1081.203 of the Interim Final Rule sets forth the requirements related to scheduling conferences. Paragraph (a) of this section requires the parties to meet before the initial scheduling conference to discuss the nature and basis of their claims and defenses, the possibilities for a prompt settlement or resolution of the case, and other matters to be determined at the scheduling conference.

Paragraph (b) of § 1081.203 of the Interim Final Rule provides that within 20 days of the service of the notice of charges, or at another time if the parties agree, the hearing officer and the parties are to have a scheduling conference. The Bureau revised paragraph (b) to clarify that a scheduling conference is to be held, not just scheduled, within 20 days of service of the notice of charges. This clarification is intended to reflect the Bureau's original intent with respect to the timing of the scheduling conference.

Paragraph (b) of this section also sets forth the issues to be discussed at the scheduling conference. These issues are drawn from those the parties are required to discuss at scheduling and prehearing conferences under the Uniform Rules, 12 CFR 19.31, the SEC Rules, 17 CFR 201.221, and the FTC Rules, 16 CFR 3.21. Paragraph (b)(1) provides that the parties shall be prepared to address the determination of hearing dates and location, and whether, in proceedings under section 1053(b) of the Dodd-Frank Act, the hearing should commence later than 60 days after service of the notice of charges. This provision is intended to account for the requirement in section 1053(b) of the Dodd-Frank Act that the hearing be held no earlier than 30 days nor later than 60 days after the date of service of the notice of charges, unless an earlier or later date is set by the Bureau at the request of any party so served. It is expected that the parties will discuss a hearing date at the scheduling conference, and that this would afford respondents the opportunity to request a hearing date outside the 30-to-60 day timeframe.

It is also expected that at or before the scheduling conference, the parties will discuss any issues related to the production of documents pursuant to § 1081.206, any anticipated motions for witness statements pursuant to § 1081.207, whether either party intends to issue documentary subpoenas, and whether either party believes that depositions will be necessary to preserve the testimony of witnesses who will be unavailable for the hearing. The parties are also expected to discuss the need and a schedule for any expert discovery.

Pursuant to paragraph (d) of § 1081.203, the hearing officer is required to issue a scheduling order at or within five days of the conclusion of the scheduling hearing, setting forth the date and location of the hearing, as well as other procedural determinations made. It is expected that the hearing officer will establish any dates for expert discovery in the scheduling order, or else expressly find that such discovery is not necessary or reasonable in a particular case. This scheduling order will govern the course of the proceedings, unless later modified by the hearing officer.

Provision for a prompt scheduling conference followed by prompt issuance of a scheduling order is necessary in order to allow for the orderly course of proceedings on the timeline set forth elsewhere in the Interim Final Rule. Particularly in cases brought pursuant to section 1053(b) of the Dodd-Frank Act in which the respondent does not request a hearing date outside the 30-to-60 day timeframe set forth in the statute, it is essential that the hearing officer and the parties have a clear understanding of the applicable schedule at the earliest possible date.

As provided for in the SEC Rules, 17 CFR 201.221(f), paragraph (e) of this section provides that any person named as a respondent in a notice of charges who fails to appear at a scheduling conference may be deemed in default pursuant to § 1081.201(d)(1). Finally, like the FTC Rules, 16 CFR 3.21(g), this section provides that scheduling conferences are presumptively public unless the hearing officer determines otherwise based on the standard set forth in § 1081.119(c).

The Bureau received no comment on § 1081.203 of the Interim Final Rule and adopts it with the single clarification discussed above in the Final Rule.

Section 1081.204 Consolidation and Severance of Actions

This section of the Interim Final Rule, modeled after the Uniform Rules, 12 CFR 19.22, allows the consolidation of actions if the proceedings arise out of the same transaction, occurrence, or series of transactions or occurrences or if the proceedings involve at least one common respondent or a material common question of law or fact. Proceedings are not to be consolidated if doing so would unreasonably delay the proceeding or cause injustice.

Severance, on the other hand, may be granted by the hearing officer only if he or she determines that undue prejudice or injustice would result from a consolidated proceeding and if such prejudice or injustice would outweigh the interests of judicial economy and speed in the adjudication of actions. This is a higher standard than is required for the consolidation of actions.

The Bureau received no comments on § 1081.204 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.205 Non-Dispositive Motions

This section of the Interim Final Rule governs all motions other than motions to dismiss or motions for summary disposition, which are governed by

§ 1081.212. The section generally sets forth the requirements for filing a non-dispositive motion, and requires that all such motions must be in writing, state with particularity the relief sought, and include a proposed order. This section also makes clear that motions filed pursuant to sections that impose different requirements should follow those requirements, and the requirements of § 1081.205 to the extent they are not inconsistent. For example, § 1081.208(g) of the Interim Final Rule (paragraph (h) of the Final Rule), which relates to motions to quash subpoenas, provides for a shorter time period for the filing of a responsive brief and prohibits the filing of a reply unless requested by the hearing officer. These conditions govern motions to quash, but such motions are still subject to other provisions of § 1081.205, including, *inter alia,* the need to meet and confer, deadlines for the hearing officer's ruling, and length limitations of the briefs.

Like the Uniform Rules and the FTC Rules, 12 CFR 19.23(d)(1); 16 CFR 3.22(d), this section gives a party ten days after service of a non-dispositive motion to respond to such a motion in writing. It also provides for reply briefs, which must be filed within three days after service of the response. A party's failure to respond to a motion shall waive that party's right to oppose such motion and constitutes consent to the entry of an order substantially in the form of the order accompanying that motion. This section adopts the SEC's 15-page length limitation for non-dispositive motions and oppositions, 17 CFR 201.154(c), and a six page length limitation for reply briefs. The Bureau has adopted these time and length limitations because they provide parties ample opportunity to express their views on matters that do not concern the ultimate disposition of the action.

This section also requires parties to make a good faith effort to meet and confer prior to the filing of a non-dispositive motion in an effort to resolve the controversy by agreement. The Bureau has included the meet-and-confer requirement because it believes such conferences can help obviate the need for, or narrow the scope of, disputed motions, thus saving both the parties and the hearing officer time and resources.

This section provides that the hearing officer shall rule on a non-dispositive motion within 14 days after the expiration of the time for filing of all motions papers authorized by this section, and that the pendency of a motion shall not stay proceedings. This time limitation is based on the FTC Rules, 16 CFR 3.22(e), and is intended to ensure the timely resolution of disputes so that the proceeding as a whole can conclude in a fair and expeditious manner. As noted above, both the FTC and the SEC have revised their rules of practice to provide for the more expeditious resolution of administrative adjudications, and the incorporation of a time period in which the hearing officer must rule on a non-dispositive motion is, in the view of the Bureau, a critical part of that effort. *See* 73 FR 58832, 58836 (Oct. 7, 2008) (FTC expects that provision requiring ALJs to decide motions within 14 days will expedite cases).

The Bureau received no comment on § 1081.205 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.206 Availability of Documents for Inspection and Copying

Modeled primarily after the SEC Rules, 17 CFR 201.230, this section of the Interim Final Rule adopts the SEC's affirmative disclosure approach to fact discovery in administrative adjudications. Generally, this section requires that the Office of Enforcement make available for inspection and copying certain categories of documents obtained by the Office of Enforcement prior to the institution of proceedings from persons not employed by the Bureau, in connection with the investigation leading to the institution of proceedings, and certain categories of documents produced by persons employed by the Bureau.

The Bureau received several comments requesting amendment to this section. Before addressing each specific comment, the Bureau sets forth its understanding of this provision in order to provide guidance to both the public and future respondents regarding how it intends to comply with the affirmative disclosure obligations of § 1081.206.

As the Bureau stated when it issued the Interim Final Rule, this section is intended to promote the fair and efficient resolution of adjudicatory proceedings. A respondent has an automatic right to inspect and copy documents under this section at the outset of the proceeding. The respondent is not required to make a formal request or wait until after the scheduling conference to gain access to documents underlying the Bureau's decision to initiate proceedings. Instead, the Bureau will provide the respondent with access to, in effect, the documents they would likely seek and obtain in the course of a protracted discovery period soon after service of the notice of charges.

This approach has several advantages. By automatically providing respondents with the factual information gathered by the Office of Enforcement in the course of the investigation leading to the institution of proceedings, this provision helps ensure that respondents have a complete understanding of the factual basis for the Bureau's action and can more accurately and efficiently determine the nature of their defenses or whether they wish to seek settlement. Because this approach renders traditional document discovery largely unnecessary, it will lead to a faster and more efficient resolution of Bureau administrative proceedings, saving both the Bureau and respondents the resources typically expended in the civil discovery process.

Section 1081.206 adopts most of the procedures and conditions set forth in the SEC Rules, as discussed below.

Pursuant to paragraph (a)(1), the Office of Enforcement's obligation under this section relates to documents obtained by the Office of Enforcement. Documents located only in the files of other divisions or offices of the Bureau are beyond the scope of paragraph (a). The term ''*documents*'' has been defined in the same manner as the term ''*documentary material*'' in section 1051(4) of the Dodd-Frank Act, 12 U.S.C. 5561(4), and encompasses, among other things, electronic files or other data or data compilations stored in any medium.

Paragraph (a)(1) also provides that the Office of Enforcement will make the documents available for inspection and copying. This provision is modeled after the SEC Rules and the Federal Rules of Civil Procedure. The Bureau anticipates that in most cases it will simply provide either paper or electronic copies of the material at issue to respondents, but has adopted the formulation in this section to preserve flexibility and the Office of Enforcement's right to require inspection and copying in appropriate cases.

Paragraphs (a)(1)(i), (ii), and (iii) describe the types of documents that are subject to the disclosure requirement of paragraph (a)(1). The Bureau interprets its obligation under paragraph (a)(1)(iii) to include both records obtained by the Office of Enforcement directly from persons not employed by the Bureau, as well as documents obtained by the Office of Enforcement indirectly from persons not employed by the Bureau. For example, if the Office of Enforcement obtains information from the Bureau's supervisory staff in connection with an investigation that the supervisory staff obtained from persons not employed by the Bureau,

the Office of Enforcement will disclose such information, provided it is not privileged or otherwise protected from disclosure.

Paragraph (a)(2) provides that the Office of Enforcement shall also make available each civil investigative demand or other written request to provide documents or to be interviewed issued by the Office of Enforcement in connection with the investigation leading to the institution of proceedings. The Office of Enforcement shall also make available any final examination or inspection reports prepared by any other office of the Bureau if the Office of Enforcement either intends to introduce any such report into evidence or to use any such report to refresh the recollection of, or impeach, any witness. The provisions of paragraph (a)(2) are included in the SEC Rules, but have been broken out into a separate paragraph of this section because they do not comprise documents that the Office of Enforcement obtained from persons not employed by the Bureau, and thus do not technically fall within the scope of paragraph (a)(1).

Pursuant to § 1081.208, a respondent may seek production of other documents pursuant to subpoena. Paragraph (a)(3) is intended to make clear that the affirmative disclosure obligation set forth in paragraphs (a)(1) and (a)(2) does not preclude the availability of subpoenas as separately provided by § 1081.208.

Paragraph (a)(4) provides that this section does not require the Office of Enforcement to produce a final examination or inspection report prepared by any other Office of the Bureau to a respondent who is not the subject of that report. The Bureau has included this provision, which does not appear in the SEC Rules, out of concern for the privileged and confidential nature of examination and inspection reports and to make clear that respondents cannot rely upon the Bureau's affirmative disclosure obligation to require the production of supervision or examination reports concerning other persons. Although the disclosure obligation as drafted would not require the production of such reports, the Bureau included this provision to remove any question regarding the issue.

Paragraph (a)(4) of the Interim Final Rule did not explicitly apply to final inspection or examination reports obtained from other government agencies. The Final Rule has been amended to clarify that such reports, to which the confidentiality and privilege concerns discussed above apply equally, are also excluded from the Bureau's disclosure obligation.

Paragraph (b)(1) of the Interim Final Rule permitted the Office of Enforcement to withhold documents that would otherwise be produced under paragraph (a) under five exceptions. The Final Rule retains these exceptions and adds an additional exception, paragraph (b)(1)(iii), as described below.

The first exception, in paragraph (b)(1)(i) shields information subject to a claim of privilege. The second exception, in paragraph (b)(1)(ii), protects as work product internal documents prepared by persons employed by the Bureau, including consulting experts, which will not be offered in evidence. Work product includes any notes, working papers, memoranda or other similar materials, prepared by an attorney or under an attorney's direction in anticipation of litigation. *See Hickman* v. *Taylor,* 329 U.S. 495 (1947); *see also* Fed. R. Civ. P. 26(b)(3) and (b)(5). Accountants, paralegals, investigators, and consulting experts who work on an investigation do so at the direction of the Director, an associate director, or another supervisory attorney, and their work product is therefore not subject to the affirmative disclosure obligation. Although such material would not fall within the purview of paragraphs (a)(1) and (a)(2), the Bureau has retained this provision of the SEC Rules to make clear that such work product is not subject to the affirmative disclosure obligation. An examination or inspection report prepared by one of the Bureau's supervision offices, which the Office of Enforcement intends to introduce into evidence or to use to refresh the recollection of, or impeach, a witness, is explicitly excluded from the materials that may be withheld pursuant to this exception.

The third exception, contained in paragraph (b)(1)(iii), is added to the Final Rule. Modeled upon a similar provision in the Rules of Practice of the Commodity Futures Trading Commission, 17 CFR 10.42, this paragraph protects documents obtained from other governmental entities that are either not relevant to the proceeding or were provided to the Bureau on the condition that the information not be disclosed. The Bureau has added this provision to accommodate any agreements limiting the disclosure of documents received from other governmental entities. To the extent the Bureau withholds documents pursuant to this exception, it will not rely upon those documents at the hearing.

The fourth exception, contained in paragraph (b)(1)(iv) of the Final Rule, protects the identity of a confidential source. *See* 5 U.S.C. 552(b)(7)(C) and (D). The fifth exception, contained in paragraph (b)(1)(v) of the Final Rule, provides that documents need not be produced where applicable law prohibits their production. The final exception protects any other document or category of documents that the hearing officer determines may be withheld as not relevant to the subject matter of the proceeding, or otherwise for good cause shown. This exception is intended to provide the hearing officer with the flexibility to adjust the Bureau's affirmative disclosure obligation to the particular contours of a proceeding. For example, this exception could be used in a situation where a single investigation involves other industry participants that are related only indirectly, or not at all, to the recommendations ultimately made to the Director with respect to the particular respondents in a specific proceeding. To require that documents not relevant to the proceeding be made available, simply because they were obtained as part of a broad investigation, burdens the respondent as well as the Office of Enforcement with unnecessary costs and delay.

Paragraph (b)(2) of this section provides that paragraph (b) does not authorize the Office of Enforcement to withhold material exculpatory evidence in the possession of the Office of Enforcement that would otherwise be subject to disclosure pursuant to paragraph (a). Pursuant to this section, the Office of Enforcement will provide respondents with material exculpatory evidence it has obtained from persons not employed by the Bureau even if such evidence is contained in documents that the Office of Enforcement is otherwise permitted to withhold pursuant to paragraph (b)(1).

The Bureau declines to adopt the SEC Rules' explicit reference to *Brady* v. *Maryland,* 373 U.S. 83 (1963) in this context. Proceedings under this part are civil in nature, not criminal, and the requirements of *Brady* are therefore inapplicable. The Office of Enforcement will turn over information from its investigatory file obtained from persons not employed by the Bureau as part of the investigation resulting in the Bureau's decision to institute proceedings, including any material exculpatory evidence so obtained. The Bureau understands this approach to be consistent with that provided for in the SEC Rules.

The Bureau also adds the clause ''that would otherwise be required to be

produced pursuant to paragraph (a) of this section'' to paragraph (b) to make clear that the material exculpatory evidence provision works in concert with paragraph (a). Paragraph (b) does not impose a separate, free-standing obligation to disclose exculpatory evidence that is not otherwise within the scope of paragraph (a).

Paragraph (c) provides that the hearing officer may require the Office of Enforcement to submit a withheld document list, and may order that a withheld document be made available for inspection and copying. Paragraph (c) has been amended to incorporate a provision from the Rules of Practice of the Commodity Futures Trading Commission, 17 CFR 10.42. This provision limits the disclosures that the Bureau will make with respect to documents withheld pursuant to paragraph (b)(1)(iii). The Bureau will inform the other parties of the fact that such documents are being withheld, but will not make further disclosures regarding those documents. Like paragraph (b)(1)(iii), this provision was added to enable the Bureau to comply with agreements limiting the disclosure of documents received from other governmental entities.

Pursuant to paragraph (d), the Office of Enforcement is required to make the material governed by this section available for inspection and copying no later than seven days after service of the notice of charges unless otherwise ordered by the hearing officer. The Bureau has considered requiring production of the covered material at the time the notice of charges is served, but has decided against such an approach. A provision for a delay of no more than seven days will allow parties to move for any appropriate protective orders and is consistent with the SEC's approach in this regard. *See* 17 CFR 201.230(d). The Bureau notes that, if seven days after the service of a notice of charges a motion for a protective order is pending but has not yet been ruled upon, production of the documents that are the subject of the motion could be delayed. The hearing officer could order temporary remedies where appropriate, such as the production of redacted copies pending a decision on the motion for a protective order. It is the Bureau's expectation that the Office of Enforcement will make the material available as soon as possible in every case.

Paragraphs (e) and (f) set forth the procedure to obtain copies of documents and the costs of such copies. As noted above, the Bureau anticipates providing electronic copies of the documents to respondents in most cases, and paragraph (f) accounts for such a provision of electronic documents. In order to preserve the discretion of the Office of Enforcement, however, this paragraph includes provisions governing the inspection and copying of documents. In order to provide for the safekeeping of documents subject to inspection, and to control costs associated with the implementation of this section, paragraph (e) provides that documents shall be made available for inspection and copying at the Bureau office where they are ordinarily maintained, or at such other place as the parties may agree. In cases in which electronic production is unwarranted, this process appears more likely to result in prompt access to documents obtained by the Office of Enforcement that are the basis of the allegations contained in the notice of charges.

Paragraph (g) of this section imposes upon the Office of Enforcement a duty to supplement its disclosures under paragraph (a)(1) of this section if it acquires information after making its disclosures that it intends to rely upon at a hearing. Although the SEC Rules do not include an analogous provision, the Bureau believes that imposing a duty to supplement will reduce the need for unnecessary discovery requests.

Like the SEC Rules, 17 CFR 201.230(h), paragraph (h) provides for a ''harmless error'' standard in the event the Office of Enforcement fails to make available to a respondent a document required to be made available by this section.

Finally, paragraph (i) is modeled on the FTC Rules, 16 CFR 3.31(g), and provides a ''claw back'' mechanism whereby inadvertent disclosure of privileged or protected information or communications shall not constitute a waiver of the privilege or protection, provided that the party took reasonable steps to prevent disclosure and promptly took reasonable steps to rectify the error. Furthermore, paragraph (i) provides that disclosure of privileged or protected information or communications shall waive the privilege only if the waiver was intentional and that the scope of such waiver is limited to the undisclosed information or communications concerning the same subject matter, which in fairness ought to be considered together with the disclosed information or communications. Paragraph (i) expressly applies to disclosures made by any party during an adjudication proceeding.

The Bureau received several comments to this section, and will address them in turn.

Comment: One commenter asserted that the ''affirmative disclosure'' approach puts respondents at a significant disadvantage to the Bureau, because the Bureau, unlike the respondent, will have already gathered all of the information it needs to prepare for the hearing through examinations and investigation proceedings as well as through its ability to collect consumer complaints and collect information from covered persons.

Response: While the Bureau will have already conducted an investigation prior to filing its notice of charges, the ''affirmative disclosure'' approach will give a respondent automatic access to the vast majority of the documents gathered as part of that investigation. Production to respondents will include any consumer complaints or documents from covered persons that enforcement counsel obtained in connection with the investigation, provided that production of those documents would not reveal the identity of a confidential source or otherwise fall within the scope of one of the relevant exceptions.

This approach will provide respondents automatic access to the factual information gathered by the Office of Enforcement in the course of the investigation leading to the institution of proceedings. As a result, the process will help ensure that respondents have a complete understanding of the basis for the Bureau's action, and can assess their defenses accordingly. If necessary, respondents may seek to obtain additional information through subpoena.

Furthermore, the exceptions to the Bureau's affirmative disclosure obligation do not disadvantage respondents as compared to traditional civil discovery because the exceptions protect documents that often would be protected in traditional civil discovery. When producing documents in traditional discovery, litigants routinely seek protection for documents that (i) are privileged; (ii) constitute work product; (iii) are irrelevant or required to be kept confidential; (iv) would reveal the identity of a confidential source; [3] (v) are prohibited from production by applicable law; or (vi) are deemed by the hearing officer or judge to be not relevant to the subject matter or otherwise not subject to production for good cause shown.

[3] As discussed below, information provided by a confidential source, and in some cases even that source's identity, will be made available to the extent the Bureau plans to call that source as a witness, rely upon information he or she provided, or to the extent the information is exculpatory.

In short, the Bureau believes the affirmative disclosure process will promote a fair and efficient resolution of administrative proceedings without placing the respondent at an unfair disadvantage.

Comment: Respondents should be permitted to (a) depose third parties who have direct knowledge of relevant matters; (b) issue and enforce subpoenas for documents and testimony, and (c) serve third parties with interrogatories.

Response: The Bureau declines to make these changes. The Bureau considered allowing third-party depositions or interrogatories but declined to do so because the need for these third-party discovery tools will likely be met through the discovery mechanisms that are available under the Final Rule, and because of the potential for third-party depositions and interrogatories to delay the proceedings.

Even without third-party discovery depositions, respondents will be able to present testimony of third-parties with knowledge of relevant matters at the hearing to support their defense. Pursuant to § 1081.208, respondents may request the issuance of a subpoena for the attendance and testimony of a witness at the hearing. If a witness is unavailable for the hearing, a respondent may take that witness's deposition and introduce that testimony on the record at a hearing.

The Bureau believes that the marginal benefit of permitting third-party interrogatories is not justified in light of the likelihood that disputes over interrogatories may delay the proceedings. The Bureau notes that neither the SEC's Rules nor the Uniform Rules permit prehearing discovery depositions or interrogatories.

As drafted, § 1081.208 requires a party to request the issuance of a subpoena from the hearing officer, and generally requires the Bureau to seek judicial enforcement of subpoenas. The Bureau considered whether to permit parties to issue subpoenas. The Bureau declined to do so because a hearing officer can help ensure that subpoenas are not ''unreasonable, oppressive, excessive in scope, or unduly burdensome.'' The commenter requested that respondents be permitted to enforce subpoenas, but the Dodd-Frank Act requires the Bureau to do so. 12 U.S.C. 5562(b)(2). The Bureau's General Counsel will enforce subpoenas on relation of a respondent, provided such enforcement is consistent with the law and the policies of the Dodd-Frank Act.

The third-party discovery permitted by the Interim Final Rule is consistent with the practice of the SEC, which shares a common approach to discovery with the Bureau. *See* 17 CFR 201.230–234. It is also consistent with the Uniform Rules, which, like the Interim Final Rule, allow third-party depositions only when a witness is unavailable for hearing, *see* 12 CFR 19.27, and require parties to apply to the administrative law judge for a third-party document subpoena, which may be granted only if the administrative law judge determines the subpoena is not ''unreasonable, oppressive, excessive in scope, or unduly burdensome.'' *See* 12 CFR 19.26. Like the SEC, the Bureau will make documents available to respondents through the affirmative disclosure process. As a result, traditional discovery is limited, and it is appropriate to require parties to request issuance of a subpoena in order to ensure that the Bureau's subpoena power is exercised appropriately and not for purposes of delay or obstruction.

This practice is also appropriate considering that respondents must demonstrate that a witness is unavailable for the hearing in order to obtain a deposition subpoena. This standard is more easily enforced if a party has to request, and a hearing officer has to issue, those subpoenas. The SEC and the Uniform Rules both restrict depositions to circumstances when a witness will not be available for the hearing, and both require parties to request or apply for a deposition subpoena.

Comment: It is unclear whether the affirmative disclosure process limits the right of respondents to seek other documents from the Bureau through subpoena. Respondents may be prevented from seeking certain documents through subpoena on the grounds that it could physically inspect and copy those same documents through the affirmative disclosure process.

Response: Section 1081.208 permits a respondent to seek other documents from the Bureau through subpoena. Such a subpoena would presumably not be necessary if the documents sought by the respondent were included in the affirmative disclosure production, but the existence of that process does not negate a respondent's right to request a subpoena for other relevant documents in the possession of the Bureau, as the Interim Final Rule makes clear in paragraph (a)(3) of § 1081.206.

Comment: The affirmative disclosure process covers documents that are ''obtained by the Office of Enforcement.'' Whether documents are relevant and should be discoverable is unrelated to who at the Bureau ''obtained'' the documents. This could lead to protracted litigation over who ''obtained'' a document that a Bureau employee sees and reads but does not touch.

Response: The affirmative disclosure process outlined in § 1081.206 is based upon the SEC's affirmative disclosure approach to fact discovery in administrative adjudications. The ''obtained by'' the Office of Enforcement language is taken directly from the SEC Rules. Section 1081.206 is intended to give respondents access to the material facts underlying enforcement counsel's decision to recommend the commencement of enforcement proceedings. It is not intended to create an obligation for enforcement counsel to search the files of other divisions or offices in the Bureau. As explained above, the Bureau will include in its affirmative disclosure documents obtained by other elements of the Bureau from persons not employed by the Bureau and later provided to the Office of Enforcement for its use ''in connection with the investigation leading to the institution of proceedings.'' § 1081.206(a)(1).

Comment: Disclosure should not be limited to documents obtained ''in connection with the investigation.'' The Bureau might have come across relevant, discoverable information without an investigation. For example, a State may conduct an investigation and turn its findings over to the Bureau and the Bureau could bring charges based on the State's findings. Or the Bureau may issue a notice of charges based upon examination findings without an investigation.

Response: The Office of Enforcement will not interpret the phrase ''in connection with the investigation'' in the manner contemplated by this commenter. Through the affirmative disclosure process, the Office of Enforcement will turn over the documents that informed its decision to recommend the institution of proceedings, except to the extent those documents meet an exception outlined in § 1081.206. In the first example offered by this commenter, the Office of Enforcement would consider documents turned over by a State that formed the basis for the Office's recommendation to bring charges against a respondent to have been obtained ''in connection with the investigation.'' The Bureau would disclose those documents to the respondent unless they were provided to the Bureau on the condition that they not be disclosed, *see* § 1081.206(b)(1)(iii), or unless the State obtained a protective order to prevent their disclosure, *see* § 1081.119(a). If documents were withheld from the respondent for either of these reasons,

the Bureau would not rely upon those documents in the proceeding.

Likewise, the Bureau would consider information obtained by the Office of Enforcement through the Bureau's supervisory channels to be obtained ''in connection with the investigation'' if such information formed the factual basis of an enforcement action.

Comment: The section excludes from discovery, in all cases, final examination ''or inspection'' reports to respondents who are not the subject of the report. Such an absolute limit on discovery, regardless of the significance of the information, is not appropriate. Further, the term ''inspection'' could mean almost anything, such as notes a Bureau employee takes when asking anyone a question about a covered person.

Response: Paragraph (a)(4) is intended to make clear that respondents have no automatic right to examination or inspection reports related to other entities. Nothing in the Interim Final Rule prevents a respondent from seeking a final examination or inspection report regarding another entity through subpoena, although given the confidential nature of such reports the Bureau would anticipate that such subpoena requests would generally be denied. Finally, the Bureau does not intend for the term ''inspection report'' to cover interview notes, for purposes of this section.

Comment: The Interim Final Rule requires the Bureau to turn over documents ''obtained'' by the Bureau's Office of Enforcement before the notice of charges issued. When the Bureau obtained documents is not relevant to whether they should be discoverable.

Response: The Bureau agrees that relevant documents upon which the Bureau intends to rely should be made available to the respondent even if they are obtained after the issuance of a notice of charges. Paragraph (g) obligates the Bureau to supplement its disclosures with any additional information that it intends to rely upon at the hearing.

Comment: The Interim Final Rule creates an incentive for Bureau employees to withhold material exculpatory evidence from the Office of Enforcement because delivering it could make it discoverable.

Response: The Bureau has no independent legal obligation to produce material exculpatory evidence *sua sponte*. Section 1081.206 of the Interim Final Rule provides for such production, but does so in a manner that is workable and practical. It is intended to ensure that respondents are in possession of material exculpatory information obtained from persons not employed by the Bureau that enforcement counsel has considered in its determination to recommend enforcement action. Extending the scope of the Interim Final Rule to cover exculpatory evidence that is not in the Office of Enforcement's possession would impose an unworkable and legally unfounded obligation on enforcement counsel and the rest of the Bureau. Furthermore, § 1081.208 enables respondents to subpoena additional documents that they believe are relevant to their defense.

Comment: This section is based upon the SEC Rules, but the SEC does not examine all of the institutions it regulates so does not necessarily have relevant, nonpublic materials outside of the Office of Enforcement. The Bureau should not be able to declare all of these materials to be per se beyond the scope of discovery without allowing respondent to seek a determination as to whether any of the materials are relevant.

Response: The Bureau does not believe that its supervisory powers require further amendment of this section. Aside from privileged internal notes and working papers generated by Bureau employees, the documents obtained by the Bureau through the exercise of its supervisory authority will come almost exclusively from the institution itself. The institution will have provided the documents to the Bureau, and cannot claim to be deprived of access to such documents in discovery. The purpose of affirmative disclosure is to give the respondent access to all of the material evidence underlying enforcement counsel's decision to commence enforcement proceedings. Rather than provide the respondent with access to all of the documents that in any way relate to it or its business—including many completely unrelated to the proceeding—enforcement counsel will turn over those documents that enforcement counsel obtained or considered in its decision to proceed in the particular action.

In addition, respondents will have the ability to conduct some limited discovery, including document subpoenas, depositions of third-parties who are unavailable for the hearing, and, in some circumstances, limited expert discovery.

Comment: This section permits the Bureau to withhold documents that ''would disclose the identity of a confidential source,'' which is inappropriate and not based upon the Uniform Rules or the SEC Rules. The respondent should be permitted to impeach the credibility of all witnesses. This section should be deleted, and in its place the Bureau should be required to produce ''a list identifying all persons or entities that have made allegations or accusations relevant to any matters being heard.'' If the person or entity is not sufficiently identified to be called as a witness, all evidence relating to or derived from the allegations or accusations is inadmissible.

Response: The commenter is incorrect in asserting that this exception to the affirmative disclosure obligation is not based upon the SEC Rules—the language is identical to the SEC Rules. *See* 17 CFR 201.230(b)(1)(iii). A respondent's ability to impeach the credibility of a witness will not be impacted by this exception to the affirmative disclosure obligation. The Bureau will identify any individual on whose testimony the Bureau intends to rely at the hearing, whether or not that individual came to the Bureau as a confidential source. The Bureau must prove all of its assertions at the hearing, and the respondent will have the ability to challenge all evidence offered.

Comment: The Office of Enforcement should be required to produce relevant materials without the hearing officer ordering production, and the Interim Final Rule should be revised to require the Office of Enforcement to produce a detailed log of the bases for withholding any privileged materials.

Response: The Office of Enforcement is required by § 1081.206 to disclose the documents described in the section without a separate order from the hearing officer. The Bureau does not believe that the affirmative disclosure obligation, which is based upon and substantively the same as that found in the SEC Rules, should be broadened further. The material subject to affirmative disclosure will provide respondents with access to all, or nearly all, of the information obtained by enforcement counsel in the investigation leading to the institution of proceedings. With respect to privilege logs, the Bureau adopts language from the SEC Rules, 17 CFR 201. 230(c). The hearing officer may require that the Office of Enforcement submit a list of documents or categories of documents withheld pursuant to paragraphs (b)(1)(i) and (ii) and (iv) through (vi), and the hearing officer may so order when appropriate. (As discussed above, with respect to documents withheld pursuant to paragraph (b)(1)(iii), the Bureau must inform respondent that such documents are being withheld, but no further disclosure is required.) To require the Bureau to produce a withheld document list in all cases,

even when not deemed appropriate by the hearing officer, would be unnecessary and unduly burdensome.

Comment: The Bureau should complete, rather than commence, production of the affirmative disclosure documents within seven days.

Response: The Bureau fully intends to supply all affirmative disclosure documents to respondents within seven days except in extraordinary circumstances (such as when a motion for protective order is pending on the seventh day). The Bureau adopted the language of this section from the SEC Rules, and has decided to retain the language in order to allow flexibility in those rare circumstances where a full production within seven days is not feasible, such as when a motion for a protective order is pending with respect to some of the documents. The Bureau expects these situations to arise very infrequently if at all, and expects to complete production within seven days in most cases.

Comment: The Bureau should be required to produce all documents electronically. Photocopying should not be required.

Response: The Bureau adopted the language regarding photocopying from the SEC Rules, but as indicated in the preamble to § 1081.206, the Bureau anticipates providing electronic copies of documents to respondents in most cases. The Bureau is retaining the language regarding photocopying in order to retain its discretion, particularly in cases where the safekeeping of documents subject to inspection and the cost of production may be of particular concern. The Bureau expects these cases to be rare.

The Bureau adopts § 1081.206 of the Interim Final Rule with the changes discussed above.

Section 1081.207 Production of Witness Statements

Modeled after the SEC Rules, 17 CFR 201.231, this section of the Interim Final Rule provides that a respondent may request for inspection and copying any statement of a witness to be called by the Office of Enforcement that (1) pertains to or is expected to pertain to his or her direct testimony; and (2) would be required to be produced pursuant to the Jencks Act, 18 U.S.C. 3500, if the adjudication proceeding were a criminal proceeding. This section is intended to promote the principles of transparency and efficiency discussed with respect to § 1081.206. Note, however, that the respondent is required to move for the production of these statements. The Bureau notes that the requirements set forth in paragraph (a) of this section do not overcome the limitations on discovery related to expert communications set forth in § 1081.210(e).

The Jencks Act does not require production of a witness's prior statement until the witness takes the stand. The Bureau expects that in most cases, the Office of Enforcement will provide prehearing production voluntarily. Submission of a witness's prior statement, however, may provide a motive for intimidation of that witness or improper contact by a respondent with the witness. This section provides, therefore, that the time for delivery of witness statements is to be determined by the hearing officer, so that a case-specific determination of such risks can be made if necessary. Upon a showing that there is substantial risk of improper use of a witness's prior statement, the hearing officer may take appropriate steps. For example, a hearing officer may delay production of a prior statement, or prohibit parties from communicating with particular witnesses.

Like § 1081.206 and the SEC Rules, this section provides for a ''harmless error'' standard in the event the Office of Enforcement fails to make available a statement required to be made available by this section.

The Bureau received no comment on § 1081.207 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.208 Subpoenas

This section of the Interim Final Rule is modeled after the SEC Rules, 17 CFR 201.232, and provides that, in connection with a hearing, a party may request the issuance of a subpoena for the attendance and testimony of a witness or the production of documents. The availability of subpoenas for witnesses and documents ensures that respondents have available to them the necessary tools to adduce evidence in support of their defenses. A subpoena may only be issued by the hearing officer (as opposed to counsel) and the section sets forth procedures to prevent the issuance of subpoenas that may be unreasonable, oppressive, excessive in scope, or unduly burdensome. The section also sets forth procedures and standards applicable to a motion to quash or modify a subpoena.

Paragraph (i) (which was paragraph (h) in the Interim Final Rule) of this section also provides that, if a subpoenaed person fails to comply, the Bureau, on its own motion or on the motion of the party at whose request the subpoena was issued, may seek a judicial order requiring compliance. In accordance with section 1052(b)(2) of the Dodd-Frank Act, which authorizes the Bureau or a Bureau investigator to seek enforcement of a subpoena, paragraph (i) only authorizes the Bureau—and not the party at whose request the subpoena was issued—to seek judicial enforcement of the subpoena. *Compare* 12 U.S.C. 1818(n) (authorizing any party to proceedings brought pursuant to 1818 to bring an action to enforce a subpoena issued in connection with the proceeding); 12 CFR 19.26(c) (authorizing the ''subpoenaing party or any other aggrieved party'' to seek judicial enforcement). In a provision added by the Bureau, this section also sets forth that failure to request that the Bureau seek enforcement of a subpoena constitutes waiver of any claim of prejudice predicated upon the unavailability of the testimony or evidence sought. This provision was added to prevent a respondent from declining to request that the Bureau seek to enforce the subpoena of a witness who fails to comply, and later claiming that his or her defense was prejudiced based upon the unavailability of that witness. The Bureau amended § 1081.208(h) of the Interim Final Rule (which is paragraph (i) in the Final Rule) to clarify that the General Counsel will initiate actions to enforce subpoenas on behalf of respondents, with the expectation that respondents will intervene to litigate on their own behalf. This will prevent conflicts that could arise were enforcement counsel required to enforce a subpoena sought by respondents in a proceeding.

One commenter asserted that respondents should be permitted to issue and enforce subpoenas. The Bureau's substantive response to this comment is discussed above in the context of a similar comment addressing § 1081.206.

Another commenter stated that the hearing officer should not be permitted to delegate the manual signing of deposition subpoenas, as there needs to be a basic check on the issuance of subpoenas, such as review by the hearing officer. This section provides that a hearing officer must issue a subpoena only upon the request of a party, which includes either respondents or the Bureau, and only if the hearing officer determines that the subpoena is not ''unreasonable, oppressive, excessive in scope, or unduly burdensome.''

Paragraph (c) of the Interim Final Rule permitted the hearing officer to delegate the manual signing of the subpoena to

''any other person authorized to issue subpoenas,'' which includes enforcement counsel. The Bureau has revised paragraph (c) to provide that the hearing officer may delegate the manual signing of the subpoena ''to any other person.'' This will give the hearing officer, in the interests of efficiency, the option of allowing counsel for either party to manually sign subpoenas after they have been issued by the hearing officer. But this delegation, should it occur, does not permit the issuance of subpoenas without the hearing officer's independent review and consent.

The Bureau on its own initiative added new paragraph (g) to § 1081.208. This paragraph requires a person responding to a subpoena for documentary material to file a sworn certificate of compliance with the subpoena response. This is intended to confirm that all of the documentary material required by the subpoena and in the possession, custody, or control of the person to whom the subpoena is directed has been produced and made available to the custodian.

The Bureau adopts § 1081.208 of the Interim Final Rule with the changes discussed above.

Section 1081.209 Deposition of Witness Unavailable for Hearing

This section of the Interim Final Rule, generally modeled after the Uniform Rules, 12 CFR 19.27, and the SEC Rules, 17 CFR 201.233, provides that parties may seek to depose material witnesses unavailable for the hearing upon application to the hearing officer for a deposition subpoena. The application must state that the witness is expected to be unavailable due to age, illness, infirmity or other reason and that the petitioning party was not the cause of the witness's unavailability. The Bureau has adopted the Uniform Rules' formulation of this standard, which provides for such depositions when the witness is ''otherwise unavailable,'' to account for the possible unavailability of witnesses for reasons other than those specified in the SEC Rules.

Paragraph (a)(2) requires a party seeking to record a deposition by audio-visual means to so note in the request for a deposition subpoena. This provision is modeled on Federal Rule of Civil Procedure 30(b)(3). Paragraph (a)(4) also provides that a deposition cannot be taken on less than 14 days' notice to the witness and all parties, absent an order to the contrary from the hearing officer.

Paragraph (g) incorporates several provisions from the SEC Rules. It provides that the witness being deposed may have an attorney present during the deposition; that objections to questions of evidence shall be noted by the deposition officer, but that only the hearing officer shall have the power to decide on the competency, materiality, or relevance of evidence; and that transcripts shall be available to the deponent and each party for purchase. Paragraph (g) of the Final Rule was amended slightly to provide that the deposition shall be filed with the Office of Administrative Adjudication (as opposed to the Executive Secretary as set forth in the Interim Final Rule).

Paragraph (h) of this section also incorporates certain procedures from § 1081.208 of the Interim Final Rule pertaining to subpoenas. Those procedures are intended to protect against deposition requests that may be unreasonable, oppressive, excessive in scope, or unduly burdensome, and to provide a mechanism for signing and service of a deposition subpoena, the filing of a motion to quash, and for enforcing subpoenas. This paragraph was amended slightly to conform to the amendments to § 1081.208.

One commenter suggested that respondents should be permitted to conduct pre-hearing depositions of third parties with relevant information, even if such witnesses will be available for the hearing. In promulgating the Interim Final Rule, the Bureau considered whether respondents should be allowed to issue subpoenas for the purpose of compelling prehearing discovery depositions as is allowed in actions under the Federal Rules of Civil Procedure. The Bureau believes expanding the scope of prehearing discovery to permit discovery depositions is not warranted for several reasons.

First, the Bureau believes that even if limitations were placed on the availability of discovery depositions, there remains a significant potential for extensive collateral litigation over their use. Second, use of discovery depositions is in tension with the statutory timetable for hearings in cease-and-desist proceedings under section 1053(b) of the Dodd-Frank Act. Indeed, in part for these reasons, the Final Rule, like the Interim Final Rule, allows the hearing officer to decide whether and to what extent to permit expert discovery in adjudication proceedings. Allowing prehearing depositions would present extreme scheduling difficulties in those cases in which respondents did not request hearing dates outside the 30-to-60 day timeframe set forth in the Dodd-Frank Act.

Finally, the Final Rule includes three provisions that address in significant part a respondent's interest in obtaining discovery prior to the start of the hearing. Section 1081.206 mandates that the Office of Enforcement generally make available not only transcripts of testimony, but documents obtained from persons not employed by the Bureau during the investigation leading to the initiation of the proceeding, as well as certain documents of the Bureau. Section 1081.208 authorizes the issuance of subpoenas *duces tecum* for the production of documents returnable at any designated time or place. In addition, § 1081.210 provides for expert discovery in appropriate cases. Given these discovery mechanisms, the ability to subpoena witnesses to testify at the hearing, the ability to take the deposition of material witnesses unavailable for hearing, and the ability of respondents to conduct informal discovery, the Bureau continues to believe that the marginal benefits of prehearing depositions are not justified by their likely cost in time, expense, collateral disputes and scheduling complexities.

The Bureau adopts § 1081.209 of the Interim Final Rule with the changes discussed above.

Section 1081.210 Expert Discovery

This section of the Interim Final Rule is modeled after the FTC Rules, 16 CFR 3.31A. Neither the Uniform Rules nor the SEC Rules provide for expert discovery. The Bureau has provided for expert discovery in appropriate cases so that the parties may fully understand the other side's position prior to the hearing, which will enable a clearer and more efficient airing of the issues at the hearing, and which may also clarify the issues for a possible prehearing settlement. It will also enable the parties to identify rebuttal expert witnesses, if needed, prior to the hearing.

Paragraph (a) provides that the hearing officer shall establish a date for the exchange of expert reports in the scheduling order. This provision is intended to allow flexibility in scheduling expert discovery depending on the complexity of the case and the date of the hearing.

Like the FTC Rules, 16 CFR 3.31A, paragraph (b) limits parties to five expert witnesses, including any rebuttal or surrebuttal experts, except in extraordinary circumstances. The Bureau believes this limitation will provide the parties with a sufficient opportunity to present expert testimony without unduly delaying the proceedings. Paragraph (b) also provides that no party may call an expert witness unless that witness has been identified and has provided a report in accordance with this section, unless the hearing

officer provides otherwise at a scheduling conference. The last clause is intended to reflect a hearing officer's discretion, at a scheduling conference, to dispense with or otherwise limit expert discovery in a particular case (as expressly provided for in paragraph (e) of this section).

Paragraph (c) sets forth the required contents of an expert report. This section is based upon the corresponding provisions of the FTC Rules.

Paragraph (d) provides for expert depositions, which are not to exceed eight hours absent agreement of the parties or an order by the hearing officer. These limitations are intended to provide adequate time to prepare for expert testimony without unduly delaying the proceedings. Paragraph (d) also provides that expert depositions shall be conducted pursuant to the procedures set forth in § 1081.209. Finally, paragraph (d) provides that an expert's deposition shall be conducted after submission of the expert's report but no later than seven days prior to the deadline for submission of rebuttal expert reports. This provision is intended to allow parties to rely upon the deposition of an opposing party's expert in the preparation of a rebuttal expert report. Because, pursuant to paragraph (a), rebuttal reports are due 28 days after the exchange of expert reports, expert depositions will need to take place within that 28-day period.

Finally, paragraph (e) (paragraph (f) of the Final Rule) authorizes the hearing officer to dispense with expert discovery in appropriate cases. For example, the Bureau envisions hearing officers relying on this provision in cease-and-desist proceedings brought pursuant to section 1053(b) of the Dodd-Frank Act, where the respondent has not requested a hearing date outside the statutory 30-to-60 day timeframe. In such cases, it may be appropriate to dispense with expert discovery for timing reasons, while allowing the parties to call expert witnesses.

After the Bureau promulgated the Interim Final Rule, the FTC amended its rule governing expert discovery. *See* 76 FR 52249 (Aug. 22, 2011). The FTC added a new paragraph to its expert discovery rule regarding materials that the parties cannot discover, including language nearly identical to language recently added to Federal Rule of Civil Procedure 26(b)(4)(B) and (C). The Bureau has similarly revised § 1081.210 to adopt these recent enhancements to the FTC Rules and the Federal Rules of Civil Procedure. The Bureau is therefore adding a new paragraph (e) to § 1081.210 and renumbering former paragraph (e) as paragraph (f). Under new paragraph (e), parties may not discover drafts of any report required by this section, regardless of the form in which the draft is recorded. In addition, the new language prohibits parties from discovering any communications, regardless of form, between another party's attorney and any of its expert witnesses, unless the communication: (1) Relates to the testifying expert's compensation for the study or testimony; (2) identifies facts or data provided by the party's attorney and considered by the testifying expert in forming the opinions to be expressed; or (3) identifies assumptions provided by the party's attorney and relied on by the testifying expert in forming the opinions to be expressed. The Bureau has also adopted the portion of the FTC Rules providing that a party may not discover facts known or opinions held by an expert who has been retained or specifically employed by another party in anticipation of litigation or preparation for the hearing and who is not listed as a witness for the hearing. The Bureau believes this section, which is consistent with Federal Rule of Civil Procedure 26(b)(4)(D), appropriately limits the ability of parties to discover opinions held by experts who will not offer opinions at the hearing.

The Bureau did not receive comments on § 1081.210 of the Interim Final Rule, and with exception to the changes discussed above, adopts it without change in the Final Rule.

Section 1081.211 Interlocutory Review

This section of the Interim Final Rule sets forth the procedure and standards applicable to interlocutory review by the Director of a ruling or order of the hearing officer.

Paragraph (a) of this section provides that the Director may take up a matter on his or her own motion at any time, even if a hearing officer does not certify it for interlocutory review, and that this section is the exclusive means for reviewing a hearing officer's ruling prior to the issuance of a recommended decision by the hearing officer.

Paragraph (b) provides that any party may file a motion for certification of a ruling or order for interlocutory review within five days of service of the order or ruling. Responses to such motions are due within three days, and the hearing officer is required to rule upon such a motion within five days thereafter.

Paragraph (c) sets forth the permissible bases for certifying a ruling or order. Certification is appropriate if the hearing officer's ruling would compel testimony or production of documents from Bureau officers or employees, or officers or employees from another governmental agency. This is consistent with the SEC Rules, 17 CFR 201.400. Like the FTC Rules, 16 CFR 3.23(a)(1), however, this provision includes officers and employees from other governmental agencies, and not just the Bureau, in order to afford the same treatment to other government agencies. Paragraph (c) also provides for certification of rulings or orders where there is a substantial ground for difference of opinion and an immediate review may materially advance the completion of the proceeding or subsequent review will be an inadequate remedy. The hearing officer may also certify a ruling or order where the ruling or order involves a motion for disqualification of the hearing officer or the suspension of an individual from appearing before the Bureau.

Paragraph (d) provides that a party whose motion for certification is denied by the hearing officer may petition the Director directly for interlocutory review. This provision is intended to guard against a hearing officer's unwillingness to certify a ruling that appears to meet the standards set forth in the section. The Bureau expects such direct petitions to the Director to be used sparingly.

Paragraph (e) governs the Director's review of matters certified pursuant to paragraph (c) or for which review is sought pursuant to paragraph (d). It sets forth the policy of the Bureau that interlocutory review is disfavored and provides that the Director will grant such review only in extraordinary circumstances.

Paragraph (f) provides that proceedings will not be stayed by the filing of a motion for certification for interlocutory review or a grant of such review unless the hearing officer or the Director shall so order. This is intended to promote the expeditious resolution of proceedings and to deter frivolous motions for certification or review.

The Bureau did not receive comment on § 1081.211 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.212 Dispositive Motions

This section of the Interim Final Rule establishes the procedures and standards for motions to dismiss and motions for summary disposition. Section 1081.212 expressly provides for the filing of motions to dismiss, but makes clear that filing such a motion does not affect a party's obligation to file an answer or take any other action. This is intended to ensure that motions to dismiss do not delay the proceedings unnecessarily. The timelines for decisions on dispositive motions,

discussed below, should help ensure that a party ultimately determined to be entitled to dismissal is not required to engage in the adjudicative process for a lengthy period of time.

Paragraph (b) provides that a respondent may file a motion to dismiss asserting that, even assuming the truth of the facts alleged in the notice of charges, it is entitled to dismissal as a matter of law. Neither the SEC Rules, the FTC Rules, nor the Uniform Rules specifically set forth procedures or a standard applicable to motions to dismiss, although the FTC Rules and Uniform Rules appear to contemplate such motions. *See* 16 CFR 3.22(a) (referencing motions to dismiss); 12 CFR 19.5(b)(7) (same). The Bureau has determined that such motions are appropriate and should be provided for in the Rules, but should not serve to delay the proceedings.

Paragraphs (c) and (d) govern the filing of motions for summary disposition. They adopt standards similar to those set forth in the Uniform Rules, the SEC Rules, and the FTC Rules for such motions. Any party to a proceeding may file a motion for summary disposition of a proceeding or for partial summary disposition of a proceeding if: (1) There is no genuine issue as to any material fact; and (2) the moving party is entitled to a favorable decision as a matter of law. The motion, which may be filed after a respondent's answer has been filed and documents have been made available for inspection and copying pursuant to § 1081.206, must be accompanied by a statement of the uncontested material facts, a brief, and any documentary evidence in support of the motion.

Any party opposing such a motion must file a statement setting forth those material facts as to which he or she contends a genuine dispute exists, supported by the same type of evidence permitted with a motion for summary disposition, and a brief in support of the contention that summary disposition would be inappropriate. These paragraphs are modeled after the Uniform Rules, 12 CFR 19.29.

Pursuant to paragraphs (e), (f), and (g), motions to dismiss and for summary disposition are subject to a 35-page limit (modeled on the SEC Rules, 17 CFR 201.250(c)), responses to such motions are due within 20 days and are subject to a 35-page limit (modeled on the Uniform Rules, 12 CFR 19.29(b)(1)), and reply briefs are due within five days of the response and shall not exceed ten pages. Oral argument is permitted at the request of any party or by motion of the hearing officer.

Paragraph (h) provides that the hearing officer must decide a dispositive motion within 30 days of the expiration of the time for filing all oppositions and replies. The Uniform Rules do not set a deadline for a decision on dispositive motions. The FTC Rules provide for the Commission to decide substantive motions within 45 days, 16 CFR 3.22(a), and the SEC Rules state that motions for summary disposition are to be decided ''promptly'' by the hearing officer, 17 CFR 201.250(b). The Bureau has adopted the 30-day timeframe for decisions on dispositive motions in keeping with its emphasis on expeditious decision-making in administrative proceedings. The Bureau believes that 30 days affords sufficient time for the hearing officer to properly assess the merits of the motion and draft either a ruling denying the motion or a recommended decision granting it.

If the hearing officer finds that a party is not entitled to dismissal or summary disposition, he or she shall make a ruling denying that motion. This ruling would not be subject to interlocutory appeal unless such an appeal was granted pursuant to the procedures and standards set forth in § 1081.211. If the hearing officer determines that dismissal or summary adjudication is appropriate, he or she will issue a recommended decision to that effect. If a party, for good cause shown, cannot yet present facts essential to justify opposition to the motion, the hearing officer is to deny or defer the motion.

The Bureau received no comments on § 1081.212 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.213 Partial Summary Disposition

Section 1081.213 is modeled on the FTC Rules, 16 CFR 3.24(a)(5). It permits a hearing officer who denies summary adjudication of the whole case nevertheless to issue an order specifying the facts that appear without substantial controversy. Those facts will be deemed established in the proceeding. This section enables the hearing officer to narrow the dispute between the parties so that the hearing can proceed as efficiently as possible.

The Bureau received no comment on § 1081.213 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.214 Prehearing Conferences

This section of the Interim Final Rule sets forth the procedures for a prehearing conference, which the hearing officer may convene on his own motion or at the request of a party. It sets forth matters that may be discussed at a prehearing conference. As with a scheduling conference pursuant to § 1081.203, the conference is presumptively public unless the hearing officer determines otherwise under the standard set forth in § 1081.119.

The Bureau received no comment on § 1081.214 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.215 Prehearing Submissions

This section of the Interim Final Rule was modeled primarily after the Uniform Rules, 12 CFR 19.32, which provide for mandatory prehearing submissions by the parties. Section 1081.215 requires that the following documents be served upon the other parties no later than ten days prior to the start of the hearing: a prehearing statement; a final list of witnesses to be called to testify that includes a description of the expected testimony of each witness; any prior sworn statements that a party intends to admit into evidence pursuant to § 1081.303; a list of exhibits along with a copy of each exhibit; and any stipulations of fact or liability. The failure of a party to comply with this provision will preclude the party from presenting any witnesses or exhibits not listed in its prehearing submission at the hearing, except for good cause shown. To account for cases in which the hearing officer has dispensed with expert discovery, this section also requires that a statement of any expert's qualifications and other information concerning the expert be turned over if it has not been provided pursuant to § 1081.210.

The FTC Rules do not provide for a prehearing submission, and the SEC Rules, 17 CFR 201.222, do not make such a submission mandatory. The Bureau has followed the Uniform Rules' model as it believes that prehearing submissions will assist the parties in clarifying and narrowing the issues to be adjudicated at the hearing, which is especially important under the expedited hearing schedule provided for by section 1053(b) of the Dodd-Frank Act and this Final Rule.

The Bureau received no comment on § 1081.215 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.216 Amicus Participation

This section of the Interim Final Rule, based upon the SEC Rules, 17 CFR 201.210, allows for amicus briefs in proceedings under this part, but only

under certain circumstances. Specifically, under paragraph (a) of this section, an amicus brief may be allowed when a motion for leave to file the brief has been granted; the brief is accompanied by written consent of all parties; the brief is filed at the request of the Director or the hearing officer, as appropriate; or the brief is presented by the United States or an officer or agency thereof, or by a State, or a political subdivision thereof.

One commenter expressed concern that the authorization for governmental agencies to file amicus briefs without receiving prior permission will result in the filing of numerous amicus briefs. The Bureau believes that amicus briefs from governmental entities are likely to make a valuable contribution to the adjudicative process, and are unlikely to become overwhelming or detrimental. The Bureau will consider revisiting this section if this belief proves incorrect, but the Final Rule adopts paragraph (a) of the Interim Final Rule without change.

A motion to file an amicus brief is subject to the procedural requirements set forth in § 1081.205. An amicus will be granted oral argument only for extraordinary reasons. In order to provide additional guidance to parties seeking to file amicus briefs, § 1081.216(d) provides that amicus briefs shall be filed pursuant to § 1081.111 and shall comply with the requirements of § 1081.112. Amicus briefs shall also be subject to the length limitations set forth in § 1081.212(e). The Bureau received no comments regarding the rest of § 1081.216 of the Interim Final Rule, and adopts the remaining paragraphs without change in the Final Rule.

Subpart C—Hearings

Section 1081.300 Public Hearings

This section of the Interim Final Rule provides that hearings before the Bureau will be presumptively public, a practice that is consistent with the provisions of the FTC Rules, 16 CFR 3.41(a), the SEC Rules, 17 CFR 201.301, and the Uniform Rules, 12 CFR 19.33(a). Specifically, the Interim Final Rule provides that hearings will be public unless a confidentiality order is entered by the hearing officer according to the standard set forth in § 1081.119, or unless the Director otherwise orders a non-public hearing on the ground that holding an open hearing would be contrary to the public interest.

One commenter stated that the hearing officer needs greater flexibility in limiting the public nature of adjudication hearings. This commenter argued that allowing the hearing officer to limit the public nature of the proceeding in accordance with the standard set forth in § 1081.119 was problematic and advocated for the hearing officer to be permitted to establish time, place and manner limitations on the attendance of the public and the media for any public hearing. This commenter also recommended that the Director be permitted to close a hearing.

The Bureau has considered this comment but determined to retain its articulated standard and presumption of public hearings. Incorporating the standard set forth in § 1081.119 into the standard for limiting the public nature of a hearing provides meaningful guidance to the hearing officer as to the types of hearings that should not be public, and promotes consistency in adjudication proceedings. With respect to the commenter's recommendation that the Director have the authority to close a public hearing, this section as previously promulgated allows the Director to limit the public nature of an adjudication proceeding on the grounds that holding an open hearing would be contrary to the public interest.

The Bureau adopts § 1081.300 of the Interim Final Rule without change in the Final Rule.

Section 1081.301 Failure To Appear

This section of the Interim Final Rule is modeled after the Uniform Rules, 12 CFR 19.21. It provides that the failure of a respondent to appear in person or by duly authorized counsel at the hearing may constitute a waiver of the respondent's right to a hearing and may be deemed an admission of the facts alleged and a consent to the relief sought in the notice of charges. This section directs the hearing officer to file a recommended decision addressing the relief sought in the notice of charges, without further notice to the respondent, when respondents fail to appear at the hearing.

The Bureau received no comments on § 1081.301 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.302 Conduct of Hearings

This section of the Interim Final Rule provides general principles for the conduct of hearings and the order in which the parties are to present their cases. The first sentence emphasizing the goals of fairness, impartiality, expediency, and orderliness is drawn from the SEC Rules, 17 CFR 201.300. The remainder of the section, which governs the order in which the parties are to present their cases, is modeled after the Uniform Rules, 12 CFR 19.35.

The Bureau received no comment on § 1081.302 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.303 Evidence

This section of the Interim Final Rule sets forth the provisions governing the offering and admissibility of evidence at hearings, and adopts evidentiary standards similar to those set forth in the FTC Rules, the SEC Rules, and the Uniform Rules.

Paragraph (a) of this section provides that enforcement counsel shall bear the burden of proving the ultimate issue(s) of the Bureau's claims at the hearing. Consistent with general administrative practice, paragraph (b) of § 1081.303 provides that evidence that is relevant, material, reliable, and not unduly repetitive shall be admissible to the fullest extent authorized by the APA and other applicable law, and that evidence shall not be excluded solely on the basis of its being hearsay if it is otherwise admissible and bears satisfactory indicia of reliability. Paragraph (c) of this section provides that official notice may be taken of any material fact that is not subject to reasonable dispute in that it is either generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Paragraph (d)(1) provides that duplicate copies of documents are admissible to the same extent as originals unless a genuine issue is raised about the veracity or legibility of a document. Paragraph (d)(2) of this section provides that, subject to paragraph (b), any document prepared by a prudential regulator or by a State regulatory agency is presumptively admissible either with or without a sponsoring witness. On its own initiative, the Bureau is revising paragraph (d)(2) of this section to add the Bureau to the list of regulators whose documents are presumptively admissible with or without a sponsoring witness. The Uniform Rules, 12 CFR 19.36(c)(2), on which this paragraph is modeled, is promulgated by each of the prudential regulators, and therefore the intent of this paragraph is, in part, for each regulator to have its own documents be deemed presumptively admissible. Consistent with the intended purpose of this paragraph, the Bureau adds itself as a regulator under paragraph (d)(2). Finally, paragraph (d)(4) of this section provides that documents generated by respondents that come from their own files are

presumed authentic and kept in the regular course of business. Respondents bear the burden of proof to introduce evidence to rebut this presumption.

Paragraph (e) of this section of the Interim Final Rule provides that objections to the admissibility of evidence must be timely made and that a failure to object to the admission of evidence shall constitute a waiver of the objection.

Pursuant to paragraph (f) of this section of the Interim Final Rule, parties may, at any stage of the proceeding, stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations may be received in evidence at the hearing and are binding on the parties.

Paragraph (g) of this section of the Interim Final Rule provides that witnesses at a hearing are required to testify under oath or affirmation. Parties are entitled to present their cases or defenses by sworn oral testimony and documentary evidence, including through the testimony of a witness appearing via videoconference or teleconference.

Paragraph (h) of this section, which relates to the admissibility of prior sworn statements of witnesses, is modeled after the SEC Rules, 17 CFR 201.235. Under paragraph (h) prior sworn statements may be admitted if a witness is dead, outside of the United States, unable to attend because of age, sickness, infirmity, imprisonment or other disability, or if the party offering the sworn statement is unable to procure the attendance of the witness by subpoena. Even if these conditions are not met, a prior sworn statement may be introduced into the record at the discretion of the hearing officer.

The Bureau adopts § 1081.303 of the Interim Final Rule with the changes discussed above.

Section 1081.304 Record of the Hearing

Modeled on the FTC Rules, 16 CFR 3.44, this section of the Interim Final Rule provides that hearings will be stenographically reported and transcribed and that the original transcript shall be part of the record. It outlines the procedure by which a party may request correction of the transcript. Finally, it states that upon completion of the hearing, the hearing officer will issue an order closing the record after giving the parties three days to determine whether the record is complete or requires supplementation.

The Bureau received no comment on § 1081.304 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.305 Post-Hearing Filings

This section of the Interim Final Rule is drawn largely from the Uniform Rules, 12 CFR 19.37, and provides that the parties may file proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of a notice on the parties that the transcript has been properly filed or within such longer period as the hearing officer may order. Proposed findings and conclusions must be supported by citation to any relevant authorities, and by page references to any relevant portions of the record. Responsive briefs may be filed to these proposed findings and conclusions within 15 days after the deadline for the proposed findings and conclusions, provided that the party responding has filed its own proposed findings and conclusions. The hearing officer shall not order the filing by any party of any post-hearing brief or responsive brief in advance of the other party's filing of its post-hearing brief.

The Bureau received no comment on § 1081.305 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.306 Record in Proceedings Before Hearing Officer; Retention of Documents; Copies

This section of the Interim Final Rule, drawn from the SEC Rules, 17 CFR 201.350, lists the documents that comprise the record of a proceeding before the hearing officer. It provides that those documents excluded from evidence should be excluded from the record but retained until either a decision of the Bureau has become final, or the conclusion of any judicial review of the Director's final order. This section also states that a copy of a document in the record may be substituted for an original.

The Bureau has amended this section to reflect the transfer of certain functions to the Office of Administrative Adjudications.

The Bureau adopts § 1081.306 of the Interim Final Rule with the changes discussed above.

Subpart D—Decision and Appeal

Section 1081.400 Recommended Decision of the Hearing Officer

This section of the Interim Final Rule adopts the general framework of the SEC Rules, 17 CFR 201.360, governing decisions by the hearing officer. Section 1081.400 provides that the hearing officer will file a recommended decision in each case within a specified time frame. Unlike the SEC Rules, which provide that the hearing officer will issue an ''initial decision,'' this section provides that the hearing officer's decision will be a ''recommended decision'' to the Director.

This section also deviates from the analogous SEC Rules in that it provides for only one timeline, rather than multiple ''tracks'' or timelines. Paragraph (a) of this section provides that the hearing officer will file a recommended decision in each case no later than 90 days after the deadline for filing post-hearing responsive briefs and in no event later than 300 days after service of the notice of charges. The 300-day timeframe is taken from the SEC Rules, 17 CFR 201.360(a)(2), and the 90-day timeframe is modeled on the FTC Rules, 16 CFR 3.51(a).

Paragraph (b) of this section provides that requests by the hearing officer for extensions of this time frame must be made to the Director and will be granted only if the Director determines that additional time is necessary or appropriate in the public interest. The Bureau anticipates such requests and extensions to be rare. As noted above, this provision was adopted to ensure the timely resolution of adjudication proceedings in light of the experience of other agencies. The Bureau believes that the 90-day and 300-day timelines set forth in this section provide sufficient time for the hearing officer to conduct appropriate proceedings and issue an informed recommended decision.

Paragraph (c) of this section is modeled on the SEC Rules, 17 CFR 201.360(b), and sets forth the contents of the recommended decision, providing that the recommended decision shall include a statement of findings of fact and conclusions of law, as well as the reasons or basis therefore, and an appropriate order, sanction, relief or denial thereof. The recommended decision shall also state that a notice of appeal may be filed within ten days after service of the recommended decision, and shall include a statement that the Director may issue a final decision and order adopting the recommended decision, unless a party timely files and perfects a notice of appeal. The recommended decision shall be filed with the Office of Administrative Adjudication (as opposed to the Executive Secretary as set forth in the Interim Final Rule), which will promptly serve the recommended decision on the parties.

Drawing from the FTC Rules, 16 CFR 3.51(d), paragraph (d) of this section provides that the recommended decision shall be made by the hearing officer who presided over the hearing, except when he or she has become unavailable to the Bureau. In such

instances, the Bureau expects the matter to be reassigned pursuant to § 1081.105(d). Paragraph (e) of this section provides that the hearing officer may reopen proceedings for receipt of further evidence upon a showing of good cause until the close of the hearing record. With the exception of correcting clerical errors or addressing a remand from the Director, the hearing officer's jurisdiction terminates upon the filing of the recommended decision.

The Bureau received no comment on § 1081.400 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.401 Transmission of Documents to Director; Record Index; Certification

This section of the Interim Final Rule is modeled on the Uniform Rules, 12 CFR 19.38(b), and the SEC Rules, 17 CFR 201.351(c). It directs the hearing officer to furnish to the Director a certified index for the case at the same time that the hearing officer files the recommended decision. It also establishes the process by which the record is transmitted to the Director for review.

The Bureau received no comment relating to this section of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.402 Notice of Appeal; Review by the Director

This section of the Interim Final Rule sets forth the process for review of a recommended decision by the Director.

Paragraph (a) of this section is drawn from the FTC Rules, 16 CFR 3.52(b), and states that any party may object to the recommended decision of the hearing officer by filing a notice of appeal to the Director within ten days of the recommended decision and perfecting that notice of appeal by filing an opening brief within 30 days of the recommended decision. Any party may respond to the opening brief by filing an answering brief within 30 days of service of the opening brief, and reply briefs may be filed within seven days after that. Appeals to the Director are available as of right in all cases where the hearing officer has issued a recommended decision.

A commenter noted that the ten-day deadline by which a party must file a notice of appeal is shorter than the 30-day deadline required by the prudential regulators, and urged the Bureau to extend its deadline to 30 days. The Bureau has considered this suggestion but has decided to keep the ten-day deadline. The burden on a party to file a proper notice of appeal is minimal. A party need only specify the party or parties against whom the appeal is taken, and designate the recommended decision or part thereof appealed from. The ten-day timeline provides adequate time to make these initial determinations. The more comprehensive document in the appeals process, the opening brief, is not due until 30 days from the service of the recommended decision. Moreover, an extension of the deadline for a notice of appeal would require extension of other deadlines in the appeal process, such as the Director's review in the absence of a notice of appeal.

This section also provides that within 40 days after the date of service of the recommended decision, the Director, on his or her own initiative, may order further briefing or argument with respect to any recommended decision or portion of any recommended decision or may issue a final decision and order adopting the recommended decision. The 40-day time period is intended to provide the Director with the benefit of knowing whether any party has filed and perfected an appeal before determining whether further briefing and argument regarding a recommended decision is necessary. Any such order shall set forth the scope of further review and the issues that will be considered and will provide for the filing of briefs if the Director deems briefing appropriate.

Finally, this section provides that, pursuant to 5 U.S.C. 704, a perfected appeal to the Director of a recommended decision is a prerequisite to the seeking of judicial review of a final decision and order, unless the Director issues a final decision and order that does not incorporate the recommended decision, in which case judicial review shall be limited to that portion of the Director's final decision and order that does not adopt the recommended decision.

The Bureau adopts § 1081.402 of the Interim Final Rule without change in the Final Rule.

Section 1081.403 Briefs Filed With the Director

This section of the Interim Final Rule outlines the requirements for briefs filed with the Director. Paragraph (a) of this section is modeled on the SEC Rules, 17 CFR 201.450(b), and governs the content of briefs. Paragraph (b) is also drawn from the SEC Rules, 17 CFR 201.450(c), and sets forth length limitations for briefs. Unlike the SEC and the FTC, the Bureau has placed page limits—rather than word limits—on briefs. This change is intended to simplify practice before the Director.

The Bureau received no comment on § 1081.403 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.404 Oral Argument Before the Director

This section of the Interim Final Rule adopts the SEC's policy for oral argument on appeal wherein the Director will consider appeals, motions, and other matters on the basis of the papers filed without oral argument unless the Director determines that the presentation of facts and legal arguments in the briefs and record and the decisional process would be significantly aided by oral argument. A party who seeks oral argument is directed to indicate such a request on the first page of its opening or answering brief. Oral argument shall be public unless otherwise ordered by the Director.

The Bureau received no comment on § 1081.404 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.405 Decision of the Director

This section of the Interim Final Rule sets forth the provisions regarding the final decision and order of the Director. Paragraph (a) provides for the scope of the Director's review and defines the record before the Director as consisting of all items that were 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.

Paragraph (b) provides that the Director may have the advice and assistance of decisional employees in considering and disposing of a case. Paragraph (c) provides that the Director's final decision will affirm, adopt, modify, set aside, or remand for further proceedings the hearing officer's recommended decision and will include a statement of the reasons or basis for the Director's actions and the findings of fact relied upon.

In accordance with section 1053 of the Dodd-Frank Act, paragraph (d) of this section provides that, 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 by the Director. The Director will then issue a final decision and order within 90 days of such notification to the parties. This policy

ensures a timely final resolution to all administrative adjudications.

Paragraph (e) provides that copies of final decisions and orders by the Director will be served upon each party, 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.

The Bureau received no comments on § 1081.405 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.406 Reconsideration

This section of the Interim Final Rule permits parties to file petitions for reconsideration of a final decision and order within 14 days after service of the decision and order. The Bureau adopts the practice set forth in the SEC Rules, 17 CFR 201.470, pursuant to which no response to a petition for reconsideration will be filed unless requested by the Director, and the Bureau adds a provision providing that the Director will request such a response before granting any motion for reconsideration. This is intended to lessen the burden on prevailing parties while preserving their opportunity to be heard if the Director is considering granting a motion for reconsideration.

The Bureau received no comments on § 1081.406 of the Interim Final Rule and adopts it without change in the Final Rule.

Section 1081.407 Effective Date; Stays Pending Judicial Review

Paragraph (a) of this section of the Interim Final Rule governs the effective date of the Director's final orders, other than consent orders. Consistent with section 1053(b) of the Dodd-Frank Act, orders to cease and desist and for other affirmative relief shall become effective 30 days after the date of service of the Director's final decision and order, unless stayed by the Director under paragraph (b) of this section.

Paragraph (b) of this section contains the procedures regarding stays of Bureau orders. Any party subject to a final order, other than a consent order, may apply to the Director for a stay of all or part of that order pending judicial review. Such a motion must be made within 30 days of service of the Director's final decision and order. A motion for a stay 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.

Finally, paragraph (d) of this section adopts the provision from the Uniform Rules, 12 CFR 19.41, providing that 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 Bureau received no comments on § 1081.407 of the Interim Final Rule and adopts it in the Final Rule without change.

VI. Legal Authority

The Bureau promulgates the Final Rule pursuant to its authority to implement section 1053 of the Dodd-Frank Act, 12 U.S.C. 5563(e), as well as its general rulemaking authority to promulgate rules necessary or appropriate to carry out the Federal consumer financial laws, 12 U.S.C. 5512(b)(1).

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, the Department of Housing and Urban Development, the SEC, the Department of Justice, and the FTC before and after issuing the Interim Final Rule, including with regard to consistency with any prudential, market, or systemic objectives administered by such agencies.[4]

The Dodd-Frank Act requires the Bureau to prescribe rules necessary to conduct hearings and adjudicatory proceedings. The Final Rule neither imposes obligations on consumers, nor is it expected to affect their access to consumer financial products or services.

The Final Rule is intended to provide an expeditious decision-making process, which will benefit both consumers and covered persons. The Final Rule adopts an affirmative disclosure approach to fact discovery, pursuant to which the Bureau will make available to respondents the information obtained by the Office of Enforcement from persons not employed by the Bureau prior to the institution of proceedings, in connection with the investigation leading to the institution of proceedings that is not otherwise privileged or protected from disclosure. This affirmative disclosure obligation substitutes for the traditional civil discovery process, which can be both time-consuming and expensive. This clear and efficient process for the conduct of adjudication proceedings benefits consumers by providing a systematic process for protecting them from unlawful behavior. At the same time, this process will afford covered persons with a cost-effective way to have their cases heard. The Final Rule is based upon, and drawn from, existing rules of the prudential regulators, the FTC, and the SEC. The Final Rule's similarity to existing rules should further reduce the expense of administrative adjudication for covered persons.

Further, the Final Rule has no unique impact on insured depository institutions or insured credit unions with less than $10 billion in assets described in section 1026(a) of the Dodd-Frank Act. Finally, the Final Rule does not have a unique impact on rural consumers.

A 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 of the Dodd-Frank Act. Notably, the commenter did not identify any specific costs to covered persons imposed by the Rules of Practice for Adjudication Proceedings 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,

[4] 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.

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 1081

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

Authority and Issuance

For the reasons set forth above, the Bureau of Consumer Financial Protection revises part 1081 to 12 CFR chapter X to read as follows:

PART 1081—RULES OF PRACTICE FOR ADJUDICATION PROCEEDINGS

Subpart A—General Rules

Subpart B—Initiation of Proceedings and Prehearing Rules

Subpart C—Hearings

Subpart D—Decision and Appeals

Authority: Pub. L. 111–203, Title X.

Subpart A—General Rules

§ 1081.100 Scope of the rules of practice.

This part prescribes rules of practice and procedure applicable to adjudication proceedings authorized by section 1053 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) to ensure or enforce compliance with the provisions of Title X of the Dodd-Frank Act, rules prescribed by the Bureau under Title X of the Dodd-Frank Act, and any other Federal law or regulation that the Bureau is authorized to enforce. These rules of practice do not govern the conduct of Bureau investigations, investigational hearings or other proceedings that do not arise from proceedings after a notice of charges.

§ 1081.101 Expedition and fairness of proceedings.

To the extent practicable, consistent with requirements of law, the Bureau's policy is to conduct such adjudication proceedings fairly and expeditiously. In the conduct of such proceedings, the hearing officer and counsel for all parties shall make every effort at each stage of a proceeding to avoid delay. With the consent of the parties, the Director, at any time, or the hearing officer at any time prior to the filing of his or her recommended decision, may shorten any time limit prescribed by this part.

§ 1081.102 Rules of construction.

For the purposes of this part:

(a) Any term in the singular includes the plural, and the plural includes the singular, if such use would be appropriate;

(b) Any use of a masculine, feminine, or neutral gender encompasses all three, if such use would be appropriate;

(c) Unless context requires otherwise, a party's counsel of record, if any, may, on behalf of that party, take any action required to be taken by the party; and

(d) To the extent this part uses terms defined by section 1002 of the Dodd-Frank Act, such terms shall have the same meaning as set forth therein, unless defined differently by § 1081.103.

§ 1081.103 Definitions.

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

Dodd-Frank Act means the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Public Law 111–203 (July 21, 2010).

Adjudication proceeding means a proceeding conducted pursuant to section 1053 of the Dodd-Frank Act and intended to lead to the formulation of a final order other than a temporary order to cease and desist issued pursuant to section 1053(c) of the Dodd-Frank Act.

Bureau means the Bureau of Consumer Financial Protection.

Chief hearing officer means the hearing officer charged with assigning hearing officers to specific proceedings, in the event there is more than one hearing officer available to the Bureau.

Counsel means any person representing a party pursuant to § 1081.107.

Decisional employee means any employee of the Bureau who has not engaged in an investigative or prosecutorial role in a proceeding and who may assist the Director or the hearing officer, respectively, in preparing orders, recommended decisions, decisions, and other documents under 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.

Enforcement counsel means any individual who files a notice of appearance as counsel on behalf of the Bureau in an adjudication proceeding.

Final order means an order issued by the Bureau with or without the consent of the respondent, which has become final, without regard to the pendency of any petition for reconsideration or review.

General Counsel means the General Counsel of the Bureau or any Bureau employee to whom the General Counsel has delegated authority to act under this part.

Hearing officer means an administrative law judge or any other person duly authorized to preside at a hearing.

Notice of charges means the pleading that commences an adjudication proceeding, as described in § 1081.200, except that it does not include a stipulation and consent order under § 1081.200(d).

Office of Administrative Adjudication means the office of the Bureau responsible for conducting adjudication proceedings.

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

Party means the Bureau, any person named as a party in any notice of charges issued pursuant to this part, and, to the extent applicable, any person who intervenes in the proceeding pursuant to § 1081.119(a) to seek a protective order.

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

Person employed by the Bureau means Bureau employees, contractors, agents, and others acting for or on behalf of the Bureau, or at its direction, including consulting experts.

Respondent means the party named in the notice of charges.

State means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, or the United States Virgin Islands or any federally recognized Indian tribe, as defined by the Secretary of the Interior under section 104(a) of the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a–1(a).

§ 1081.104 Authority of the hearing officer.

(a) *General Rule.* The hearing officer shall have all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay. No provision of this part shall be construed to limit the powers of the hearing officers provided by the Administrative Procedure Act, 5 U.S.C. 556, 557.

(b) *Powers.* The powers of the hearing officer include but are not limited to the power:

(1) To administer oaths and affirmations;

(2) To issue subpoenas, subpoenas *duces tecum,* and protective orders, as authorized by this part, and to quash or modify any such subpoenas or orders;

(3) To take depositions or cause depositions to be taken;

(4) To receive relevant evidence and to rule upon the admission of evidence and offers of proof;

(5) To regulate the course of a proceeding and the conduct of parties and their counsel;

(6) To reject written submissions that materially fail to comply with the requirements of this part, and to deny confidential status to documents and testimony without prejudice until a party complies with all relevant rules;

(7) To hold conferences for settlement, simplification of the issues, or any other proper purpose and require the attendance at any such conference of at least one representative of each party who has authority to negotiate concerning the resolution of issues in controversy;

(8) To inform the parties as to the availability of one or more alternative means of dispute resolution, and to encourage the use of such methods;

(9) To certify questions to the Director for his or her determination in accordance with the rules of this part;

(10) To consider and rule upon, as justice may require, all procedural and other motions appropriate in adjudication proceedings;

(11) To issue and file recommended decisions;

(12) To recuse himself or herself by motion made by a party or on his or her own motion;

(13) To issue such sanctions against parties or their counsel as may be necessary to deter repetition of sanctionable conduct or comparable conduct by others similarly situated, as provided for in this part or as otherwise necessary to the appropriate conduct of hearings and related proceedings, provided that no sanction shall be imposed before providing the sanctioned person an opportunity to show cause why no such sanction should issue; and

(14) To do all other things necessary and appropriate to discharge the duties of a presiding officer.

§ 1081.105 Assignment, substitution, performance, disqualification of hearing officer.

(a) *How assigned.* In the event that more than one hearing officer is available to the Bureau for the conduct of proceedings under this part, the presiding hearing officer shall be designated by the chief hearing officer, who shall notify the parties of the hearing officer designated.

(b) *Interference.* Hearing officers shall not be subject to the supervision or direction of, or responsible to, any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for the Bureau, and all direction by the Bureau to the hearing officer concerning any adjudication proceedings shall appear in and be made part of the record.

(c) *Disqualification of hearing officers.* (1) When a hearing officer deems himself or herself disqualified to preside in a particular proceeding, he or she shall issue a notice stating that he or she is withdrawing from the matter and setting forth the reasons therefore.

(2) Any party who has a reasonable, good faith basis to believe that a hearing officer has a personal bias, or is otherwise disqualified from hearing a case, may make a motion to the hearing officer that the hearing officer withdraw. The motion shall be accompanied by an affidavit setting forth the facts alleged to constitute grounds for disqualification. Such motion shall be filed at the earliest practicable time after the party learns, or could reasonably have learned, of the alleged grounds for disqualification. If the hearing officer does not disqualify himself or herself within ten days, he or she shall certify the motion to the Director pursuant to § 1081.211, together with any statement he or she may wish to have considered by the Director. The Director shall promptly determine the validity of the grounds alleged, either directly or on the report of another hearing officer appointed to conduct a hearing for that purpose, and shall either direct the reassignment of the matter or confirm the hearing officer's continued role in the matter.

(d) *Unavailability of hearing officer.* In the event that the hearing officer withdraws or is otherwise unable to perform the duties of the hearing officer, the chief hearing officer or the Director shall designate another hearing officer to serve.

§ 1081.106 Deadlines.

The deadlines for action by the hearing officer established by §§ 1081.203, 1081.205, 1081.211, 1081.212, and 1081.400, or elsewhere in this part, confer no substantive rights on respondents.

§ 1081.107 Appearance and practice in adjudication proceedings.

(a) *Appearance before the Bureau or a hearing officer.* (1) *By attorneys.* Any member in good standing of the bar of the highest court of any State may represent others before the Bureau if such attorney is not currently suspended or debarred from practice before the Bureau or by a court of the United States or of any State.

(2) *By non-attorneys.* So long as such individual is not currently suspended or debarred from practice before the Bureau:

(i) An individual may appear on his or her own behalf;

(ii) A member of a partnership may represent the partnership;

(iii) A duly authorized officer of a corporation, trust or association may represent the corporation, trust or association; and

(iv) A duly authorized officer or employee of any government unit, agency, or authority may represent that unit, agency, or authority.

(3) *Notice of appearance.* Any individual acting as counsel on behalf of a party, including the Bureau, shall file a notice of appearance at or before the time that the individual submits papers or otherwise appears on behalf of a party in the adjudication proceeding. The notice of appearance must include a written declaration that the individual is currently qualified as provided in paragraph (a)(1) or (a)(2) of this section and is authorized to represent the particular party, and if applicable, must include the attorney's jurisdiction of admission or qualification, attorney identification number, and a statement by the appearing attorney attesting to his or her good standing within the legal profession. By filing a notice of appearance on behalf of a party in an adjudication proceeding, the counsel agrees and represents that he or she is authorized to accept service on behalf of the represented party and that, in the event of withdrawal from representation, he or she will, if required by the hearing officer, continue to accept service until a new counsel has filed a notice of appearance or until the represented party indicates that he or she will proceed on a pro se basis. The notice of appearance shall provide the representative's email address, telephone number and business address and, if different from the representative's addresses, electronic or other address at which the represented party may be served.

(b) *Sanctions.* Dilatory, obstructionist, egregious, contemptuous or contumacious conduct at any phase of any adjudication proceeding may be grounds for exclusion or suspension of counsel from the proceeding. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(c) *Standards of conduct; disbarment.* (1) All attorneys practicing before the Bureau shall conform to the standards of ethical conduct required by the bars of which the attorneys are members.

(2) If for good cause shown, the Director believes that any attorney is not conforming to such standards, or that an attorney or counsel to a party has otherwise engaged in conduct warranting disciplinary action, the Director may issue an order requiring such person to show cause why he should not be suspended or disbarred from practice before the Bureau. The alleged offender shall be granted due opportunity to be heard in his or her own defense and may be represented by counsel. Thereafter, if warranted by the facts, the Director may issue against the attorney or counsel an order of reprimand, suspension, or disbarment.

§ 1081.108 Good faith certification.

(a) *General requirement.* Every filing or submission of record following the issuance of a notice of charges shall be signed by at least one counsel of record in his or her individual name and shall state counsel's address, email address, and telephone number. A party who acts as his or her own counsel shall sign his or her individual name and state his or her address, email address, and telephone number on every filing or submission of record. Papers filed by electronic transmission may be signed with an ''/s/'' notation, which shall be deemed the signature of the party or representative whose name appears below the signature line.

(b) *Effect of signature.* (1) The signature of counsel or a party shall constitute a certification that: the counsel or party has read the filing or submission of record; to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the filing or submission of record is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and the filing or submission of record is not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a filing or submission of record is not signed, the hearing officer shall strike the filing or submission of record, unless it is signed promptly after the omission is called to the attention of the filer.

(c) *Effect of making oral motion or argument.* The act of making any oral motion or oral argument by any counsel or party constitutes a certification that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, his or her statements are well-grounded in fact and are warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and are not made for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(d) *Sanctions.* Counsel or a party that fails to abide by the requirements of this section may be subject to sanctions pursuant to § 1081.104(b)(13).

§ 1081.109 Conflict of interest.

(a) *Conflict of interest in representation.* No person shall appear as counsel for another person in an adjudication proceeding if it reasonably appears that such representation may be materially limited by that counsel's responsibilities to a third person or by the counsel's own interests. The hearing officer may take corrective measures at any stage of a proceeding to cure a conflict of interest in representation, including the issuance of an order limiting the scope of representation or disqualifying an individual from appearing in a representative capacity for the duration of the proceeding.

(b) *Certification and waiver.* If any person appearing as counsel represents two or more parties to an adjudication proceeding or also represents a non-party on a matter relevant to an issue in the proceeding, counsel must certify in writing at the time of filing the notice of appearance required by § 1081.107(a)(3):

(1) That the counsel has personally and fully discussed the possibility of conflicts of interest with each such party and non-party; and

(2) That each such party and/or non-party waives any right it might otherwise have had to assert any known conflicts of interest or to assert any conflicts of interest during the course of the proceeding.

§ 1081.110 Ex parte communication.

(a) *Definitions.* (1) For purposes of this section, *ex parte communication* means any material oral or written

communication relevant to the merits of an adjudication proceeding that was neither on the record nor on reasonable prior notice to all parties that takes place between:

(i) An interested person not employed by the Bureau (including such person's counsel); and

(ii) The hearing officer handling the proceeding, the Director, or a decisional employee.

(2) *Exception.* A request for status of the proceeding does not constitute an ex parte communication.

(3) *Pendency of an adjudication proceeding* means the time from when the Bureau issues a notice of charges, unless the person responsible for the communication has knowledge that a notice of charges will be issued, in which case the pendency of an adjudication shall commence at the time of his or her acquisition of such knowledge, or from when an order by a court of competent jurisdiction remanding a Bureau decision and order for further proceedings becomes effective, until the time the Director enters his or her final decision and order in the proceeding and the time permitted to seek reconsideration of that decision and order has elapsed. For purposes of this section, an order of remand by a court of competent jurisdiction shall be deemed to become effective when the Bureau's right to petition for review or for a writ of certiorari has lapsed without a petition having been filed, or when such a petition has been denied. If a petition for reconsideration of a Bureau decision is filed pursuant to § 1081.406, the matter shall be considered to be a pending adjudication proceeding until the time the Bureau enters an order disposing of the petition.

(b) *Prohibited ex parte communications.* During the pendency of an adjudication proceeding, except to the extent required for the disposition of ex parte matters as authorized by law or as otherwise authorized by this part:

(1) No interested person not employed by the Bureau shall make or knowingly cause to be made to the Director, or to the hearing officer, or to any decisional employee, an ex parte communication; and

(2) The Director, the hearing officer, or any decisional employee shall not make or knowingly cause to be made to any interested person not employed by the Bureau any ex parte communication.

(c) *Procedure upon occurrence of ex parte communication.* If an ex parte communication prohibited by paragraph (b) of this section is received by the hearing officer, the Director, or any decisional employee, that person shall cause all such written communications (or, if the communication is oral, a memorandum stating the substance of the communication) to be placed on the record of the proceeding and served on all parties. All other parties to the proceeding shall have an opportunity, within ten days of receipt of service of the ex parte communication, to file responses thereto and to recommend any sanctions, in accordance with paragraph (d) of this section, that they believe to be appropriate under the circumstances.

(d) *Sanctions.* (1) *Adverse action on claim.* Upon receipt of an ex parte communication knowingly made or knowingly caused to be made by a party and prohibited by paragraph (b) of this section, the Director or hearing officer, as appropriate, may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(2) *Discipline of persons practicing before the Bureau.* The Director may, to the extent not prohibited by law, censure, suspend, or revoke the privilege to practice before the Bureau of any person who makes, or solicits the making of, an unauthorized ex parte communication.

(e) *Separation of functions.* Except to the extent required for the disposition of ex parte matters as authorized by law, the hearing officer may not consult a person or party on any matter relevant to the merits of the adjudication, unless upon notice and opportunity for all parties to participate. An employee or agent engaged in the performance of investigative or prosecuting functions for the Bureau in a case, other than the Director, may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision, except as witness or counsel in public proceedings.

§ 1081.111 Filing of papers.

(a) *Filing.* The following papers must be filed by parties in an adjudication proceeding: the notice of charges, proof of service of the notice of charges, notices of appearance, answer, the disclosure statement required under § 1081.201(e), motion, brief, request for issuance or enforcement of a subpoena, response, opposition, reply, notice of appeal, or petition for reconsideration. The hearing officer shall file all written orders, rulings, notices, or requests. Any papers required to be filed shall be filed with the Office of Administrative Adjudication, except as otherwise provided herein.

(b) *Manner of filing.* Unless otherwise specified by the Director or the hearing officer, filing may be accomplished by:

(1) Electronic transmission in accordance with guidance issued by the Office of Administrative Adjudication; or

(2) Any of the following methods if respondent demonstrates, in accordance with guidance issued by the Office of Administrative Adjudication, that electronic filing is not practicable:

(i) Personal delivery;

(ii) Delivery to a reliable commercial courier service or overnight delivery service; or

(iii) Mailing the papers through the U.S. Postal Service by First Class Mail, Registered Mail, Certified Mail or Express Mail.

(c) *Papers filed in an adjudication proceeding are presumed to be public.* Unless otherwise ordered by the Bureau or the hearing officer, all papers filed in connection with an adjudication proceeding are presumed to be open to the public. The Bureau may provide public access to and publish any papers filed in an adjudication proceeding except if there is a pending motion for a protective order filed pursuant to § 1081.119, or if there is an order from the Director, hearing officer, or a Federal court authorizing the confidential treatment of the papers filed.

§ 1081.112 Formal requirements as to papers filed.

(a) *Form.* All papers filed by parties must:

(1) Set forth the name, address, telephone number, and email address of the counsel or party making the filing;

(2) Be double-spaced (except for single-spaced footnotes and single-spaced indented quotations) and printed or typewritten on 8½ x 11 inch paper in 12-point or larger font;

(3) Include at the head of the paper, or on a title page, a caption setting forth the title of the case, the docket number of the proceeding, and a brief descriptive title indicating the purpose of the paper;

(4) Be paginated with margins at least one inch wide; and

(5) If filed by other than electronic means, be stapled, clipped or otherwise fastened in a manner that lies flat when opened.

(b) *Signature.* All papers must be dated and signed as provided in § 1081.108.

(c) *Number of copies.* Unless otherwise specified by the Director or the hearing officer, one copy of all

documents and papers shall be filed if filing is by electronic transmission. If filing is accomplished by any other means, an original and one copy of all documents and papers shall be filed, except that only one copy of transcripts of testimony and exhibits must be filed.

(d) *Authority to reject document for filing.* The Office of Administrative Adjudication or the hearing officer may reject a document for filing that materially fails to comply with these rules.

(e) *Sensitive personal information.* Sensitive personal information means an individual's Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver's license number, State-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual's medical records. Sensitive personal information shall not be included in, and must be redacted or omitted from, filings unless the person filing the paper determines that such information is relevant or otherwise necessary for the conduct of the proceeding. If the person filing a paper determines the sensitive personal information contained in the paper is relevant or necessary to the proceeding, the person shall file the paper in accordance with paragraph (f) of this section, including filing an expurgated copy of the paper with the sensitive personal information redacted.

(f) *Confidential treatment of information in certain filings.* A party seeking confidential treatment of information contained in a filing must contemporaneously file either a motion requesting such treatment in accordance with § 1081.119 or a copy of the order from the Director, hearing officer, or Federal court authorizing such confidential treatment. The filing must comply with any applicable order of the Director or hearing officer and must be accompanied by:

(1) A complete, sealed copy of the documents containing the materials as to which confidential treatment is sought, with the allegedly confidential material clearly marked as such, and with the first page of the document labeled ''Under Seal.'' If the movant seeks or has obtained a protective order against disclosure to other parties as well as the public, copies of the documents shall not be served on other parties; and

(2) An expurgated copy of the materials as to which confidential treatment is sought, with the allegedly confidential materials redacted. The redacted version shall indicate any omissions with brackets or ellipses, and its pagination and depiction of text on each page shall be identical to that of the sealed version.

(g) *Certificate of service.* Any papers filed in an adjudication proceeding shall contain proof of service on all other parties or their counsel in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. The certificate of service must be affixed to the papers filed and signed in accordance with § 1081.108.

§ 1081.113 Service of papers.

(a) *When required.* In every adjudication proceeding, each paper required to be filed by § 1081.111 shall be served upon each party in the proceeding in accordance with the provisions of this section; provided, however, that absent an order to the contrary, no service shall be required for motions which are to be heard ex parte.

(b) *Upon a person represented by counsel.* Whenever service is required to be made upon a person represented by counsel who has filed a notice of appearance pursuant to § 1081.107(a)(3), service shall be made pursuant to paragraph (c) of this section upon counsel, unless service upon the person represented is ordered by the Director or the hearing officer, as appropriate.

(c) *Method of service.* Except as provided in paragraph (d) of this section or as otherwise ordered by the hearing officer or the Director, service shall be made by delivering a copy of the filing by one of the following methods:

(1) Transmitting the papers by electronic transmission where the persons so serving each other have consented to service by specified electronic transmission and provided the Bureau and the parties with notice of the means for service by electronic transmission (e.g., email address or facsimile number);

(2) Handing a copy to the person required to be served; or leaving a copy at the person's office with a clerk or other person in charge thereof, or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling or usual place of abode with some person of suitable age and discretion then residing therein;

(3) Mailing the papers through the U.S. Postal Service by First Cass Mail, Registered Mail, Certified Mail or Express Mail delivery addressed to the person; or

(4) Sending the papers through a third-party commercial courier service or express delivery service.

(d) *Service of certain papers by the Bureau.* Service of the notice of charges, recommended decisions and final orders of the Bureau shall be effected as follows:

(1) *Service of a notice of charges.* (i) *To individuals.* Notice of a proceeding shall be made to an individual by delivering a copy of the notice of charges to the individual or to an agent authorized by appointment or by law to receive such notice. Delivery, for purposes of this paragraph, means handing a copy of the notice to the individual; or leaving a copy at the individual's office with a clerk or other person in charge thereof; or leaving a copy at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or sending a copy of the notice addressed to the individual through the U.S. Postal Service by Registered Mail, Certified Mail or Express Mail delivery, or by third-party commercial carrier, for overnight delivery and obtaining a confirmation of receipt.

(ii) *To corporations or entities.* Notice of a proceeding shall be made to a person other than a natural person by delivering a copy of the notice of charges to an officer, managing or general agent, or any other agent authorized by appointment or law to receive such notice, by any method specified in paragraph (d)(1)(i) of this section.

(iii) *Upon persons registered with the Bureau.* In addition to any other method of service specified in paragraph (d)(1)(i) or (ii) of this section, notice may be made to a person currently registered with the Bureau by sending a copy of the notice of charges addressed to the most recent business address shown on the person's registration form by U.S. Postal Service certified, registered or Express Mail and obtaining a confirmation of receipt or attempted delivery.

(iv) *Upon persons in a foreign country.* Notice of a proceeding to a person in a foreign country may be made by any method specified in paragraph (d)(1) of this section, or by any other method reasonably calculated to give notice, provided that the method of service used is not prohibited by the law of the foreign country.

(v) *Record of service.* The Bureau shall maintain and file a record of service of the notice of charges on parties, identifying the party given notice, the method of service, the date of service, the address to which service was made, and the person who made service. If service is made in person, the certificate of service shall state, if

available, the name of the individual to whom the notice of charges was given. If service is made by U.S. Postal Service Registered Mail, Certified Mail or Express Mail, the Bureau shall maintain the confirmation of receipt or attempted delivery. If service is made to an agent authorized by appointment to receive service, the certificate of service shall be accompanied by evidence of the appointment.

(vi) *Waiver of service.* In lieu of service as set forth in paragraph (d)(1)(i) or (d)(1)(ii) of this section, the party may be provided a copy of the notice of charges by First Class Mail or other reliable means if a waiver of service is obtained from the party and placed in the record.

(2) *Service of recommended decisions and final orders.* Recommended decisions issued by the hearing officer and final orders issued by the Bureau shall be served promptly on each party pursuant to any method of service authorized under paragraph (d)(1) of this section. Such decisions and orders may also be served by electronic transmission if the party to be served has agreed to accept such service in writing, signed by the party or its counsel, and has provided the Bureau with information concerning the manner of electronic transmission.

§ 1081.114 Construction of time limits.

(a) *General rule.* In computing any period of time prescribed by this part, by order of the Director or a hearing officer, or by any applicable statute, the date of the act or event that commences the designated period of time is not included. The last day so computed is included unless it is a Saturday, Sunday, or Federal holiday as set forth in 5 U.S.C. 6103(a). When the last day is a Saturday, Sunday, or Federal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or Federal holiday. Intermediate Saturdays, Sundays, and Federal holidays are included in the computation of time, except when the time period within which an act is to be performed is ten days or less, not including any additional time allowed for in paragraph (c) of this section.

(b) *When papers are deemed to be filed or served.* Filing and service are deemed to be effective:

(1) In the case of personal service or same day commercial courier delivery, upon actual receipt by person served;

(2) In the case of overnight commercial delivery service, Express Mail delivery, First Class Mail, Registered Mail, or Certified Mail, upon deposit in or delivery to an appropriate point of collection; or

(3) In the case of electronic transmission, upon transmission.

(c) *Calculation of time for service and filing of responsive papers.* Whenever a time limit is measured by a prescribed period from the service of any notice or paper, the applicable time limits are calculated as follows:

(1) If service is made by First Class Mail, Registered Mail, or Certified Mail, add three calendar days to the prescribed period;

(2) If service is made by Express Mail or overnight delivery service, add one calendar day to the prescribed period; or

(3) If service is made by electronic transmission, add one calendar day to the prescribed period.

§ 1081.115 Change of time limits.

(a) Except as otherwise provided by law, the hearing officer may, in any proceeding before him or her, for good cause shown, extend the time limits prescribed by this part or by any notice or order issued in the proceedings. After appeal to the Director pursuant to § 1081.402, the Director may grant extensions of the time limits for good cause shown. Extensions may be granted on the motion of a party after notice and opportunity to respond is afforded all non-moving parties or on the Director's or the hearing officer's own motion, as appropriate.

(b) *Considerations in determining whether to extend time limits or grant postponements, adjournments and extensions.* In considering all motions for extensions of time filed pursuant to paragraph (a) of this section, the Director or the hearing officer should adhere to a policy of strongly disfavoring granting such motions, except in circumstances where the moving party makes a strong showing that the denial of the motion would substantially prejudice its case. In determining whether to grant any motions, the Director or hearing officer, as appropriate, shall consider, in addition to any other relevant factors:

(1) The length of the proceeding to date;

(2) The number of postponements, adjournments or extensions already granted;

(3) The stage of the proceedings at the time of the motion;

(4) The impact of the motion on the hearing officer's ability to complete the proceeding in the time specified by § 1081.400(a); and

(5) Any other matters as justice may require.

(c) *Time limit.* Postponements, adjournments, or extensions of time for filing papers shall not exceed 21 days unless the Director or the hearing officer, as appropriate, states on the record or sets forth in a written order the reasons why a longer period of time is necessary.

(d) *No effect on deadline for recommended decision.* The granting of any extension of time pursuant to this section shall not affect any deadlines set pursuant to § 1081.400(a).

§ 1081.116 Witness fees and expenses.

Respondents shall pay to witnesses subpoenaed for testimony or depositions on their behalf the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, provided that, in the case of a deposition subpoena addressed to a party, no witness fees or mileage need be paid. Fees for witnesses shall be tendered in advance by any respondent requesting the issuance of a subpoena, except that fees and mileage need not be tendered in advance where the Bureau is the party requesting the subpoena. The Bureau shall pay to witnesses subpoenaed for testimony or depositions on behalf of the Office of Enforcement the same fees for attendance and mileage as are paid in the United States district courts in proceedings in which the United States is a party, but the Bureau need not tender such fees in advance.

§ 1081.117 Bureau's right to conduct examination, collect information.

Nothing contained in this part limits in any manner the right of the Bureau to conduct any examination, inspection, or visitation of any person, to conduct or continue any form of investigation authorized by law, to collect information in order to monitor the market for risks to consumers in the offering or provision of consumer financial products or services, or to otherwise gather information in accordance with law.

§ 1081.118 Collateral attacks on adjudication proceedings.

Unless a court of competent jurisdiction, or the Director for good cause, so directs, if an interlocutory appeal or collateral attack is brought in any court concerning all or any part of an adjudication proceeding, the challenged adjudication proceeding shall continue without regard to the pendency of that court proceeding. No default or other failure to act as directed in the adjudication proceeding within the times prescribed in this part shall be excused based on the pendency before any court of any interlocutory appeal or collateral attack.

§ 1081.119 Confidential information; protective orders.

(a) Rights of third parties. Any party that intends to disclose information obtained from a third party that is subject to a claim of confidentiality must provide notice to the third party at least ten days prior to the proposed disclosure of such information. In response to such notice, the third party may consent to the disclosure of such information, which may be conditioned on the entry of an appropriate protective order, or may intervene in the proceeding for the limited purpose of moving for a protective order pursuant to this section. Any written filing by a party that contains such confidential information must be accompanied by a certification that proper notice was provided. The act of making any oral motion or oral argument by any counsel or party which contains such confidential information constitutes a certification that proper notice was provided. A third party wishing to intervene for purposes of protecting its confidential information may file a single motion, in conformity with all applicable rules, setting forth the basis of both the third party's right to intervene and the basis for the protective order, in conformity with paragraph (b).

(b) *Procedure.* In any adjudication proceeding, a party, including a third party who has intervened pursuant to paragraph (a) of this section, may file a motion requesting a protective order to limit from disclosure to other parties or to the public documents or testimony that contain confidential information. The motion should include a general summary or extract of the documents or testimony without revealing confidential details, and a copy of the proposed protective order. A motion for confidential treatment of documents should be filed in accordance with § 1081.112(f), and all other applicable rules.

(c) *Basis for issuance.* Documents and testimony introduced in a public hearing, or filed in connection with an adjudication proceeding, are presumed to be public. A motion for a protective order shall be granted:

(1) Upon a finding that public disclosure will likely result in a clearly defined, serious injury to the party or third party requesting confidential treatment;

(2) After finding that the material constitutes sensitive personal information, as defined in § 1081.112(e);

(3) If all parties, including third parties to the extent their information is at issue, stipulate to the entry of a protective order; or

(4) Where public disclosure is prohibited by law.

(d) *Requests for additional information supporting confidentiality.* The hearing officer may require a movant under paragraph (b) of this section to furnish in writing additional information with respect to the grounds for confidentiality. Failure to supply the information so requested within five days from the date of receipt by the movant of a notice of the information required shall be deemed a waiver of the objection to public disclosure of that portion of the documents to which the additional information relates, unless the hearing officer shall otherwise order for good cause shown at or before the expiration of such five-day period.

(e) *Confidentiality of documents pending decision.* Pending a determination of a motion under this section, the documents as to which confidential treatment is sought and any other documents that would reveal the confidential information in those documents shall be maintained under seal and shall be disclosed only in accordance with orders of the hearing officer. Any order issued in connection with a motion under this section shall be public unless the order would disclose information as to which a protective order has been granted, in which case that portion of the order that would reveal the protected information shall be nonpublic.

§ 1081.120 Settlement.

(a) *Availability.* Any respondent in an adjudication proceeding instituted under this part, may, at any time, propose in writing an offer of settlement.

(b) *Procedure.* An offer of settlement shall state that it is made pursuant to this section; shall recite or incorporate as a part of the offer the provisions of paragraphs (c)(3) and (4) of this section; shall be signed by the person making the offer, not by counsel; and shall be submitted to enforcement counsel.

(c) *Consideration of offers of settlement.* (1) Offers of settlement shall be considered when time, the nature of the proceedings, and the public interest permit.

(2) Any settlement offer shall be presented to the Director with a recommendation, except that, if the recommendation is unfavorable, the offer shall not be presented to the Director unless the person making the offer so requests.

(3) By submitting an offer of settlement, the person making the offer waives, subject to acceptance of the offer:

(i) All hearings pursuant to the statutory provisions under which the proceeding has been instituted;

(ii) The filing of proposed findings of fact and conclusions of law;

(iii) Proceedings before, and a recommended decision by, a hearing officer;

(iv) All post-hearing procedures;

(v) Judicial review by any court; and

(vi) Any objection to the jurisdiction of the Bureau under section 1053 of the Dodd-Frank Act.

(4) By submitting an offer of settlement the person further waives:

(i) Such provisions of this part or other requirements of law as may be construed to prevent any Bureau employee from participating in the preparation of, or advising the Director as to, any order, opinion, finding of fact, or conclusion of law to be entered pursuant to the offer; and

(ii) Any right to claim bias or prejudgment by the Director based on the consideration of or discussions concerning settlement of all or any part of the proceeding.

(5) If the Director rejects the offer of settlement, the person making the offer shall be notified of the Director's action and the offer of settlement shall be deemed withdrawn. The rejected offer shall not constitute a part of the record in any proceeding against the person making the offer, provided, however, that rejection of an offer of settlement does not affect the continued validity of waivers pursuant to paragraph (c)(4) of this section with respect to any discussions concerning the rejected offer of settlement.

(d) *Consent orders.* If the Director accepts the offer of settlement, all terms and conditions of a settlement entered into under this section shall be recorded in a written stipulation signed by all settling parties, and a consent order concluding the proceeding. The stipulation and consent order shall be filed pursuant to § 1081.111, and shall recite or incorporate as a part of the stipulation the provisions of paragraphs (c)(3) and (4) of this section. The Director will then issue a consent order, which shall be a final order concluding the proceeding.

§ 1081.121 Cooperation with other agencies.

It is the policy of the Bureau to cooperate with other governmental agencies to avoid unnecessary overlap or duplication of regulatory functions.

Subpart B—Initiation of Proceedings and Prehearing Rules

§ 1081.200 Commencement of proceeding and contents of notice of charges.

(a) *Commencement of proceeding.* A proceeding governed by this part is commenced by filing of a notice of charges by the Bureau in accordance with § 1081.111. The notice of charges must be served by the Bureau upon the respondent in accordance with § 1081.113(d)(1).

(b) *Contents of a notice of charges.* The notice of charges must set forth:

(1) The legal authority for the proceeding and for the Bureau's jurisdiction over the proceeding;

(2) A statement of the matters of fact and law showing that the Bureau is entitled to relief;

(3) A proposed order or prayer for an order granting the requested relief;

(4) The time and place of the hearing as required by law or regulation;

(5) The time within which to file an answer as required by law or regulation;

(6) That the answer shall be filed and served in accordance with subpart A of this part; and

(7) The docket number for the adjudication proceeding.

(c) *Publication of notice of charges.* Unless otherwise ordered by the Bureau, the notice of charges shall be given general circulation by release to the public, by publication on the Bureau's Web site and, where directed by the hearing officer or the Director, by publication in the **Federal Register**. The Bureau may publish any notice of charges after ten days from the date of service except if there is a pending motion for a protective order filed pursuant to § 1081.119.

(d) *Commencement of proceeding through a consent order.* Notwithstanding paragraph (a) of this section, where the parties agree to settlement before the filing of a notice of charges, a proceeding may be commenced by filing a stipulation and consent order. The stipulation and consent order shall be filed pursuant to § 1081.111. The stipulation shall contain the information required under § 1081.120(d), and the consent order shall contain the information required under paragraphs (b)(1) through (b)(2) of this section. The proceeding shall be concluded upon issuance of the consent order by the Director.

(e) *Voluntary dismissal.* (1) *Without an order.* The Bureau may voluntarily dismiss an adjudication proceeding without an order entered by a hearing officer by filing either:

(i) A notice of dismissal before the respondent(s) serves an answer; or

(ii) A stipulation of dismissal signed by all parties who have appeared.

(2) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice, and does not operate as an adjudication on the merits.

§ 1081.201. Answer and disclosure statement and notification of financial interest.

(a) *Time to file answer.* Within 14 days of service of the notice of charges, respondent shall file an answer as designated in the notice of charges.

(b) *Content of answer.* An answer must specifically respond to each paragraph or allegation of fact contained in the notice of charges and must admit, deny, or state that the party lacks sufficient information to admit or deny each allegation of fact. A statement of lack of information has the effect of a denial. Denials must fairly meet the substance of each allegation of fact denied; general denials are not permitted. When a respondent denies part of an allegation, that part must be denied and the remainder specifically admitted. Any allegation of fact in the notice of charges which is not denied in the answer shall be deemed admitted for purposes of the proceeding. A respondent is not required to respond to the portion of a notice of charges that constitutes the prayer for relief or proposed order. The answer must set forth affirmative defenses, if any, asserted by the respondent.

(c) *If the allegations of the complaint are admitted.* If the respondent elects not to contest the allegations of fact set forth in the notice of charges, the answer shall consist of a statement that the respondent admits all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the notice of charges, and together with the notice of charges will provide a record basis on which the hearing officer shall issue a recommended decision containing appropriate findings and conclusions and a proposed order disposing of the proceeding. In such an answer, the respondent may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 1081.305.

(d) *Default.* (1) Failure of a respondent to file an answer within the time provided shall be deemed to constitute a waiver of the respondent's right to appear and contest the allegations of the notice of charges and to authorize the hearing officer, without further notice to the respondent, to find the facts to be as alleged in the notice of charges and to enter a recommended decision containing appropriate findings and conclusions. In such cases, respondent shall have no right to appeal pursuant to § 1081.402, but must instead proceed pursuant to paragraph (d)(2) of this section.

(2) A motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. In order to prevent injustice and on such conditions as may be appropriate, the hearing officer, at any time prior to the filing of the recommended decision, or the Director, at any time, may for good cause shown set aside a default.

(e) *Disclosure statement and notification of financial interest.* (1) *Who must file; contents.* A respondent, nongovernmental intervenor, or nongovernmental amicus must file a disclosure statement and notification of financial interest that:

(i) Identifies any parent corporation, any publicly owned corporation owning ten percent or more of its stock, and any publicly owned corporation not a party to the proceeding that has a financial interest in the outcome of the proceeding and the nature of that interest; or

(ii) States that there are no such corporations.

(2) *Time for filing; supplemental filing.* A respondent, nongovernmental intervenor, or nongovernmental amicus must:

(i) File the disclosure statement with its first appearance, pleading, motion, response, or other request addressed to the hearing officer or the Bureau; and

(ii) Promptly file a supplemental statement if any required information changes.

§ 1081.202 Amended pleadings.

(a) *Amendments before the hearing.* The notice of charges, answer, or any other pleading may be amended or supplemented only with the opposing party's written consent or leave of the hearing officer. The respondent must answer an amended notice of charges within the time remaining for the respondent's answer to the original notice of charges, or within ten days after service of the amended notice of charges, whichever is later, unless the hearing officer orders otherwise for good cause.

(b) *Amendments to conform to the evidence.* When issues not raised in the notice of charges or answer are tried at the hearing by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the notice of charges or answer, and no formal amendments are

required. If evidence is objected to at the hearing on the ground that it is not within the issues raised by the notice of charges or answer, the hearing officer may admit the evidence when admission is likely to assist in adjudicating the merits of the action and the objecting party fails to satisfy the hearing officer that the admission of such evidence would unfairly prejudice that party's action or defense upon the merits. The hearing officer may grant a continuance to enable the objecting party to meet such evidence.

§ 1081.203 Scheduling conference.

(a) *Meeting of the parties before scheduling conference.* As early as practicable before the scheduling conference described in paragraph (b) of this section, counsel for the parties shall meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case. The parties shall also discuss and agree, if possible, on the matters set forth in paragraph (b) of this section.

(b) *Scheduling conference.* Within 20 days of service of the notice of charges or such other time as the parties and hearing officer may agree, counsel for all parties shall appear before the hearing officer in person at a specified time and place or by telephone for the purpose of scheduling the course and conduct of the proceeding. This meeting or telephone conference is called a *scheduling conference.* At the scheduling conference, counsel for the parties shall be prepared to address:

(1) Determination of the dates and location of the hearing, including, in proceedings under section 1053(b) of the Dodd-Frank Act, whether the hearing should commence later than 60 days after service of the notice of charges;

(2) Simplification and clarification of the issues;

(3) Amendments to pleadings;

(4) Settlement of any or all issues;

(5) Production of documents as set forth in § 1081.206 and of witness statements as set forth in § 1081.207, and prehearing production of documents in response to subpoenas *duces tecum* as set forth in § 1081.208;

(6) Whether or not the parties intend to move for summary disposition of any or all issues;

(7) Whether the parties intend to seek the deposition of witnesses pursuant to § 1081.209;

(8) A schedule for the exchange of expert reports and the taking of expert depositions, if any; and

(9) Such other matters as may aid in the orderly disposition of the proceeding.

(c) *Transcript.* The hearing officer, in his or her discretion, may require that a scheduling conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at his or her expense.

(d) *Scheduling order.* At or within five days following the conclusion of the scheduling conference, the hearing officer shall serve on each party an order setting forth the date and location of the hearing and any agreements reached and any procedural determinations made.

(e) *Failure to appear; default.* Any person who is named in a notice of charges as a person against whom findings may be made or sanctions imposed and who fails to appear, in person or through counsel, at a scheduling conference of which he or she has been duly notified may be deemed in default pursuant to § 1081.201(d)(1). A party may make a motion to set aside a default pursuant to § 1081.201(d)(2).

(f) *Public access.* The scheduling conference shall be public unless the hearing officer determines, based on the standard set forth in § 1081.119(c), that the conference (or any part thereof) shall be closed to the public.

§ 1081.204 Consolidation and severance of actions.

(a) *Consolidation.* (1) On the motion of any party, or on the hearing officer's own motion, the hearing officer may consolidate, for some or all purposes, any two or more proceedings, if each such proceeding involves or arises out of the same transaction, occurrence or series of transactions or occurrences, or involves at least one common respondent or a material common question of law or fact, unless such consolidation would cause unreasonable delay or injustice.

(2) In the event of consolidation under paragraph (a)(1) of this section, appropriate adjustment to the prehearing schedule may be made to avoid unnecessary expense, inconvenience, or delay.

(b) *Severance.* The hearing officer may, upon the motion of any party, sever the proceeding for separate resolution of the matter as to any respondent only if the hearing officer finds that:

(1) Undue prejudice or injustice to the moving party would result from not severing the proceeding; and

(2) Such undue prejudice or injustice would outweigh the interests of judicial economy and expedition in the complete and final resolution of the proceeding.

§ 1081.205 Non-dispositive motions.

(a) *Scope.* This section applies to all motions except motions to dismiss and motions for summary disposition. A non-dispositive motion filed pursuant to another section of this part shall comply with any specific requirements of that section and this section to the extent these requirements are not inconsistent.

(b) *In writing.* (1) Unless made during a hearing or conference, an application or request for an order or ruling must be made by written motion.

(2) All written motions must state with particularity the relief sought and must be accompanied by a proposed order.

(3) No oral argument may be held on written motions except as otherwise directed by the hearing officer. Written memoranda, briefs, affidavits or other relevant material or documents may be filed in support of or in opposition to a motion.

(c) *Oral motions.* The Director or the hearing officer, as appropriate, may order that an oral motion be submitted in writing.

(d) *Responses and replies.* (1) Except as otherwise provided herein, within ten days after service of any written motion, or within such other period of time as may be established by the hearing officer or the Director, as appropriate, any party may file a written response to a motion. The hearing officer shall not rule on any oral or written motion before each party has had an opportunity to file a response.

(2) Reply briefs, if any, may be filed within three days after service of the response.

(3) The failure of a party to oppose a written motion or an oral motion made on the record is deemed consent by that party to the entry of an order substantially in the form of the order accompanying the motion.

(e) *Length limitations.* No motion subject to this section (together with the brief in support of the motion) or brief in response to the motion shall exceed 15 pages in length, exclusive of pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions or rules, and exhibits. No reply brief shall exceed six pages in length, exclusive of pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative

provisions or rules, and exhibits. Motions for leave to file motions and briefs in excess of these limitations are disfavored.

(f) *Meet and confer requirements.* Each motion filed under this section shall be accompanied by a signed statement representing that counsel for the moving party has conferred or made a good faith effort to confer with opposing counsel in a good faith effort to resolve by agreement the issues raised by the motion 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.

(g) *Ruling on non-dispositive motions.* Unless otherwise provided by a relevant section of this part, a hearing officer shall rule on non-dispositive motions. Such ruling shall be issued within 14 days after the expiration of the time period allowed for the filing of all motion papers authorized by this section. The Director, for good cause, may extend the time allowed for a ruling.

(h) *Proceedings not stayed.* A motion under consideration by the Director or the hearing officer shall not stay proceedings before the hearing officer unless the Director or the hearing officer, as appropriate, so orders.

(i) *Dilatory motions.* Frivolous, dilatory, or repetitive motions are prohibited. The filing of such motions may form the basis for sanctions.

§ 1081.206 Availability of documents for inspection and copying.

For purposes of this section, the term *documents* shall include any book, document, record, report, memorandum, paper, communication, tabulation, chart, logs, electronic files, or other data or data compilations stored in any medium.

(a) *Documents to be available for inspection and copying.* (1) Unless otherwise provided by this section, or by order of the hearing officer, the Office of Enforcement shall make available for inspection and copying by any respondent documents obtained by the Office of Enforcement prior to the institution of proceedings, from persons not employed by the Bureau, in connection with the investigation leading to the institution of proceedings. Such documents shall include:

(i) Any documents turned over in response to civil investigative demands or other written requests to provide documents or to be interviewed issued by the Office of Enforcement;

(ii) All transcripts and transcript exhibits; and

(iii) Any other documents obtained from persons not employed by the Bureau.

(2) In addition, the Office of Enforcement shall make available for inspection and copying by any respondent:

(i) Each civil investigative demand or other written request to provide documents or to be interviewed issued by the Office of Enforcement in connection with the investigation leading to the institution of proceedings; and

(ii) Any final examination or inspection reports prepared by any other Office of the Bureau if the Office of Enforcement either intends to introduce any such report into evidence or to use any such report to refresh the recollection of, or impeach, any witness.

(3) Nothing in paragraph (a) of this section shall limit the right of the Office of Enforcement to make available any other document, or shall limit the right of a respondent to seek access to or production pursuant to subpoena of any other document, or shall limit the authority of the hearing officer to order the production of any document pursuant to subpoena.

(4) Nothing in paragraph (a) of this section shall require the Office of Enforcement to produce a final examination or inspection report prepared by any other Office of the Bureau or any other government agency to a respondent who is not the subject of that report.

(b) *Documents that may be withheld.* (1) The Office of Enforcement may withhold a document if:

(i) The document is privileged;

(ii) The document is an internal memorandum, note or writing prepared by a person employed by the Bureau or another government agency, other than an examination or supervision report as specified in paragraph (a)(2)(ii) of this section, or would otherwise be subject to the work product doctrine and will not be offered in evidence;

(iii) The document was obtained from a domestic or foreign governmental entity and is either not relevant to the resolution of the proceeding or was provided on condition that the information not be disclosed;

(iv) The document would disclose the identity of a confidential source;

(v) Applicable law prohibits the disclosure of the document; or

(vi) The hearing officer grants leave to withhold a document or category of documents as not relevant to the subject matter of the proceeding or otherwise, for good cause shown.

(2) Nothing in paragraph (b)(1) of this section authorizes the Office of Enforcement in connection with an adjudication proceeding to withhold material exculpatory evidence in the possession of the Office that would otherwise be required to be produced pursuant to paragraph (a) of this section.

(c) *Withheld document list.* The hearing officer may require the Office of Enforcement to produce a list of documents or categories of documents withheld pursuant to paragraphs (b)(1)(i) through (v) of this section or to submit to the hearing officer any document withheld, except for any documents that are being withheld pursuant to section (b)(1)(iii), in which case the Office of Enforcement shall inform the other parties of the fact that such documents are being withheld, but no further disclosures regarding those documents shall be required. The hearing officer may determine whether any withheld document should be made available for inspection and copying. When similar documents are withheld pursuant to paragraphs (b)(1)(i) through (v) of this section, those documents may be identified by category instead of by individual document. The hearing officer retains discretion to determine when an identification by category is insufficient.

(d) *Timing of inspection and copying.* Unless otherwise ordered by the hearing officer, the Office of Enforcement shall commence making documents available to a respondent for inspection and copying pursuant to this section no later than seven days after service of the notice of charges.

(e) *Place of inspection and copying.* Documents subject to inspection and copying pursuant to this section shall be made available to the respondent for inspection and copying at the Bureau office where they are ordinarily maintained, or at such other place as the parties, in writing, may agree. A respondent shall not be given custody of the documents or leave to remove the documents from the Bureau's offices pursuant to the requirements of this section other than by written agreement of the Office of Enforcement. Such agreement shall specify the documents subject to the agreement, the date they shall be returned and such other terms or conditions as are appropriate to provide for the safekeeping of the documents.

(f) *Copying costs and procedures.* The respondent may obtain a photocopy of any documents made available for inspection or, at the discretion of the Office of Enforcement, electronic copies of such documents. The respondent shall be responsible for the cost of photocopying. Unless otherwise ordered, charges for copies made by the

Office of Enforcement at the request of the respondent will be at the rate charged pursuant to part 1070. The respondent shall be given access to the documents at the Bureau's offices or such other place as the parties may agree during normal business hours for copying of documents at the respondent's expense.

(g) *Duty to supplement.* If the Office of Enforcement acquires information that it intends to rely upon at a hearing after making its disclosures under paragraph (a)(1) of this section, the Office of Enforcement shall supplement its disclosures to include such information.

(h) *Failure to make documents available—harmless error.* In the event that a document required to be made available to a respondent pursuant to this section is not made available by the Office of Enforcement, no rehearing or redecision of a proceeding already heard or decided shall be required unless the respondent establishes that the failure to make the document available was not harmless error.

(i) *Disclosure of privileged or protected information or communications; scope of waiver; obligations of receiving party.* (1) The disclosure of privileged or protected information or communications by any party during an adjudication proceeding shall not operate as a waiver 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 any party that received the information or communication of the claim and the basis for it.

(2) After being notified, the receiving party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the hearing officer under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(3) The disclosure of privileged or protected information or communications by any party during an adjudication proceeding shall waive the privilege or protection, with respect to other parties to the proceeding, 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.

§ 1081.207 Production of witness statements.

(a) *Availability.* Any respondent may move that the Office of Enforcement produce for inspection and copying any statement of any person called or to be called as a witness by the Office of Enforcement that pertains, or is expected to pertain, to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. 3500, if the adjudication proceeding were a criminal proceeding. For purposes of this section, the term ''statement'' shall have the meaning set forth in 18 U.S.C. 3500(e). Such production shall be made at a time and place fixed by the hearing officer and shall be made available to any party, provided, however, that the production shall be made under conditions intended to preserve the items to be inspected or copied.

(b) *Failure to produce—harmless error.* In the event that a statement required to be made available to a respondent pursuant to this section is not made available by the Office of Enforcement, no rehearing or redecision of a proceeding already heard or decided shall be required unless the respondent establishes that the failure to make the statement available was not harmless error.

§ 1081.208 Subpoenas.

(a) *Availability.* In connection with any hearing ordered by the hearing officer, a party may request the issuance of one or more subpoenas requiring the attendance and testimony of witnesses at the designated time and place of the hearing, or the production of documentary or other tangible evidence returnable at any designated time or place.

(b) *Procedure.* Unless made on the record at a hearing, requests for issuance of a subpoena shall be made in writing, and filed and served on each party pursuant to subpart A of this part. The request must contain a proposed subpoena and a brief statement showing the general relevance and reasonableness of the scope of testimony or documents sought.

(c) *Signing may be delegated.* A hearing officer may authorize issuance of a subpoena, and may delegate the manual signing of the subpoena to any other person.

(d) *Standards for issuance.* The hearing officer shall promptly issue any subpoena requested pursuant to this section. However, where it appears to the hearing officer that the subpoena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may, in his or her discretion, as a condition precedent to the issuance of the subpoena, require the person seeking the subpoena to show further the general relevance and reasonable scope of the testimony or other evidence sought. If after consideration of all the circumstances, the hearing officer determines that the subpoena or any of its terms is unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the subpoena, or issue it only upon such conditions as fairness requires. In making the foregoing determination, the hearing officer may inquire of the other participants whether they will stipulate to the facts sought to be proved.

(e) *Service.* Upon issuance by the hearing officer, the party making the request shall serve the subpoena on the person named in the subpoena and on each party in accordance with § 1081.113(c). Subpoenas may be served in any State, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any State, territory, possession of the United States, or the District of Columbia, or as otherwise permitted by law.

(f) *Tender of fees required.* When a subpoena compelling the attendance of a person at a hearing is issued at the request of anyone other than an officer or agency of the United States, service is valid only if the subpoena is accompanied by a tender to the subpoenaed person of the fees for one day's attendance and mileage specified by § 1081.116.

(g) *Production of documentary material.* Production of documentary material in response to a subpoena shall be made under a sworn certificate, in such form as the subpoena designates, by the person to whom the subpoena 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 subpoena and in the possession, custody, or control of the person to whom the subpoena is directed has been produced and made available to the custodian.

(h) *Motion to quash or modify.* (1) *Procedure.* Any person to whom a subpoena is directed, or who is an owner, creator, or the subject of the documents that are to be produced

pursuant to a subpoena, or any party may, prior to the time specified therein for compliance, but in no event more than ten days after the date of service of such subpoena, move that the subpoena be quashed or modified. Such motion shall be filed and served on all parties pursuant to subpart A of this part. Notwithstanding § 1081.205, the party on whose behalf the subpoena was issued or enforcement counsel may, within five days of service of the motion, file a response to the motion. Reply briefs are not permitted unless requested by the hearing officer. Filing a motion to modify a subpoena does not stay the movant's obligation to comply with those portions of the subpoena that the person has not sought to modify.

(2) *Standards governing motion to quash or modify.* If compliance with the subpoena would be unreasonable, oppressive, or unduly burdensome, the hearing officer shall quash or modify the subpoena, or may order return of the subpoena only upon specified conditions. These conditions may include but are not limited to a requirement that the party on whose behalf the subpoena was issued shall make reasonable compensation to the person to whom the subpoena was addressed for the cost of copying or transporting evidence to the place for return of the subpoena.

(i) *Enforcing subpoenas.* If a subpoenaed person fails to comply with any subpoena issued pursuant to this section or any order of the hearing officer which directs compliance with all or any portion of a subpoena, the Bureau's General Counsel may, on its own motion or at the request of the party on whose behalf the subpoena was issued, apply to an appropriate United States district court, in the name of the Bureau but on relation of such party, for an order requiring compliance with so much of the subpoena as the hearing officer has not quashed or modified, unless, in the judgment of the General Counsel, the enforcement of such subpoena would be inconsistent with law and the policies of Title X of the Dodd-Frank Act. Failure to request that the Bureau's General Counsel seek enforcement of a subpoena constitutes a waiver of any claim of prejudice predicated upon the unavailability of the testimony or evidence sought.

§ 1081.209 Deposition of witness unavailable for hearing.

(a) *General rules.* (1) If a witness will not be available for the hearing, a party desiring to preserve that witness's testimony for the record may request in accordance with the procedures set forth in this section that the hearing officer issue a subpoena, including a subpoena *duces tecum,* requiring the attendance of the witness at a deposition. The hearing officer may issue a deposition subpoena under this section upon a showing that:

(i) The witness will be unable to attend or may be prevented from attending the hearing because of age, sickness, or infirmity, or will otherwise be unavailable;

(ii) The witness's unavailability was not procured or caused by the subpoenaing party;

(iii) The testimony is reasonably expected to be material; and

(iv) Taking the deposition will not result in any undue burden to any other party and will not cause undue delay of the proceeding.

(2) In addition to making a showing as required by paragraph (a)(1) of this section, the request for a deposition subpoena must contain a proposed deposition subpoena and a brief statement showing the general relevance and reasonableness of the scope of testimony and documents sought, and the time and place for taking the deposition. Any request to record the deposition by audio-visual means must be made in the request for a deposition subpoena.

(3) Any requested deposition subpoena that sets forth a valid basis for its issuance must be promptly issued, unless the hearing officer on his or her own motion requires a written response or requires attendance at a conference concerning whether the requested subpoena should be issued. However, where it appears to the hearing officer that the deposition subpoena sought may be unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may, in his or her discretion, as a condition precedent to the issuance of the deposition subpoena, require the person seeking the deposition subpoena to show further the general relevance and reasonable scope of the testimony or other evidence sought. If after consideration of all the circumstances, the hearing officer determines that the deposition subpoena or any of its terms is unreasonable, oppressive, excessive in scope, or unduly burdensome, he or she may refuse to issue the deposition subpoena, or issue it only upon such conditions as fairness requires. In making the foregoing determination, the hearing officer may inquire of the other participants whether they will stipulate to the facts sought to be proved.

(4) Unless the hearing officer orders otherwise, no deposition under this section shall be taken on fewer than 14 days' notice to the witness and all parties.

(b) *Procedure.* Unless made on the record at a hearing, requests for issuance of a deposition subpoena shall be made in writing, and filed and served on each party pursuant to subpart A of this part.

(c) *Signing may be delegated.* A hearing officer may authorize issuance of a deposition subpoena, and may delegate the manual signing of the deposition subpoena to any other person.

(d) *Service.* Upon issuance by the hearing officer, the party making the request shall serve the subpoena on the person named in the subpoena and on each party in accordance with § 1081.113(c). Deposition subpoenas may be served in any State, territory, possession of the United States, or the District of Columbia, on any person or company doing business in any State, territory, possession of the United States, or the District of Columbia, or as otherwise permitted by law.

(e) *Tender of fees required.* When a subpoena compelling the attendance of a person at a deposition is issued at the request of anyone other than an officer or agency of the United States, service is valid only if the subpoena is accompanied by a tender to the subpoenaed person of the fees for one day's attendance and mileage specified by § 1081.116.

(f) *Motion to quash or modify.* (1) *Procedure.* Any person to whom a deposition subpoena is directed, or who is an owner, creator, or the subject of the documents that are to be produced pursuant to a deposition subpoena, or any party may, prior to the time specified therein for compliance, but in no event more than ten days after the date of service of such subpoena, move that the deposition subpoena be quashed or modified. Such motion must include a statement of the basis for the motion to quash or modify the deposition subpoena, and shall be filed and served on all parties pursuant to subpart A of this part. Notwithstanding § 1081.205, the party on whose behalf the deposition subpoena was issued or enforcement counsel may, within five days of service of the motion, file a response to the motion. Reply briefs are not permitted unless requested by the hearing officer.

(2) *Standards governing motion to quash or modify.* If compliance with the deposition subpoena would be unreasonable, oppressive or unduly burdensome, or the deposition subpoena does not meet the requirements set forth in paragraph (a)(1) of this section, the hearing officer shall quash or modify the deposition

subpoena, or may order return of the deposition subpoena only upon specified conditions. These conditions may include but are not limited to a requirement that the party on whose behalf the deposition subpoena was issued shall make reasonable compensation to the person to whom the deposition subpoena was addressed for the cost of copying or transporting evidence to the place for return of the deposition subpoena.

(g) *Procedure upon deposition.* (1) Depositions shall be taken before any person before whom a deposition may be taken pursuant to the Federal Rules of Civil Procedure (the ''deposition officer'').

(2) The witness being deposed may have an attorney present during the deposition.

(3) Each witness testifying pursuant to a deposition subpoena must be duly sworn, and each party shall have the right to examine the witness. Objections to questions or documents must be in short form, stating the grounds for the objection. Objections to questions of evidence shall be noted by the deposition officer upon the deposition, but a deposition officer other than the hearing officer shall not have the power to decide on the competency, materiality, or relevance of evidence. Failure to object to questions or documents is not deemed a waiver except where the ground for the objection might have been avoided if the objection had been timely presented. All questions, answers, and objections must be recorded.

(4) The deposition must be subscribed by the witness, unless the parties and the witness, by stipulation, have waived the signing, or the witness is ill, cannot be found, or has refused to sign. If the deposition is not subscribed by the witness, the court reporter taking the deposition shall certify that the transcript is a true and complete transcript of the deposition.

(5) The original deposition transcript and exhibits shall be filed with the Office of Administrative Adjudication. The cost of the transcript shall be paid by the party requesting the deposition. A copy of the deposition shall be available to the deponent and each party for purchase at prescribed rates.

(h) *Enforcing subpoenas.* Any party may move before the hearing officer for an order compelling the witness to answer any questions the witness has refused to answer or submit any evidence the witness has refused to submit during the deposition. If a subpoenaed person fails to comply with any order of the hearing officer which directs compliance with all or any portion of a deposition subpoena under this section, the Bureau's General Counsel may, on its own motion or at the request of the party on whose behalf the subpoena was issued, apply to an appropriate United States district court, in the name of the Bureau but on relation of such party, for an order requiring compliance with so much of the subpoena as the hearing officer has not quashed or modified, unless, in the judgment of the General Counsel, the enforcement of such subpoena would be inconsistent with law and the policies of Title X of the Dodd-Frank Act. Failure to request that the Bureau seek enforcement of a subpoena constitutes a waiver of any claim of prejudice predicated upon the unavailability of the testimony or evidence sought.

§ 1081.210 Expert discovery.

(a) At a date set by the hearing officer at the scheduling conference, each party shall serve the other with a report prepared by each of its expert witnesses. Each party shall serve the other parties with a list of any rebuttal expert witnesses and a rebuttal report prepared by each such witness not later than 28 days after the deadline for service of expert reports, unless another date is set by the hearing officer. A rebuttal report shall be limited to rebuttal of matters set forth in the expert report for which it is offered in rebuttal. If material outside the scope of fair rebuttal is presented, a party may file a motion not later than five days after the deadline for service of rebuttal reports, seeking appropriate relief with the hearing officer, including striking all or part of the report, leave to submit a surrebuttal report by the party's own experts, or leave to call a surrebuttal witness and to submit a surrebuttal report by that witness.

(b) No party may call an expert witness at the hearing unless he or she has been listed and has provided reports as required by this section, unless otherwise directed by the hearing officer at a scheduling conference. Each side will be limited to calling at the hearing five expert witnesses, including any rebuttal or surrebuttal expert witnesses. A party may file a motion seeking leave to call additional expert witnesses due to extraordinary circumstances.

(c) Each report shall be signed by the expert and contain a complete statement of all opinions to be expressed and the basis and reasons therefore; the data, materials, or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored or co-authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified or sought to testify as an expert at trial or hearing, or by deposition within the preceding four years. A rebuttal or surrebuttal report need not include any information already included in the initial report of the witness.

(d) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. Unless otherwise ordered by the hearing officer, a deposition of any expert witness shall be conducted after the disclosure of a report prepared by the witness in accordance with paragraph (a) of this section, and at least seven days prior to the deadline for submission of rebuttal expert reports. A deposition of an expert witness shall be completed no later than 14 days before the hearing unless otherwise ordered by the hearing officer. No expert deposition shall exceed eight hours on the record, absent agreement of the parties or an order of the hearing officer for good cause shown. Expert depositions shall be conducted pursuant to the procedures set forth in § 1081.209(g).

(e) A party may not discover facts known or opinions held by an expert who has been retained or specifically employed by another party in anticipation of litigation or preparation for the hearing and who is not listed as a witness for the hearing. A party may not discover drafts of any report required by this section, regardless of the form in which the draft is recorded, or any communications between another party's attorney and any of that other party's experts, regardless of the form of the communications, except to the extent that the communications:

(1) Relate to compensation for the testifying expert's study or testimony;

(2) Identify facts or data that the other party's attorney provided and that the testifying expert considered in forming the opinions to be expressed; or

(3) Identify assumptions that the other party's attorney provided and that the testifying expert relied on in forming the opinions to be expressed.

(f) The hearing officer shall have the discretion to dispense with the requirement of expert discovery in appropriate cases.

§ 1081.211 Interlocutory review.

(a) *Availability.* The Director may, at any time, direct that any matter be submitted to him or her for review. Subject to paragraph (c) of this section, the hearing officer may, on his or her own motion or on the motion of any

party, certify any matter for interlocutory review by the Director. This section is the exclusive remedy for review of a hearing officer's ruling or order prior to the Director's consideration of the entire proceeding.

(b) *Procedure.* Any party's motion for certification of a ruling or order for interlocutory review shall be filed with the hearing officer within five days of service of the ruling or order, shall specify the ruling or order or parts thereof for which interlocutory review is sought, shall attach any other portions of the record on which the moving party relies, and shall otherwise comply with § 1081.205. Notwithstanding § 1081.205, any response to such a motion must be filed within three days of service of the motion. The hearing officer shall issue a ruling on the motion within five days of the deadline for filing a response.

(c) *Certification process.* Unless the Director directs otherwise, a ruling or order may not be submitted to the Director for interlocutory review unless the hearing officer, upon the hearing officer's motion or upon the motion of a party, certifies the ruling or order in writing. The hearing officer shall not certify a ruling or order unless:

(1) The ruling or order would compel testimony of Bureau officers or employees, or those from another governmental agency, or the production of documentary evidence in the custody of the Bureau or another governmental agency;

(2) The ruling or order involves a motion for disqualification of the hearing officer pursuant to § 1081.105(c)(2);

(3) The ruling or order suspended or barred an individual from appearing before the Bureau pursuant to § 1081.107(c); or

(4) Upon motion by a party, the hearing officer is of the opinion that:

(i) The ruling or order involves a controlling question of law as to which there is substantial ground for difference of opinion; and

(ii) An immediate review of the ruling or order is likely to materially advance the completion of the proceeding or subsequent review will be an inadequate remedy.

(d) *Interlocutory review.* A party whose motion for certification has been denied by the hearing officer may petition the Director for interlocutory review.

(e) *Director review.* The Director shall determine whether or not to review a ruling or order certified under this section or the subject of a petition for interlocutory review. Interlocutory review is disfavored, and the Director will grant a petition to review a hearing officer's ruling or order prior to his or her consideration of a recommended decision only in extraordinary circumstances. The Director may decline to review a ruling or order certified by a hearing officer pursuant to paragraph (c) of this section or the petition of a party who has been denied certification if he or she determines that interlocutory review is not warranted or appropriate under the circumstances, in which case he or she may summarily deny the petition. If the Director determines to grant the review, he or she will review the matter and issue his or her ruling and order in an expeditious fashion, consistent with the Bureau's other responsibilities.

(f) *Proceedings not stayed.* The filing of a motion requesting that the hearing officer certify any of his or her prior rulings or orders for interlocutory review or a petition for interlocutory review filed with the Director, and the grant of any such review, shall not stay proceedings before the hearing officer unless he or she, or the Director, shall so order. The Director will not consider a motion for a stay unless the motion shall have first been made to the hearing officer.

§ 1081.212 Dispositive motions.

(a) *Dispositive motions.* This section governs the filing of motions to dismiss and motions for summary disposition. The filing of any such motion does not obviate a party's obligation to file an answer or take any other action required by this part or by an order of the hearing officer, unless expressly so provided by the hearing officer.

(b) *Motions to dismiss.* A respondent may file a motion to dismiss asserting that, even assuming the truth of the facts alleged in the notice of charges, it is entitled to dismissal as a matter of law.

(c) *Motion for summary disposition.* A party may make a motion for summary disposition asserting that the undisputed pleaded facts, admissions, affidavits, stipulations, documentary evidence, matters as to which official notice may be taken, and any other evidentiary materials properly submitted in connection with a motion for summary disposition show that:

(1) There is no genuine issue as to any material fact; and

(2) The moving party is entitled to a decision in its favor as a matter of law.

(d) *Filing of motions for summary disposition and responses.* (1) After a respondent's answer has been filed and documents have been made available to the respondent for inspection and copying pursuant to § 1081.206, any party may move for summary disposition in its favor of all or any part of the proceeding.

(2) A motion for summary disposition must be accompanied by a statement of the material facts as to which the moving party contends there is no genuine issue. Such motion must be supported by documentary evidence, which may take the form of admissions in pleadings, stipulations, depositions, investigatory depositions, transcripts, affidavits and any other evidentiary materials that the moving party contends support his or her position. The motion must also be accompanied by a brief containing the points and authorities in support of the contention of the moving party. Any party opposing a motion for summary disposition must file a statement setting forth those material facts as to which he or she contends a genuine dispute exists. Such opposition must be supported by evidence of the same type as may be submitted in support of a motion for summary disposition and a brief containing the points and authorities in support of the contention that summary disposition would be inappropriate.

(3) Any affidavit or declaration submitted in support of or in opposition to a motion for summary disposition shall set forth such facts as would be admissible in evidence, shall show affirmatively that the affiant is competent to testify to the matters stated therein, and must be signed under oath and penalty of perjury.

(e) *Page limitations for dispositive motions.* A motion to dismiss or for summary disposition, together with any brief in support of the motion (exclusive of any declarations, affidavits, or attachments) shall not exceed 35 pages in length. Motions for extensions of this length limitation are disfavored.

(f) *Opposition and reply response time and page limitation.* Any party, within 20 days after service of a dispositive motion, or within such time period as allowed by the hearing officer, may file a response to such motion. The length limitations set forth in paragraph (e) of this section shall also apply to such responses. Any reply brief filed in response to an opposition to a dispositive motion shall be filed within five days after service of the opposition. Reply briefs shall not exceed ten pages.

(g) *Oral argument.* At the request of any party or on his or her own motion, the hearing officer may hear oral argument on a dispositive motion.

(h) *Decision on motion.* Within 30 days following the expiration of the time for filing all responses and replies to any dispositive motion, the hearing officer shall determine whether the motion shall be granted. If the hearing

officer determines that dismissal or summary disposition is warranted, he or she shall issue a recommended decision granting the motion. If the hearing officer finds that no party is entitled to dismissal or summary disposition, he or she shall make a ruling denying the motion. If it appears that a party, for good cause shown, cannot present by affidavit, prior to hearing, facts essential to justify opposition to the motion, the hearing officer shall deny or defer the motion.

§ 1081.213 Partial summary disposition.

If on a motion for summary disposition under § 1081.212 a decision is not rendered upon the whole case or for all the relief asked and a hearing is necessary, the hearing officer shall issue an order specifying the facts that appear without substantial controversy and directing further proceedings in the action. The facts so specified shall be deemed established.

§ 1081.214 Prehearing conferences.

(a) *Prehearing conferences.* The hearing officer may, in addition to the scheduling conference, on his or her own motion or at the request of any party, direct counsel for the parties to meet with him or her (in person or by telephone) at a prehearing conference for further discussion of the issues outlined in § 1081.203, or for discussion of any additional matters that in the view of the hearing officer will aid in an orderly disposition of the proceeding, including but not limited to:

(1) Identification of potential witnesses and limitation on the number of witnesses;

(2) The exchange of any prehearing materials including witness lists, statements of issues, exhibits, and any other materials;

(3) Stipulations, admissions of fact, and the contents, authenticity, and admissibility into evidence of documents;

(4) Matters of which official notice may be taken; and

(5) Whether the parties intend to introduce prior sworn statements of witnesses as set forth in § 1081.303(h).

(b) *Transcript.* The hearing officer, in his or her discretion, may require that a prehearing conference be recorded by a court reporter. A transcript of the conference and any materials filed, including orders, becomes part of the record of the proceeding. A party may obtain a copy of the transcript at his or her expense.

(c) *Public access.* Any prehearing conferences shall be public unless the hearing officer determines, based on the standard set forth in § 1081.119(c), that the conference (or any part thereof) shall be closed to the public.

§ 1081.215 Prehearing submissions.

(a) Within the time set by the hearing officer, but in no case later than ten days before the start of the hearing, each party shall serve on every other party:

(1) A prehearing statement, which shall include an outline or narrative summary of its case or defense, and the legal theories upon which it will rely;

(2) A final list of witnesses to be called to testify at the hearing, including the name and address of each witness and a short summary of the expected testimony of each witness;

(3) Any prior sworn statements that a party intends to admit into evidence pursuant to § 1081.303(h);

(4) A list of the exhibits to be introduced at the hearing along with a copy of each exhibit; and

(5) Any stipulations of fact or liability.

(b) *Expert witnesses.* Each party who intends to call an expert witness shall also serve, in addition to the information required by paragraph (a)(2) of this section, a statement of the expert's qualifications, a listing of other proceedings in which the expert has given or sought to give expert testimony at trial or hearing or by deposition within the preceding four years, and a list of publications authored or co-authored by the expert within the preceding ten years, to the extent such information has not already been provided pursuant to § 1081.210.

(c) *Effect of failure to comply.* No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 1081.216 Amicus participation.

(a) *Availability.* An amicus brief may be filed only if:

(1) A motion for leave to file the brief has been granted;

(2) The brief is accompanied by written consent of all parties;

(3) The brief is filed at the request of the Director or the hearing officer, as appropriate; or

(4) The brief is presented by the United States or an officer or agency thereof, or by a State or a political subdivision thereof.

(b) *Procedure.* An amicus brief may be filed conditionally with the motion for leave. The motion for leave shall identify the interest of the movant and shall state the reasons why a brief of an amicus curiae is desirable. Except as all parties otherwise consent, any amicus curiae shall file its brief within the time allowed the party whose position the amicus will support, unless the Director or hearing officer, as appropriate, for good cause shown, grants leave for a later filing. In the event that a later filing is allowed, the order granting leave to file shall specify when an opposing party may reply to the brief.

(c) *Motions.* A motion for leave to file an amicus brief shall be subject to § 1081.205.

(d) *Formal requirements as to amicus briefs.* Amicus briefs shall be filed pursuant to § 1081.111 and shall comply with the requirements of § 1081.112 and shall be subject to the length limitation set forth in § 1081.212(e).

(e) *Oral argument.* An amicus curiae may move to present oral argument at any hearing before the hearing officer, but such motions will be granted only for extraordinary reasons.

Subpart C—Hearings

§ 1081.300 Public hearings.

All hearings in adjudication proceedings shall be public unless a confidentiality order is entered by the hearing officer pursuant to § 1081.119 or unless otherwise ordered by the Director on the grounds that holding an open hearing would be contrary to the public interest.

§ 1081.301 Failure to appear.

Failure of a respondent to appear in person or by a duly authorized counsel at the hearing constitutes a waiver of respondent's right to a hearing and may be deemed an admission of the facts as alleged and consent to the relief sought in the notice of charges. Without further proceedings or notice to the respondent, the hearing officer shall file a recommended decision containing findings of fact and addressing the relief sought in the notice of charges.

§ 1081.302 Conduct of hearings.

All hearings shall be conducted in a fair, impartial, expeditious, and orderly manner. Enforcement counsel shall present its case-in-chief first, unless otherwise ordered by the hearing officer, or unless otherwise expressly specified by law or regulation. Enforcement counsel shall be the first party to present an opening statement and a closing statement, and may make a rebuttal statement after the respondent's closing statement. If there are multiple respondents, respondents may agree among themselves as to their order of presentation of their cases, but if they do not agree, the hearing officer shall fix the order.

§ 1081.303 Evidence.

(a) *Burden of proof.* Enforcement counsel shall have the burden of proof of the ultimate issue(s) of the Bureau's claims at the hearing.

(b) *Admissibility.* (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law. Irrelevant, immaterial, and unreliable evidence shall be excluded.

(2) Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues; if the evidence would be misleading; or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(3) Evidence that constitutes hearsay may be admitted if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair. Hearsay is a statement, other than one made by the declarant while testifying at the hearing, offered in evidence to prove the truth of the matter asserted. If otherwise meeting the standards for admissibility described in this section, transcripts of depositions, investigational hearings, prior testimony in Bureau or other proceedings, and any other form of hearsay shall be admissible and shall not be excluded solely on the ground that they are or contain hearsay.

(4) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this part. Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this part solely on that basis.

(c) *Official notice.* Official notice may be taken of any material fact that is not subject to reasonable dispute in that it is either generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. If official notice is requested or is taken of a material fact not appearing in the evidence in the record, the parties, upon timely request, shall be afforded an opportunity to disprove such noticed fact.

(d) *Documents.* (1) A duplicate copy of a document is admissible to the same extent as the original, unless a genuine issue is raised as to whether the copy is in some material respect not a true and legible copy of the original.

(2) Subject to the requirements of paragraph (b) of this section, any document, including a report of examination, supervisory activity, inspection or visitation, prepared by the Bureau, a prudential regulator, as that term is defined in section 1002(24) of the Dodd-Frank Act, or by a State regulatory agency, is presumptively admissible either with or without a sponsoring witness.

(3) Witnesses may use existing or newly created charts, exhibits, calendars, calculations, outlines or other graphic material to summarize, illustrate, or simplify the presentation of testimony. Such materials may, subject to the hearing officer's discretion, be used with or without being admitted into evidence.

(4) As respondents are in the best position to determine the nature of documents generated by such respondents and which come from their own files, the burden of proof is on the respondent to introduce evidence to rebut a presumption that such documents are authentic and kept in the regular course of business.

(e) *Objections.* (1) Objections to the admissibility of evidence must be timely made and rulings on all objections must appear on the record.

(2) Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the record. Rejected exhibits, adequately marked for identification, shall be retained pursuant to § 1081.306(b) so as to be available for consideration by any reviewing authority.

(3) Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.

(f) *Stipulations.* (1) The parties may, at any stage of the proceeding, stipulate as to any relevant matters of fact or the authentication of any relevant documents. Such stipulations must be received in evidence at a hearing and are binding on the parties with respect to the matters therein stipulated.

(2) Unless the hearing officer directs otherwise, all stipulations of fact and law previously agreed upon by the parties, and all documents, the admissibility of which have been previously stipulated, will be admitted into evidence upon commencement of the hearing.

(g) *Presentation of evidence.* (1) A witness at a hearing for the purpose of taking evidence shall testify under oath or affirmation.

(2) A party is entitled to present its case or defense by sworn oral testimony and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as, in the discretion of the hearing officer, may be required for a full and true disclosure of the facts.

(3) An adverse party, or an officer, agent, or employee thereof, and any witness who appears to be hostile, unwilling, or evasive, may be interrogated by leading questions and may also be contradicted and impeached by the party calling him or her.

(4) The hearing officer shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(i) Make the interrogation and presentation effective for the ascertainment of the truth;

(ii) Avoid needless consumption of time; and

(iii) Protect witnesses from harassment or undue embarrassment.

(5) The hearing officer may permit a witness to appear at a hearing via video conference or telephone for good cause shown.

(h) *Introducing prior sworn statements of witnesses into the record.* At a hearing, any party wishing to introduce a prior, sworn statement of a witness, not a party, otherwise admissible in the proceeding, may make a motion setting forth the reasons therefore. If only part of a statement is offered in evidence, the hearing officer may require that all relevant portions of the statement be introduced. If all of a statement is offered in evidence, the hearing officer may require that portions not relevant to the proceeding be excluded. A motion to introduce a prior sworn statement may be granted if:

(1) The witness is dead;

(2) The witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the prior sworn statement;

(3) The witness is unable to attend or testify because of age, sickness, infirmity, imprisonment or other disability;

(4) The party offering the prior sworn statement has been unable to procure the attendance of the witness by subpoena; or

(5) In the discretion of the hearing officer, it would be desirable, in the interests of justice, to allow the prior sworn statement to be used. In making this determination, due regard shall be given to the presumption that witnesses will testify orally in an open hearing. If the parties have stipulated to accept a prior sworn statement in lieu of live testimony, consideration shall also be given to the convenience of the parties in avoiding unnecessary expense.

§ 1081.304 Record of the hearing.

(a) *Reporting and transcription.* Hearings shall be stenographically reported and transcribed under the supervision of the hearing officer, and the original transcript shall be a part of the record and the sole official transcript. The live oral testimony of each witness may be video recorded digitally, in which case the video recording and the written transcript of the testimony shall be made part of the record. Copies of transcripts shall be available from the reporter at prescribed rates.

(b) *Corrections.* Corrections of the official transcript may be made only when they involve errors affecting substance and then only in the manner herein provided. Corrections ordered by the hearing officer or agreed to in a written stipulation signed by all counsel and parties not represented by counsel, and approved by the hearing officer, shall be included in the record, and such stipulations, except to the extent they are capricious or without substance, shall be approved by the hearing officer. Corrections shall not be ordered by the hearing officer except upon notice and opportunity for the hearing of objections. Such corrections shall be made by the official reporter by furnishing substitute type pages, under the usual certificate of the reporter, for insertion in the official record. The original uncorrected pages shall be retained in the files of the Bureau.

(c) *Closing of the hearing record.* Upon completion of the hearing, the hearing officer shall issue an order closing the hearing record after giving the parties three days to determine if the record is complete or needs to be supplemented. The hearing officer shall retain the discretion to permit or order correction of the record as provided in paragraph (b) of this section.

§ 1081.305 Post-hearing filings.

(a) *Proposed findings and conclusions and supporting briefs.* (1) Using the same method of service for each party, the hearing officer shall serve notice upon each party that the certified transcript, together with all hearing exhibits and exhibits introduced but not admitted into evidence at the hearing, has been filed promptly after that filing. Any party may file with the hearing officer proposed findings of fact, proposed conclusions of law, and a proposed order within 30 days following service of this notice by the hearing officer or within such longer period as may be ordered by the hearing officer.

(2) Proposed findings and conclusions must be supported by citation to any relevant authorities and by page references to any relevant portions of the record. A post-hearing brief may be filed in support of proposed findings and conclusions, either as part of the same document or in a separate document.

(b) *Responsive briefs.* Responsive briefs may be filed within 15 days after the date on which the parties' proposed findings, conclusions, and order are due. Responsive briefs must be strictly limited to responding to matters, issues, or arguments raised in another party's papers. A party who has not filed proposed findings of fact and conclusions of law or a post-hearing brief may not file a responsive brief. Unless directed by the hearing officer, reply briefs are not permitted.

(c) *Order of filing.* The hearing officer shall not order the filing by any party of any post-hearing brief or responsive brief in advance of the other party's filing of its post-hearing brief or responsive brief.

§ 1081.306 Record in proceedings before hearing officer; retention of documents; copies.

(a) *Contents of the record.* The record of the proceeding shall consist of:

(1) The notice of charges, the answer, and any amendments thereto;

(2) Each motion, submission, or other paper filed in the proceedings, and any amendments and exceptions to or regarding them;

(3) Each stipulation, transcript of testimony, and any document or other item admitted into evidence;

(4) Any transcript of a conference or hearing before the hearing officer;

(5) Any amicus briefs filed pursuant to § 1081.216;

(6) With respect to a request to disqualify a hearing officer or to allow the hearing officer's withdrawal under § 1081.105(c), each affidavit or transcript of testimony taken and the decision made in connection with the request;

(7) All motions, briefs, and other papers filed on interlocutory appeal;

(8) All proposed findings and conclusions;

(9) Each written order issued by the hearing officer or Director; and

(10) Any other document or item accepted into the record by the hearing officer.

(b) *Retention of documents not admitted.* Any document offered into evidence but excluded shall not be considered part of the record. The Office of Administrative Adjudication shall retain any such document until the later of the date upon which an order by the Director ending the proceeding becomes final and not appealable, or upon the conclusion of any judicial review of the Director's order.

(c) *Substitution of copies.* A true copy of a document may be substituted for any document in the record or any document retained pursuant to paragraph (b) of this section.

Subpart D—Decision and Appeals

§ 1081.400 Recommended decision of the hearing officer.

(a) *Time period for filing recommended decision.* Subject to paragraph (b) of this section, the hearing officer shall file a recommended decision no later than 90 days after the deadline for filing post-hearing responsive briefs pursuant to § 1081.305(b) and in no event later than 300 days after filing of the notice of charges.

(b) *Extension of deadlines.* In the event the hearing officer presiding over the proceeding determines that it will not be possible to issue the recommended decision within the time periods specified in paragraph (a) of this section, the hearing officer shall submit a written request to the Director for an extension of the time period for filing the recommended decision. This request must be filed no later than 30 days prior to the expiration of the time for issuance of a recommended decision. The request will be served on all parties in the proceeding, who may file with the Director briefs in support of or in opposition to the request. Any such briefs must be filed within three days of service of the hearing officer's request and shall not exceed five pages. If the Director determines that additional time is necessary or appropriate in the public interest, the Director shall issue an order extending the time period for filing the recommended decision.

(c) *Content.* (1) A recommended decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable, probative, and substantial evidence. The recommended decision shall include a statement of findings of fact (with specific page references to principal supporting items of evidence in the record) and conclusions of law, as well as the reasons or basis therefore, as to all the material issues of fact, law, or discretion presented on the record and the appropriate order, sanction, relief or denial thereof. The recommended decision shall also state that a notice of appeal may be filed within ten days after service of the recommended decision and include a statement that, unless a party timely files and perfects

a notice of appeal of the recommended decision, the Director may adopt the recommended decision as the final decision and order of the Bureau without further opportunity for briefing or argument.

(2) Consistent with paragraph (a) of this section, when more than one claim for relief is presented in an adjudication proceeding, or when multiple parties are involved, the hearing officer may direct the entry of a recommended decision as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of a recommended decision.

(d) *By whom made.* The recommended decision shall be made and filed by the hearing officer who presided over the hearings, except when he or she shall have become unavailable to the Bureau.

(e) *Reopening of proceeding by hearing officer; termination of jurisdiction.* (1) At any time from the close of the hearing record pursuant to § 1081.304(c) until the filing of his or her recommended decision, a hearing officer may reopen the proceeding for the receipt of further evidence for good cause shown.

(2) Except for the correction of clerical errors or pursuant to an order of remand from the Director, the jurisdiction of the hearing officer is terminated upon the filing of his or her recommended decision with respect to those issues decided pursuant to paragraph (c) of this section.

(f) *Filing, service, and publication.* Upon filing by the hearing officer of the recommended decision, the Office of Administrative Adjudication shall promptly transmit the recommended decision to the Director and serve the recommended decision upon the parties.

§ 1081.401 Transmission of documents to Director; record index; certification.

(a) *Filing of index.* At the same time the Office of Administrative Adjudication transmits the recommended decision to the Director, the hearing officer shall furnish to the Director a certified index of the entire record of the proceedings. The certified index shall include, at a minimum, an entry for each paper, document or motion filed in the proceeding, the date of the filing, and the identity of the filer. The certified index shall also include an exhibit index containing, at a minimum, an entry consisting of exhibit number and title or description for each exhibit introduced and admitted into evidence and each exhibit introduced but not admitted into evidence.

(b) *Retention of record items by the Office of Administrative Adjudication.* After the close of the hearing, the Office of Administrative Adjudication shall retain originals of any motions, exhibits or any other documents filed with, or accepted into evidence by, the hearing officer, or any other portions of the record that have not already been filed with the Office of Administrative Adjudication.

§ 1081.402 Notice of appeal; review by the Director.

(a) *Notice of appeal.* (1) *Filing.* Any party may file exceptions to the recommended decision of the hearing officer by filing a notice of appeal with the Office of Administrative Adjudication within ten days after service of the recommended decision. The notice shall specify the party or parties against whom the appeal is taken and shall designate the recommended decision or part thereof appealed from. If a timely notice of appeal is filed by a party, any other party may thereafter file a notice of appeal within five days after service of the first notice, or within ten days after service of the recommended decision, whichever period expires last.

(2) *Perfecting a notice of appeal.* Any party filing a notice of appeal must perfect its appeal by filing its opening appeal brief within 30 days of service of the recommended decision. Any party may respond to the opening appeal brief by filing an answering brief within 30 days of service of the opening brief. Any party may file a reply to an answering brief within seven days of service of the answering brief. These briefs must conform to the requirements of § 1081.403.

(b) *Director review other than pursuant to an appeal.* In the event no party perfects an appeal of the recommended decision, the Director shall, within 40 days after the date of service of the recommended decision, either issue a final decision and order adopting the recommended decision, or order further briefing regarding any portion of the recommended decision. The Director's order for further briefing shall set forth the scope of review and the issues that will be considered and will make provision for the filing of briefs in accordance with the timelines set forth in paragraph (a)(2) of this section (except that that opening briefs shall be due within 30 days of service of the order of review) if deemed appropriate by the Director.

(c) *Exhaustion of administrative remedies.* Pursuant to 5 U.S.C. 704, a perfected appeal to the Director of a recommended decision pursuant to paragraph (a) of this section is a prerequisite to the seeking of judicial review of a final decision and order, or portion of the final decision and order, adopting the recommended decision.

§ 1081.403 Briefs filed with the Director.

(a) *Contents of briefs.* Briefs shall be confined to the particular matters at issue. Each exception to the findings or conclusions being reviewed shall be stated succinctly. Exceptions shall be supported by citation to the relevant portions of the record, including references to the specific pages relied upon, and by concise argument including citation of such statutes, decisions, and other authorities as may be relevant. If the exception relates to the admission or exclusion of evidence, the substance of the evidence admitted or excluded shall be set forth in the brief, in an appendix thereto, or by citation to the record. Reply briefs shall be confined to matters in answering briefs of other parties.

(b) *Length limitation.* Except with leave of the Director, opening and answering briefs shall not exceed 30 pages, and reply briefs shall not exceed 15 pages, exclusive of pages containing the table of contents, table of authorities, and any addendum that consists solely of copies of applicable cases, pertinent legislative provisions or rules, and exhibits. Motions to file briefs in excess of these limitations are disfavored.

§ 1081.404 Oral argument before the Director.

(a) *Availability.* The Director will consider appeals, motions, and other matters properly before him or her on the basis of the papers filed by the parties without oral argument unless the Director determines that the presentation of facts and legal arguments in the briefs and record and decisional process would be significantly aided by oral argument, in which case the Director shall issue an order setting the date on which argument shall be held. A party seeking oral argument shall so indicate on the first page of its opening or answering brief.

(b) *Public arguments; transcription.* All oral arguments shall be public unless otherwise ordered by the Director. Oral arguments before the Director shall be reported stenographically, unless otherwise ordered by the Director. Motions to correct the transcript of oral argument shall be made according to the same procedure provided in § 1081.304(b).

§ 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.

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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

11. Appendix B – Forms and Templates

Investigative Policies Forms and Templates

Recommendation for Assignment of a Matter

Date:

From:

To:

Matter Name:

Name of Subject(s) (if known) and any D/B/As:

Nature of the Matter: [ONE sentence description of the substantive basis of the matter]

Summary of Issue:

Potentially Relevant Laws:

Source of Information ("Source" in LawBase): CHOOSE AN ITEM.

Issue Team Comments:

Proposed Strategic Allocation: CHOOSE AN ITEM.

Institution Type: CHOOSE AN ITEM.

CFPB-FTC Notification Topics (check all that apply):

☐ Auto Finance	☐ Auto Loan Mods	☐ Credit Repair
☐ Credit Reporting	☐ Debt Collection	☐ Debt Relief
☐ Elder Finance	☐ Fair Lending	☐ Furnisher Rule
☐ Lead Generator	☐ Military Lending	☐ Mortgage Assistance
☐ Mortgage Origination	☐ Mortgage Servicing	☐ Non-Mortgage Debt Relief
☐ Payday Lending	☐ Payment Cards	☐ Payment Processing
☐ Personal Loans	☐ Privacy	☐ Rent-to-Own
☐ RESPA	☐ Robocaller	☐ Student Lending
☐ Other (specify)_____		

For Supervisor Review (to be filled in upon opening of the research matter; prior to notifying Senior Team):

☐ **ACCEPTED** ☐ **DECLINED**

Matter Name (if different from above):

Beginning of EAP Research Phase: CLICK HERE TO ENTER A DATE.

Primary Market: CHOOSE AN ITEM.

Strategic Allocation: CHOOSE AN ITEM.

Must the FTC be notified? CHOOSE AN ITEM.

Assigned LD/ALD: CHOOSE AN ITEM.

Assigned Enforcement Attorney(s):

- Lead:
- Assist:
- Assist:

CFPB Office of Enforcement Investigation – Opening Memorandum

Investigation Number:

Investigation Name:

Date Investigation Opened:

Sources of Investigation (check at least one source):

__Referral from Government Agency:

__Non-Government Referral:

__CFPB Division:

__Consumer Complaints

__Enforcement Research

__Other:

Background:

[This section should describe the conduct under investigation; the provisions of law potentially applicable to potential violation(s); the facts that, if proven, would constitute legal violations; and any other additional narrative, facts, or issues you believe to be relevant or useful. Detailed legal analysis is not required.]

Potential Violator(s) and Counsel, if known:

Other Relevant Parties (describe relevance):

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

[The memo should provide a basis for each of the specific laws referenced in the Statement of Purpose.]

Enforcement Deputy Assigned:
Enforcement Assistant Deputy Assigned:
Investigation Team Leader Assigned:
Investigation Team Members Assigned:

CID Packet and Related Steps: A Checklist and Summary

Revised 05.01.13

Serving CIDs:

1. Required (usually): Send the CID packet by certified mail, return receipt requested to the principal place of business, 12 U.S.C. 5562(c)(8)(C). Service in person is also permissible, 12 U.S.C. 5562(c)(8)(A)-(B).

2. Recommended (and *in addition* to certified mail): Send a courtesy copy of the CID packet by another method – UPS overnight mail, email, fax, etc. (usually UPS overnight, if you do not have prior contact with the entity). Consider whether there is a registered agent. If you have agreement from the company or from opposing counsel to accept service through another method, memorialize the agreement in writing (cover letter, email, etc.).

Notifying Supervision: Before sending any CID, review the "Team email re CID Protocol" (in the CID Policies – Related Policies subfolder), which describes the protocol to follow when serving a CID on an entity where Supervision has a "supervisory presence."

The CID Packet	CID for documents, interrogatories, written reports	CID for oral testimony	Notes/Relevant Policy
CID cover letter	Optional	Optional	- Signed by lead attorney (found in CID Policies – Samples subfolder). - If you send the CID by two methods, the cover letter should be sent with the "courtesy copy."
CID Form	Required	Required	- Signed by Litigation Deputy. - The custodian is the LD and the deputy custodian is the paralegal. - For investigational hearings, list *every person* who may ask questions during the hearing. - Bureau addresses not needed on the form – they are included in the CID instructions. - See Final Statement of Purpose Policy (in the CID Policies – Related Policies subfolder). - Notice of Purpose should match the opening EAP memo.
CID definitions and instructions	Required	Required	- One template is for CIDs for documents, and a separate template is for CIDs for oral testimony. - Instructions and options are included in template, but use judgment and consult with ALD/LD with respect to the specifics of your matter.
ECPA Note	Required when CID requests certain records (*e.g.*, phone)	Not applicable	- See Final ECPA (Electronic Communications Privacy Act) Policy (in the CID Policies – Related Policies subfolder). - See sample ECPA CID request (in CID Policies – Samples subfolder). - Insert mandatory ECPA cautionary note (found in policy) directly after request.
Certificate of Compliance	Required	Not applicable	- There is a certificate for documents and a separate certificate for interrogatory answers and reports. Include one or both, as appropriate for your CID.
Business Records Certificate	Required	Not applicable	- Include with all CIDs for documents.
Document Submission Standards	Required	Not applicable	- Consult with e-Litigation Support Team before sending CIDs and include them in meet and confer meetings.
Rules Relating to Investigations	Required	Required	- Include Rules Relating to Investigations with every CID. A PDF of the Final Rule is in the CID Policies folder. 12 C.F.R. § 1080, June 29, 2012.
Certificate of Compliance with RFPA	Required	Not applicable	- See Final RFPA Policy (in the CID Policies – Related Policies subfolder).
Notice to Persons Supplying Information	Required	Required	- See Notice to Persons Supplying Information Policy (in the CID Policies – Related Policies subfolder).

CID Form

Consumer Financial Protection Bureau

United States of America
Consumer Financial Protection Bureau

Civil Investigative Demand

To

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
	Bureau Investigators

☐ **Produce Documents and/or Tangible Things, as set forth in the attached document, by the following date** _____

☐ **Provide Written Reports and/or Answers to Questions, as set forth in the attached document, by the following date** _____

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

Custodian / Deputy Custodian	**Bureau Counsel**
Date Issued	**Signature**
	Name / Title

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 CFPB 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.

CID Document Submission Standards

For use starting 02.12.13

This describes the technical requirements for producing paper collections, email and electronic document/ native file collections to the Consumer Finance Protection Bureau's Office of Enforcement. All documents shall be produced in complete form, in color, unredacted unless privileged, and shall not be edited, cut, or expunged. The Bureau encourages all documents be submitted in electronic form. These standards must be followed for all documents you submit in response to the CID.

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. Time zone in which emails were standardized during conversion (email collections only).
    f. 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 printed to paper or 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:
        "MAGNETIC MEDIA – DO NOT X-RAY"
        "MAY BE OPENED FOR POSTAL INSPECTION"
    b. CD-R CD-ROMs should be formatted to ISO 9660 specifications;
    c. DVD-ROM 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. Case number
    b. Production date
    c. Bates range
    d. Disk number (1 of X), if applicable
    e. Name of producing party

f. 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 this demand.
6. All produced media must be encrypted using Microsoft Bitlocker. No other third party encryption utilities are accepted without prior approval.
   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, compressed archives and encrypted media should be provided separately either via email or in a separate cover letter from the data.

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.

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.

1. **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 TIF images; (2) scan and process all paper documents into TIF images, OCR the images, and apply bates numbers to each page of the image; (3) produce fully searchable 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:

Comma	¶	ASCII character (020)
Quote	þ	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 TIF 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:

Field Name	Description
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 range
ATTACH_END	Last Bates number of attachment range
GROUP_ID	A unique family identifier used to link documents/emails and attachments
PRIV	Indicate "YES" if document has a Privilege claim
REQ_NUM	Indicate Interrogatory number(s) document is responsive to. (ROG ##) If multiple, separate by semi-colon
DOC_REQ	Indicate Document Request document is responsive to. (DR ##) If multiple, separate by semi-colon

RECORDTYPE	Email: Populate field as "E-Mail" Attachment: Populate field as "Attachment" Email Attachment: Populate field as "Attachment (E-mail)" Loose Native: Populate field as "E-Document" Scanned Paper: Populate field as "Paper"
CUSTODIAN	Individual(s) or department(s) from which the record originated **semi-colon should be used to separate multiple entries
FROM	Email: Sender of email Non-email: (empty) **semi-colon should be used to separate multiple entries
TO	Email: 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
SUBJECT	Subject line of the email
DATE_SENT	Email: Date the email was sent
TIME_SENT	Email: Time the email was sent **This data must be a separate field and cannot be combined with the DATE_SENT field
DATE_RECVD	Email: Date the email was received
TIME_RECVD	Email: Time the email was received
NATIVELINK	Hyperlink to the email or native file document **The linked file must be named per the BATES_BEGIN number
FILE_EXT	The file extension representing the email or native file document
AUTHOR	Email: (empty) Non-email: Author of the document
DATE_CREATED	The date the electronic file was created as reported by the OS
TIME_CREATED	The time the electronic file was created as reported by the OS
DATE_MOD	Date an electronic file was last modified as reported by the OS
TIME_MOD	Time an electronic file was last modified as reported by the OS
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
PGCOUNT	Number of pages in native file document/email *if TIFs are included.
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 as reported by OS
FILENAME	Email: Filename of loose email or subject of non-loose email Non-email: original file name
MD5HASH	The 32 digit value representing each unique document
TEXTPATH	Contains path to OCR/Extracted text file that is titled after the document BATES_BEGIN

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 .TIF files. The number of files per folder should be limited to 500 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.

iii. The number of native files per folder should not exceed 500 files.

iv. If the native file is withheld for privilege, a copy of the redacted text file should be the replacement native.

d. Images

i. Images should be single-page, Group IV TIF 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"

vi. The number of TIF files per folder should not exceed 500 files.

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.

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
	**This file should not contain a header row.*

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\IMG0000003.TIF,Y,,,1
IMG0000005,OPTIONALVOLUMENAME,E:\001\IMG0000003.TIF,Y,,,2
IMG0000006,OPTIONALVOLUMENAME,E:\001\IMG0000003.TIF,,,,

2. **PDF File Production**
When approved, Adobe PDF files may be produced in lieu of TIF 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.
3. **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:

- SQL Backup file
- MS Access
- XML
- CSV

- TSV
- Excel (with prior approval)

4. **Audio/Video/Electronic Phone Records**

If audio, video, or telephone records must be produced, the call information (metadata) related to each audio recording must be provided. The metadata file must be produced in one of the following formats, CSV, TSV, or XML. The metadata must include, if available, the following fields:

FIELDNAME	DESCRIPTION
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
CUSTOMERID:	Customer's identification number
CUSTOMERNAME:	Name of person called
CUSTOMERCITY:	Customer's city of residence
CUSTOMERSTATE:	Customer's state of residence
DURATION:	Duration of Call
DATE:	Date of call
START_TIME:	Start time of call
END_TIME:	End time of call
FILENAME:	Filename of audio file

Supported Date Formats	Example
Month, Day, yyyy hh:mm:ss	January 25, 1996 10:45:15
hh:mm:ss Mon Day, yyyy	10:45:15 Jan 25, 1996
mm/dd/yyyy hh:mm:ss am/pm	01/25/1996 10:45:15 am

5. Hard Copy Submission

For any documents submitted in hard copy form:

a. Original documents shall not be submitted;
b. Hard copy submissions shall be organized first by request number and second by custodian. Other than organizing by request number, such documents shall be produced in the order in which they appear in your files, without being shuffled or otherwise rearranged;
c. If, in their original condition, documents were stapled, clipped, or otherwise fastened together or maintained in file folders, binders, cover, or containers, they shall be produced in such form, and any documents that must be removed from their original folders, binders, covers, or containers in order to be produced shall be identified in a manner so as clearly to specify the folder, binder, cover, or container from which such documents came;
d. Such documents shall include all covering letters and memoranda, transmittal slips, appendices, tables, or other attachments; and
e. Such documents shall have unique, sequential bates numbers clearly marked on each page.

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.

Obtaining and Sharing Personally Identifiable Financial Information in Compliance with RFPA

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 Consumer Financial Protection Bureau (CFPB) "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 or voluntary request] to [NAME OF RECIPIENT], 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 or voluntary request] are in compliance with laws administered by the Consumer Financial Protection Bureau. 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).

_____

Kent Markus
Consumer Financial Protection Bureau
Assistant Director, Office of Enforcement

Notice To Persons Form

CONSUMER FINANCIAL PROTECTION BUREAU
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 Consumer Financial Protection Bureau (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.

Statement of Bureau Investigator Confirming Non-Signature

In the Matter of: _____

Witness Name: _____

Hearing Date: _____

Bureau Investigator(s): _____

I, _____, hereby certify that the witness, having been afforded a reasonable opportunity to read and review the foregoing transcript, has failed to submit a signed Certification of Witness to the Bureau within 30 calendar days, and/or the witness cannot be found, is ill, or has waived in writing his or her right to signature. This signed statement constitutes a statement "on the record" as required by section 1080.9(a) of the Bureau Rules Relating to Investigations, 12 C.F.R. § 1080.9(a).

_____ _____

Bureau Investigator Signature Date

Certification of Witness

In the Matter of: _____

Witness Name: _____

Hearing Date: _____

Bureau Investigator(s): _____

I, _____, hereby certify that I have read and reviewed the foregoing transcript, and the same is a true, correct, and complete record of testimony given by me. Any additions or corrections, if any, have been noted on the attached errata sheet with a statement of the reasons for making the change, which are incorporated by reference herein.

_____ _____

Witness Signature Date

Cover Letter for Investigational Hearing Transcript Review

[DATE]

[METHOD OF DELIVEY]

[FIRST NAME, LAST NAME]
[ADDRESS 1]
[ADDRESS 2]
[ADDRESS 3]
[CITY], [STATE] [ZIP]

Re: Investigational Hearing of [WITNESS NAME]

Dear [Mr./Ms.] [LAST NAME]:

Enclosed please find a copy of the investigational hearing transcript of [WITNESS NAME]. The enclosed transcript copy is the property of the Bureau, and must be returned to the Bureau upon completion of review. You are not permitted to make a copy of the enclosed transcript. If you would like to purchase your own copy of the transcript, please let me know.

Pursuant to section 1080.9(a) of the Bureau Rules Relating to Investigations, 12 C.F.R. § 1080.9(a), the witness has 30 calendar days from the date you receive this transcript to read and review the transcript and sign the enclosed Certification of Witness or provide a written waiver of signature. If the witness identifies any changes to the transcript, he/she should note those changes on the enclosed Errata Sheet for Changes to Transcript and forward that document, as an attachment to the Certification of Witness, to the Bureau investigator(s) identified on the Errata Sheet.

If you have any questions, please do not hesitate to contact me at (202) 435-XXXX.

Sincerely,

[ENFORCEMENT ATTORNEY NAME]
Enforcement Attorney

Enclosures

Cover Letter for Supervised Investigational Hearing Transcript Review

[DATE]

[FIRST NAME, LAST NAME]

Re: Investigational Hearing of [WITNESS NAME]

Dear [Mr./Ms.] [LAST NAME]:

Enclosed please find a copy of the investigational hearing transcript of [WITNESS NAME]. The enclosed transcript copy is the property of the Bureau, **must not be removed from [NAME AND ADDRESS OF SUPERVISED LOCATION]**, and must be returned to the Bureau upon completion of review. You are not permitted to make a copy of the enclosed transcript.

Pursuant to section 1080.9(a) of the Bureau Rules Relating to Investigations, 12 C.F.R. § 1080.9(a), the witness has 30 calendar days from the date he or she is first provided the opportunity to inspect this transcript to read and review the transcript and sign the enclosed Certification of Witness or provide a written waiver of signature. If the witness identifies any changes to the transcript, he/she should note those changes on the enclosed Errata Sheet for Changes to Transcript and include that document, as an attachment to the Certification of Witness, to the Bureau investigator(s) identified on the Errata Sheet.

If you have any questions, please do not hesitate to contact me at (202) 435-XXXX.

Sincerely,

[ENFORCEMENT ATTORNEY NAME]
Enforcement Attorney

Enclosures

Errata Sheet for Changes to Transcript

In the Matter of: _____

Witness Name: _____

Hearing Date: _____

Bureau Investigator(s): _____

Please note any desired changes in the attached transcript and the corrections thereof on this errata sheet. Include a statement of the reason for any change as required by section 1080.9(a) of Bureau Rules Relating to Investigations, 12 C.F.R. § 1080.9(a). An example of a reason for a change includes "To correct a typographical error." Once complete, please forward, as an attachment to the Certification of Witness, to the Bureau investigator(s) identified above.

Page No.	Line No.	Change/Reason for Change

_____ _____

Witness Signature Date

Sample Information Access Letter

May 4, 2012

VIA ELECTRONIC MAIL
CFPB Legal Division
Enforcement @cfpb.gov

Re: Access letter submitted pursuant to 12 C.F.R. § 1070.43(b)

The [agency] through its Director, [name], hereby requests, pursuant to 12 C.F.R. § 1070.43(b), access to certain confidential information held by the CFPB.

[Agency] specifically requests access to [type of information requested] relating to [name of entity] and [state] consumers which the CFPB [specify the particular part of division of the Bureau that possesses the information, if appropriate, *i.e.* Office of Enforcement] [describe origin of requested information, *i.e.* "received from the company in response to Civil Investigative Demands"].

[Agency] certifies that it seeks this information for the purpose of investigating [entity name]'s potential violations of [applicable state or federal law] in the course of offering [describe type of product] to [state, if applicable] consumers. [Agency] further certifies that it will not use the information for any other purpose without the prior written permission of the CFPB. Moreover, [Agency] certifies that it will keep the information in confidence and in accordance with 12 C.F.R. § 1070.47, and will not further disclose this information without the prior written permission of the CFPB.

The information sought is exempt from disclosure under [name and citation for state or federal FOIA law] due to the exemption codified at [exemption citation].

[Agency] certifies that it will maintain the requested confidential information in a manner that conforms to the standards that apply to federal agencies for the protection of the confidentiality of personally identifiable information and for data security and integrity.

Sincerelv,

[Name, title]
[Agency]

Sample Information Access Letter (CSI)

[DATE]

VIA ELECTRONIC MAIL
Consumer Financial Protection Bureau
Office of the General Counsel
c/o Enforcement Attorney **[Insert ENF Attorney name here]**
[Insert YOUR email address here]

Re: Access letter submitted pursuant to 12 C.F.R. § 1070.43(b)

The [agency] through its Director, [name], hereby requests, pursuant to 12 C.F.R. § 1070.43(b), access to certain confidential information held by the CFPB.

[Agency] specifically requests access to [type of information requested] relating to [name of entity] and [state] consumers which the CFPB [specify the particular part or division of the Bureau that possesses the information, if appropriate, i.e. Office of Enforcement] [describe origin of requested information, i.e. "received from the company in response to Civil Investigative Demands"]. The confidential supervisory information requested concerns [entity(ies)], which are under [Agency's] jurisdiction.

[Agency] certifies that it seeks this information for the purpose of investigating [entity name]'s potential violations of [applicable state or federal law] in the course of offering [describe type of product] to [state, if applicable] consumers. [Agency] further certifies that it will not use the information for any other purpose without the prior written permission of the CFPB. Moreover, [Agency] certifies that it will keep the information in confidence and in accordance with 12 C.F.R. § 1070.47, and will not further disclose this information without the prior written permission of the CFPB.

The information sought is exempt from disclosure under [name and citation for state or federal FOIA law] due to the exemption codified at [exemption citation].

[Agency] certifies that it will maintain the requested confidential information in a manner that conforms to the standards that apply to federal agencies for the protection of the confidentiality of personally identifiable information and for data security and integrity.

Sincerely,

[Name, title]
[Agency]

Sample Common Interest Agreement

COMMON INTEREST AGREEMENT BETWEEN THE CONSUMER FINANCIAL PROTECTION BUREAU AND [Agency] REGARDING INVESTIGATION OF [Subject]

The Consumer Financial Protection Bureau (the "CFPB") and the [Agency] (collectively, "the Parties") share close and common legal interests in the enforcement of federal consumer financial law as defined by the Consumer Financial Protection Act of 2010 ("CFP Act"), 12 U.S.C. § 5481(14), and any law subject to the enforcement jurisdiction of the [Agency] intended to protect users of Consumer Financial Products or Services, as defined in Section 1002(5) of the CFP Act, 12 U.S.C. § 5481(5) (collectively, "Consumer Protection Laws").

The Parties have shared, mutual or related jurisdiction over [Subject] (the "Subject") and wish to establish a cooperative relationship, consistent with the law, concerning their investigation of, or litigation concerning, potential violations of Consumer Protection Laws by the Subject (the "Claims"). They expect to consult one another throughout the enforcement process and agree that the sharing of information by their employees, consultants, agents and counsel will further their common enforcement goals. The Parties expect that this consultation and sharing may lead to prosecution, whether administrative or judicial, of at least some of the Claims against the Subject.

In furtherance of their common law enforcement goals and statutory responsibilities involving the Subject, the Parties have agreed to share certain confidential information, privileged materials, and their written and oral work products relating to their respective and joint investigations.

The Parties hereby enter into this Common Interest Agreement (the "Agreement").

1. The Parties do not intend through their consultations, either before or after the initiation of litigation, to waive work product protection or any privileges, such as, but not limited to, the attorney-client, law enforcement, deliberative process, and bank examination privileges, which would otherwise attach to any information, documents, or communications shared among the respective agencies. The Parties specifically intend that all such privileges shall be preserved, and that privileged information shall be protected from disclosure to the Subject or to any third party, except with respect to disclosures agreed to by both Parties and disclosures that are otherwise mandated pursuant to federal or state statutes.

2. The Parties agree and acknowledge that only the Party providing information under this Agreement is authorized to waive any privileges that may be asserted with respect to such information or document. To the extent that the Parties jointly or collaboratively create or generate information or documents under this Agreement, the authorization of both Parties is required to waive any privileges that may be asserted with respect to such information or documents.

3. Unless information is marked "non-confidential and public" by the providing Party, it will be subject to the provisions of this Agreement.

4. The [Agency] may seek information from the CFPB by submitting a written request to the CFPB's General Counsel or its delegee containing the information specified in 12 C.F.R. § 1070.43(b). In some instances, the CFPB's Office of General Counsel or its delegee may authorize standing requests for certain information with an approved 12 C.F.R. § 1070.43(b) submission. The CFPB's Rule on Disclosure of Records and Information, 12 C.F.R. § 1070 *et seq.*, sets forth the [Agency's] obligations regarding information received from the CFPB, including the procedure for handling third party requests for CFPB information and limitations on the [Agency] disclosing the CFPB's information.

5. All information obtained by the CFPB from the [Agency] shall remain the property of the [Agency] and, to the extent practicable, shall be maintained and identified as such and may not be disclosed, except as permitted in writing by the [Agency]. The CFPB shall, upon the reasonable request of the [Agency] or the termination of this Agreement or the law enforcement investigation or proceeding to which this Agreement pertains, to the extent permitted by law, return, destroy, delete, or otherwise dispose of any information as directed by the [Agency].

6. The CFPB agrees to establish and maintain safeguards to protect the confidentiality of the information provided by the [Agency] pursuant to this Agreement, by:

   (i) restricting access to the [Agency]'s information to its officers, employees, contractors, and agents who have a need for such information in the performance of their official duties, and informing such persons with access of their responsibilities under the Agreement, except as otherwise provided in writing by the [Agency];

   (ii) establishing appropriate administrative, technical, and physical safeguards to ensure the confidentiality of personally identifiable information and data security and integrity; and

   (iii) complying with applicable breach notification policies and procedures.

7. If a request for the [Agency]'s information is made pursuant to the Freedom of Information Act or the Privacy Act, the CFPB will inform the requester that the [Agency]'s information may not be disclosed insofar as it is the property of the [Agency], and that any request for the disclosure of such information is properly directed to the [Agency]. In providing the information, the [Agency] will also endeavor to communicate, through appropriate markings or otherwise, whether information provided by the [Agency] is confidential or privileged, including whether the information contains confidential or privileged commercial or financial information or trade secrets.

8. In the event the CFPB receives any legally enforceable demand or request for information of the [Agency] (including, but not limited to, any judicial or administrative subpoena, court order, discovery request, request by the U.S. Government Accountability Office), or in the event the [Agency]'s information is subject to an affirmative disclosure obligation, the CFPB shall promptly notify the [Agency] in writing and provide a copy of the demand or request for the information or describe the affirmative disclosure obligation, and, before complying with the request or demand or disclosure obligation, shall:

   (i) consult with the [Agency] and, to the extent applicable, afford the [Agency] a reasonable opportunity to respond to the demand or request;

   (ii) assert all reasonable and appropriate legal exemptions or privileges that the [Agency] may reasonably request be asserted on its behalf; and

   (iii) consent to an application by the [Agency] to intervene in any action or administrative proceeding to preserve, protect, and maintain the confidentiality of the information or any related privilege.

9. Nothing in this Agreement shall prevent the CFPB from complying with a legally valid and enforceable order of a court of competent jurisdiction, an order issued by a federal Administrative Law Judge, or, if compliance is deemed compulsory, a request or demand from a duly authorized committee of the United States Senate or House of Representatives.

10. No provision of this Agreement is intended to, and no provision of the Agreement shall be construed to, limit or otherwise affect the authority of the Parties to administer, implement, or enforce any provision of the Consumer Protection Laws subject to their respective jurisdictions.

11. Either Party may terminate this Agreement by notifying the other Party in writing of its intention to withdraw from this Agreement. Notwithstanding termination of this Agreement, the confidentiality obligations it established shall remain in full force and effect, without regard to whether the Agreement is terminated or the Claims are subject to any final judgment or settlement.

12. Any notice to the CFPB required under this Agreement shall be delivered to the Office of Enforcement at Enforcement@cfpb.gov, and the lead Enforcement attorney assigned to this matter, [name], at [email address] or [his/her] successor.

13. Any notice to the [Agency] required under this Agreement shall be delivered to [name, email address] and [name, email address], or their successors.

14. This Agreement may be modified, amended, or supplemented only by a written instrument signed by the Parties. This Agreement may be executed in counterparts. Facsimile signatures are acceptable.

FOR THE CONSUMER FINANCIAL PROTECTIONBUREAU

By: _____
[Name]
[Title]
Consumer Financial Protection Bureau

Date: _____

FOR THE [Agency]

By: _____
[Name]
[Title]
[Agency]

Date: _____

Closing an Enforcement Matter

Matter Closing Form

CFPB ENFORCEMENT RESEARCH MATTER – CLOSING FORM

Research Matter Number:

Research Matter Name:

Date Research Matter Opened:

Nature of the Matter*:

Strategic Allocation[37]:

Supervising Litigation Deputy:

Staff:

Date Research Matter Closed:

After conducting research, [INSERT ATTORNEY NAME HERE] has recommended that this research matter be closed as not meriting further attention at this time. [INSERT NAME OF LITIGATION DEPUTY] has approved closing this matter.

[37] Copy from LawBase.

Investigation Closing Memorandum

CFPB ENFORCEMENT INVESTIGATION – CLOSING MEMORANDUM

Investigation Number:

Investigation Name: *In Re*

Date Investigation Opened:

First Enforcement Deputy Assigned:
Final Enforcement Deputy Assigned:

Date Investigation Closed:

Legal action taken as a result of the investigation:

___No action
___Settlement:
___Litigation:

Reason no action taken:

Result/Disposition of legal action taken as a result of the investigation:

Further action required by disposition of legal action:

Notification(s) of result of investigation provided to source(s) of investigation:

__No notifications
__Sources notified (include dates and methods of notification):

___Notification of investigation closing requested by potential defendant(s):

___Notification of investigation closing provided to potential defendant(s):

__Notification attached:

Status of evidence collected during investigation:

Termination Letter Template

[Date]

RE: Investigation Number [###]

Dear [Party or Party's Attorney]:

This investigation has been completed as to [name of party receiving notice], and the staff of the Consumer Financial Protection Bureau's Office of Enforcement currently does not intend to recommend that the Bureau take enforcement action against [name of party receiving notice].

This letter must in no way be construed as indicating that [name of party receiving notice] has been exonerated or that no action may ultimately result from the Bureau's investigation of this matter. Rather this letter's sole purpose is to inform [name of party receiving notice] that the Office of Enforcement has completed all or part of its investigation and is not currently recommending enforcement action against [name of party receiving notice].

Very truly yours,

Assistant Director for Enforcement
[or his delegate]

Litigation Forms and Templates

Sample Tolling Agreement

Tolling Agreement

This Agreement is entered into effective [DATE], by the Consumer Financial Protection Bureau ("the Bureau") and [Subject] (jointly referred to hereinafter as "the Parties").

On [Date], the Bureau notified [Subject] that the Bureau was conducting an investigation of [Subject] to determine whether there were violations of [laws being investigated (e.g., Equal Credit Opportunity Act, 15 U.S.C. §§1691-1691f)] and any other laws enforceable by the Bureau.

NOW THEREFORE, the Parties, through their authorized representatives, stipulate and agree as follows:

1. The Parties agree to a suspension of the running of any applicable unexpired statute of limitations for any cause of action or related claim or remedy that could be brought against [Subject] by the Bureau arising from its investigation under [applicable laws being investigated] until the Bureau brings an action against [Subject] or the Bureau notifies [Subject] that no further action will be taken in this matter. In the event [Subject] raises or asserts a statute of limitations defense, or any other defense based on delay or the passage of time, the parties hereby expressly agree that the period of time from the date of signing of this agreement until the date a civil action or adjudication proceeding is commenced is excluded for purposes of calculating the statute of limitations or delay period.

[If the parties do not agree to an indefinite time period for tolling, use this paragraph (1) instead:

The running of any applicable unexpired statute of limitations for any cause of action or related claim or remedy that could be brought against [Subject] by the Bureau arising from its investigation under [applicable laws being investigated] shall be suspended from [DATE] to [DATE] (the "Tolling Period"). In the event [Subject] raises or asserts a statute of limitations defense, or any other defense based on delay or the passage of time, the parties hereby expressly agree that the Tolling Period is excluded for purposes of calculating the statute of limitations or

delay period.]

2. This Agreement is not intended to and shall not be construed as an admission of liability by any party, and all parties continue to reserve all rights and defenses available to them, except as provided by this Agreement.

3. This Agreement may be modified, amended, or supplemented only by a written instrument signed by all parties. This Agreement may be executed in counterparts. Facsimile and pdf signatures are acceptable.

4. This Agreement is binding on all parties and their respective successors in interest and assigns.

CONSUMER FINANCIAL PROTECTION BUREAU
By: _____ Date: _____
[Name]
Title

[INDIVIDUAL RESPONDENT/DEFENDANT]
_____ Date: _____

[CORPORATE SUBJECT]
By: _____ Date: _____
[Name], Esq.
[Law Firm Name]
Counsel to [Subject]

Adjudicative Proceedings Forms and Templates

Sample TRO

A Sample TRO appears on the following page. Please note that this is a generic format and local rules must be consulted for formatting and other procedure.

UNITED STATES DISTRICT COURT
_____DISTRICT OF _____

Consumer Financial Protection Bureau,
Plaintiff,
v.

xxxxxxxxxxx, an individual, and also d/b/a xxxxxxxxxxx;

ABC Corporation,
a professional corporation;

Defendants.

Case No. _____

***EX PARTE* TEMPORARY RESTRAINING ORDER WITH ASSET FREEZE, APPOINTMENT OF TEMPORARY RECEIVER, EXPEDITED DISCOVERY, AND OTHER EQUITABLE RELIEF AND ORDER TO SHOW CAUSE WHY PRELIMINARY INJUNCTION SHOULD NOT ISSUE**

(FILED UNDER SEAL)

Plaintiff, the Consumer Financial Protection Bureau ("CFPB" or "Bureau"), pursuant to: (1) Sections 1031(a), 1036(a), 1054, and 1055 of the Consumer Financial Protection Act of 2010 ("CFPA"), 12 U.S.C. §§ 5531(a), 5536(a), 5564, and 5565; and (2) Section 626 of the Omnibus Appropriations Act, 2009, as amended by Section 1097 of the CFPA, 12 U.S.C. § 5538, and the Mortgage Assistance Relief Services Rule, 16 C.F.R. Part 322, recodified as 12 C.F.R. Part 1015 ("Regulation O"), has filed a Complaint for preliminary and permanent injunctive relief, rescission or reformation of contracts, the refund of monies paid, restitution, disgorgement of ill-gotten monies, and other equitable relief for Defendants' acts or practices in violation of the CFPA and Regulation O in connection with the marketing and sale of their mortgage assistance relief services, and has applied for a temporary restraining order pursuant to Rule 65(b) of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

This Court, having considered the Bureau's Complaint, *ex parte* application, declarations, exhibits, and memoranda filed in support of the Bureau's application, and the evidence presented by all parties, finds that:

1. This Court has jurisdiction over the subject matter of this case, there is good cause to believe it will have jurisdiction over all the parties hereto, and venue in this district is proper;

2. There is good cause to believe that Defendants (list all defendants) (collectively "Defendants"), have engaged and are likely to continue to engage in acts or practices that violate section 1036 of the CFPA, 12 U.S.C. § 5536, and Regulation O, 12 C.F.R. Part 1015, and that the Bureau is therefore likely to prevail on the merits of this action;

3. There is good cause to believe that immediate and irreparable harm will result from Defendants' ongoing violations of the CFPA and Regulation O unless Defendants are restrained and enjoined by Order of this Court;

4. There is good cause to believe that immediate and irreparable damage to the Court's ability to grant effective final relief for consumers in the form of monetary restitution and disgorgement or compensation for unjust enrichment will occur from the transfer, dissipation, or concealment by Defendants of their assets or business records unless Defendants continue to be restrained and enjoined by Order of this Court; and that in accordance with Fed. R. Civ. P. 65(b), the interest of justice requires that the Bureau's application be heard *ex parte* without prior notice to Defendants. Therefore, there is good cause for relieving the Bureau of the duty to provide Defendants with prior notice of the Bureau's application;

5. Good cause exists for appointing a temporary receiver over (list various businesses); permitting the Bureau immediate access to Defendants' business premises; and permitting the Bureau to take expedited discovery;

6. Weighing the equities and considering the Bureau's likelihood of ultimate success on the merits and the likelihood of irreparable harm in the absence of preliminary relief, the balance of hardships favors the Bureau, and a temporary restraining order with an asset freeze, expedited discovery as to the existence and location of assets and documents, and other equitable relief is in the public interest; and

7. No security is required of any agency of the United States for issuance of a restraining order. Fed. R. Civ. P. 65.

ORDER

DEFINITIONS

8. For the Purposes of this Order, the following definitions shall apply:

a. "Assets" means any legal or equitable interest in, right to or claim to any real, personal, or intellectual property owned or controlled by, or held, in whole or in part for the benefit of, or subject to access by any Defendant, wherever located, whether in the United States or abroad, including, but not limited to, chattel, goods, instruments, equipment, fixtures, general intangibles, effects, leaseholds, contracts, mail or other deliveries, shares of stock, commodities, futures, inventory, checks, notes, accounts, credits, receivables (as those terms are defined in the Uniform Commercial Code), funds, cash, and trusts, including but not limited to any trust held for the benefit of any Defendant, any of the Individual Defendants' minor children, or any of the Individual Defendants' spouses, and shall include both existing assets and assets acquired after the date of entry of this Order;

b. "Corporate Defendants" means (list corporate defendants);

c. "Defendants" means the Individual Defendants and all of the Corporate Defendants, individually, collectively, or in any

combination, and each of them by whatever names each might be known.

d. "Document" and "Electronically Stored Information" are synonymous in meaning and equal in scope to the usage of the terms in Rule 34(a) of the Federal Rules of Civil Procedure and include but are not limited to:

   i. The original or a true copy of any written, typed, printed, electronically stored, transcribed, taped, recorded, filmed, punched, or graphic matter or other data compilations of any kind, including, but not limited to, letters, email or other correspondence, messages, memoranda, paper, interoffice communications, notes, reports, summaries, manuals, magnetic tapes or discs, tabulations, books, records, checks, invoices, work papers, journals, ledgers, statements, returns, reports, schedules, files, charts, logs, electronic files, stored in any medium; and

   ii. Any electronically created or stored information, including but not limited to electronic mail, instant messaging, videoconferencing, SMS, MMS, or other text messaging, and other electronic correspondence (whether active, archived, unsent, or in a deleted items folder), word processing files, spreadsheets, databases, unorganized data, document metadata, presentation files, and sound recordings, whether stored on any cell phones, smartphones, flash drives, personal digital assistants ("PDAs"), cards, desktop personal computer and workstations, laptops, notebooks and other portable computers, or other electronic storage media, backup disks and tapes,

archive disks and tapes, and other forms of offline storage, whether assigned to individuals or in pools of computers available for shared use, or personally owned but used for work-related purposes, whether stored on-site with the computer used to generate them, stored offsite in another company facility, or stored, hosted, or otherwise maintained off-site by a third party; and computers and related offline storage used by Defendants or Defendants' participating associates, which may include persons who are not employees of the company or who do not work on company premises.

e. "Electronic Data Host" means any person or entity that stores, hosts, or otherwise maintains electronically stored information.

f. "Financial institution" means any bank, savings and loan institution, credit union, or any financial depository of any kind, including, but not limited to, any brokerage house, trustee, broker-dealer, escrow agent, title company, commodity trading company, or precious metal dealer.

g. "Individual Defendants" means (list defendants – John Smith and Jane Doe, individually, collectively, or in any combination, and each of them by any other names by which they might be known.

h. "Material fact" means any fact that is likely to affect a person's choice of, or conduct regarding, goods or services.

i. "Mortgage assistance relief product or service" means any product, service, plan, or program, offered or provided to the consumer in exchange for consideration, that is represented, expressly or by implication, to assist or attempt to assist the consumer with any of the following:

i. stopping, preventing, or postponing any mortgage or deed of trust foreclosure sale for the consumer's dwelling, any repossession of the consumer's dwelling, or otherwise saving the consumer's dwelling from foreclosure or repossession;

ii. negotiating, obtaining, or arranging a modification of any term of dwelling loan, including a reduction in the amount of interest, principal balance, monthly payments, or fees;

iii. obtaining any forbearance or modification in the timing of payments from any dwelling loan holder or servicer on any dwelling loan;

iv. negotiating, obtaining, or arranging any extension of the period of time within which the consumer may (i) cure his or her default on a dwelling loan, (ii) reinstate his or her dwelling loan, (iii) redeem a dwelling, or (iv) exercise any right to reinstate a dwelling loan or redeem a dwelling;

v. obtaining any waiver of an acceleration clause or balloon payment contained in any promissory note or contract secured by any dwelling; or

vi. negotiating, obtaining, or arranging (i) a short sale of a dwelling, (ii) a deed in lieu of foreclosure, (iii) or any other disposition of a dwelling loan other than a sale to a third party that is not the dwelling loan holder.

The foregoing shall include any manner of claimed assistance, including, but not limited to, auditing or examining a consumer's mortgage or home loan application.

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

k. "Receivership Defendants" means (list corporate defendants), and their successors, assigns, affiliates, or subsidiaries, and each of them by whatever names each might be known, provided that the Temporary Receiver has reason to believe they are owned or controlled in whole or in part by any of the Defendants.

l. The words "and" and "or" shall be understood to have both conjunctive and disjunctive meanings as necessary to make the applicable phrase or sentence inclusive rather than exclusive.

I.

PROHIBITED REPRESENTATIONS

IT IS THEREFORE ORDERED that Defendants and their successors, assigns, officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with any of them who receive actual notice of this Order by personal service, facsimile transmission, email, or otherwise, whether acting directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, marketing, promotion, offering for sale, sale, or performance of any mortgage assistance relief product or service, are hereby temporarily restrained and enjoined from falsely representing, or from assisting others who are falsely representing, expressly or by implication, any of the following:

A. That any Defendant or any other person:

1. will or likely will obtain for consumers mortgage loan modifications that substantially reduce consumers' mortgage payments or interest rates or help consumers avoid foreclosure;

2. as a result of a forensic loan audit, will or likely will obtain mortgage loan modifications for consumers that substantially reduce consumers' mortgage payments or interest rates; and

3. is the United States government or is affiliated with, endorsed or approved by, or otherwise associated with the United States government.

B. The degree of success that any Defendant or any other person has had in performing any mortgage assistance relief service;

C. The nature of any Defendant's or any other person's relationship with any mortgage loan holder or servicer, or other secured or unsecured lender;

D. The amount of time it will take or is likely to take to obtain or arrange a renegotiation, settlement, modification, or other alteration of the terms of any secured or unsecured debt, including but not limited to the modifications of any term of a consumer's home loan, deed of trust, or mortgage, including any recapitalization or reinstatement agreement; or

E. The cost of any Defendants' service including that there will be no charge for all or a portion of such service.

II.

DISCLOSURES REQUIRED BY AND REPRESENTATIONS PROHIBITED BY REGULATION O

IT IS FURTHER ORDERED that Defendants and their successors, assigns, officers, agents, servants, employees, independent contractors, and attorneys, and those persons in active concert or participation with any of them who receive actual notice of this Order by personal service, facsimile transmission, email, or otherwise, whether acting directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, marketing, promotion,

offering for sale, sale, or performance of any good or service, are hereby temporarily restrained and enjoined from engaging in, or assisting others in engaging in, the following conduct:

A. Representing, expressly or by implication, that a consumer cannot or should not contact or communicate with his or her lender or servicer, in violation of 12 C.F.R. § 1015.3(a);

B. Failing to make the following disclosure clearly and prominently in all general and consumer-specific commercial communications: "[Name of Company] is not associated with the government, and our service is not approved by the government or your lender," in violation of 12 C.F.R. §§ l015.4(a)(1), 1015.4(b)(2);

C. Failing to make the following disclosure clearly and prominently in all general and consumer-specific commercial communications: "Even if you accept this offer and use our service, your lender may not agree to change your loan," in violation of 12 C.F.R. §§ 1015.4(a)(2), 1015.4(b)(3);

D. Failing to make the following disclosure clearly and prominently in all consumer-specific commercial communications: "You may stop doing business with us at any time. You may accept or reject the offer of mortgage assistance we obtain from your lender [or servicer]. If you reject the offer, you do not have to pay us. If you accept the offer, you will have to pay us [insert amount or method for calculating the amount] for our services." For the purposes of this section, the amount "you will have to pay" shall consist of the total amount the consumer must pay to purchase, receive, and use all of the mortgage assistance relief services that are the subject of the sales offer, including but not limited to, all fees and charges, in violation of 12 C.F.R. § 1015.4(b)(1);

E. Failing, in all general commercial communications, consumer-specific commercial communications, and other communications in cases where any Defendant or person has represented, expressly or by implication, in connection with the advertising, marketing, promotion, offering for sale, sale, or performance of any mortgage assistance relief service, that the consumer should temporarily or permanently discontinue payments, in whole or in part, on a dwelling loan, to place clearly and prominently, and in close proximity to any such representation the following disclosure: "If you stop paying your mortgage, you could lose your home and damage your credit rating," in violation of 12 C.F.R. § 1015.4(c); and

F. Any other conduct in violation of 12 C.F.R. § 1015 *et seq*.

III.

PROHIBITION ON COLLECTION OF ADVANCE FEES

IT IS FURTHER ORDERED that Defendants and their officers, agents, servants, employees, independent contractors, and attorneys, and those persons in active concert or participation with any of them who receive actual notice of this Order by personal service, facsimile transmission, email, or otherwise, whether acting directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, marketing, promotion, offering for sale, sale, or performance of any mortgage assistance relief service, are hereby temporarily restrained and enjoined from asking for or receiving payment before consumers have executed a written agreement between the consumer and the loan holder or servicer that incorporates the offer obtained by Defendants.

IV.

PRESERVATION OF RECORDS AND TANGIBLE THINGS

IT IS FURTHER ORDERED that Defendants and their successors, assigns, officers, agents, servants, employees, independent contractors, and

attorneys, and those persons in active concert or participation with any of them who receive actual notice of this Order by personal service, facsimile transmission, email, or otherwise, whether acting directly or through any entity, corporation, subsidiary, division, affiliate, or other device, are hereby temporarily enjoined from destroying, erasing, mutilating, concealing, altering, transferring, or otherwise disposing of, in any manner, directly or indirectly, any Documents or records that relate to the business practices, or business or personal finances of any Defendant, or other entity directly or indirectly under the control of any Defendant.

V.

DISABLEMENT OF WEBSITES

IT IS FURTHER ORDERED that, immediately upon service of the Order upon them and pending determination of the Bureau's request for a preliminary injunction, (1) any person hosting any Internet website for, or on behalf of, any Defendant, and (2) Defendants and their successors, assigns, officers, agents, servants, employees, independent contractors, and attorneys, and those persons in active concert or participation with any of them who receive actual notice of this Order by personal service, facsimile transmission, email, or otherwise, whether acting directly or through any corporation, subsidiary, division, or other device, shall:

A. Immediately do whatever is necessary to ensure that any Internet website used by Defendants for the advertising, marketing, promotion, offering for sale, sale, or performance of any mortgage assistance relief service, including but not limited to www._____, www._____, and www._____, containing statements, representations, or omissions prohibited by Sections I and II of this Order cannot be accessed by the public;

B. Prevent the destruction or erasure of any Internet website used by Defendants for the advertising, marketing, promotion, offering for sale, sale, or performance of any mortgage assistance relief service, by preserving such website in the format in which it is maintained currently; and

C. Immediately notify in writing counsel for the Bureau of any other Internet website operated or controlled by any Defendant not listed in Subsections V.A above.

VI.

SUSPENSION OF INTERNET DOMAIN NAME REGISTRATIONS

IT IS FURTHER ORDERED that, pending determination of the Bureau's request for a preliminary injunction, any domain name registrar shall suspend the registration of any internet website used by Defendants for the advertising, marketing, promotion, offering for sale, sale, or performance of any mortgage assistance relief service, and containing statements, representations, or omissions prohibited by Sections I and II of this Order, including, but not limited to (list the above-mentioned websites) and provide immediate notice to counsel for the Bureau of any other Internet domain names registered or controlled by any Defendants.

VII.

ASSET FREEZE

IT IS FURTHER ORDERED that Defendants and their successors, assigns, officers, agents, servants, employees, independent contractors, and attorneys, and all persons directly or indirectly under the control of any of them, including any financial institution, and all other persons in active concert or participation with any of them who receive actual notice of this Order by personal service, facsimile, email, or otherwise, are hereby temporarily restrained and enjoined from directly or indirectly:

A. Selling, liquidating, assigning, transferring, converting, loaning, hypothecating, disbursing, gifting, conveying, encumbering, pledging, concealing, dissipating, spending, withdrawing, or otherwise disposing of any Asset that is:

1. in the actual or constructive possession of any Defendant; or

2. in the actual or constructive possession of, or owned or controlled by, or subject to access by, or belonging to, any corporation, partnership, trust or other entity directly or indirectly owned, managed or controlled by any Defendant;

B. Opening, or causing to be opened, any safe deposit box, commercial mail box, or storage facility belonging to, for the use or benefit of, controlled by, or titled in the name of any Defendant, or subject to access by any Defendant;

C. Incurring charges or cash advances on any credit card, stored value card, debit card or charge card issued in the name, singly or jointly, of any Defendant or any other entity directly or indirectly owned, managed, or controlled by any Defendant; or

D. Cashing any checks from consumers, clients, or customers of any Defendant.

IT IS FURTHER ORDERED that the Assets affected by this Section shall include: (a) all Assets of each Defendant as of the time this Order is entered, and (b) those Assets obtained or received after entry of this Order that are derived, directly or indirectly, from the actions alleged in Plaintiff's Complaint. This Section does not prohibit transfers to the Temporary Receiver, as specifically required in Section XVII (Delivery of Receivership Property), nor does it prohibit

the Repatriation of Foreign Assets, as specifically required in Section XI of this Order.

VIII.

RETENTION OF ASSETS AND RECORDS BY FINANCIAL INSTITUTIONS AND OTHER THIRD PARTIES

IT IS FURTHER ORDERED that, except as otherwise ordered by this Court, any financial or brokerage institution, business entity, electronic data host, Internet or "e-currency" payment processor, or person served with a copy of this Order, or who otherwise has actual or constructive knowledge of this Order, that holds, controls, or maintains custody of any account, Document, or Asset of, on behalf of, in the name of, for the benefit of, subject to withdrawal by, subject to access or use by, or under the signatory power of any Defendant or other party subject to Section VII above, or has held, controlled, or maintained any such account, Document, or Asset at any time since (list the relevant date – *i.e.* January 21, 2011), shall:

A. Hold, preserve, and retain within such person's control, and prohibit the withdrawal, removal, alteration, assignment, transfer, pledge, hypothecation, encumbrance, disbursement, dissipation, conversion, sale, liquidation, or other disposal of such account, Document, or Asset held by or under such person's control, except as directed by further order of the Court or as directed in writing by the Temporary Receiver regarding accounts, Documents, or Assets held in the name of or benefit of any Receivership Defendant;

B. Provide the Temporary Receiver, the Temporary Receiver's agents, the Bureau, and the Bureau's agents immediate access to Documents, including those electronically stored, hosted, or otherwise maintained on behalf of Defendants for forensic imaging or copying;

C. Deny access to any safe deposit box, commercial mail box, or storage facility belonging to, for the use or benefit of, controlled by, or titled in the name of any Defendant, or subject to access by any Defendant or other party subject to Section VII (Asset Freeze) above;

D. Provide to counsel for the Bureau and the Temporary Receiver, within one (1) business day, a sworn statement setting forth:

1. the identification of each account or Asset titled in the name, individually or jointly, or held on behalf of or for the benefit of, subject to withdrawal by, subject to access or use by, or under the signatory power of any Defendant or other party subject to Section VII above, whether in whole or in part;

2. the balance of each such account, or a description of the nature and value of such Asset, as of the close of business on the day on which this Order is served;

3. the identification of any safe deposit box, commercial mail box, or storage facility belonging to, for the use or benefit of, controlled by, or titled in the name of any Defendant, or subject to access by any Defendant or other party subject to Section VII above, whether in whole or in part; and

4. if the account, safe deposit box, or other Asset has been closed or removed, the date closed or removed, the balance on said date, and the name or the person or entity to whom such account or other Asset was remitted;

E. Provide to counsel for the Bureau and the Temporary Receiver, within three (3) business days after being served with a request, copies of all Documents pertaining to such account or Asset, including but not limited to originals or copies of account applications, account statements, signature

cards, checks, drafts, deposit tickets, transfers to and from the accounts, all other debit and credit instruments or slips, currency transaction reports, 1099 forms, and safe deposit box logs; provided that such institution or custodian may charge a reasonable fee; and

F. Cooperate with all reasonable requests of the Temporary Receiver relating to this Order's implementation.

G. The accounts subject to this provision include: (a) all Assets of each Defendant deposited as of the time this Order is entered, and (b) those Assets deposited after entry of this Order that are derived from the actions alleged in Plaintiff's Complaint. This Section does not prohibit transfers to the Temporary Receiver, as specifically required in Section XVII (Delivery of Receivership Property), nor does it prohibit the Repatriation of Foreign Assets, as specifically required in Section Xl of this Order.

H. The Bureau is granted leave, pursuant to Fed. R. Civ. P. 45, to subpoena Documents immediately from any financial or brokerage institution, business entity, electronic data host, or person served with a copy of this Order that holds, controls, or maintains custody of any account, Document, or Asset of, on behalf of, in the name of, for the benefit of, subject to withdrawal by, subject to access or use by, or under the signatory power of any Defendant or other party subject to Section VII above, or has held, controlled, or maintained any such account, Document, or Asset at any time since (list relevant date – same as above), and such financial or brokerage institution, business entity, electronic data host or person shall respond to such subpoena within three (3) business days after service.

IX.

FINANCIAL STATEMENTS AND ACCOUNTING

IT IS FURTHER ORDERED that each Defendant, within three (3) business days of service of this Order, shall prepare and deliver to counsel for the Bureau:

A. For each Individual Defendant, a completed financial statement accurate as of the date of service of this Order upon such Defendant on the form of Attachment A to this Order captioned "Financial Statement of Individual Defendant."

B. For each Corporate Defendant, a completed financial statement accurate as of the date of service of this Order upon such Defendant (unless otherwise agreed upon with Bureau counsel) in the form of Attachment B to this Order captioned "Financial Statement of Corporate Defendant."

C. A list of all officers and directors of each Corporate Defendant and all other individuals or entities with authority to direct the operations of each Corporate Defendant or withdraw money from the account of each Corporate Defendant.

X.

CONSUMER CREDIT REPORTS

IT IS FURTHER ORDERED that pursuant to Section 604(a)(1) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(1), the Bureau may obtain credit reports concerning any Defendant, and that, upon written request, any credit reporting agency from which such reports are requested shall provide them to the Bureau.

XI.

REPATRIATION OF FOREIGN ASSETS

IT IS FURTHER ORDERED that, within three (3) business days following the service of this Order, each Defendant shall:

A. Provide counsel for the Bureau and the Temporary Receiver with a full accounting of all Assets, accounts, and Documents outside of the

territory of the United States that are held either: (1) by Defendants; (2) for their benefit; (3) in trust by or for them, individually or jointly; or (4) under their direct or indirect control, individually or jointly;

B. Transfer to the territory of the United States all Assets, accounts, and Documents in foreign countries held either: (1) by Defendants; (2) for their benefit; (3) in trust by or for them, individually or jointly; or (4) under their direct or indirect control, individually or jointly;

C. All repatriated Assets, accounts, and Documents are subject to Section VII of this Order; and

D. Provide the Bureau access to all records of accounts or Assets of the Corporate Defendants and Individual Defendants held by financial institutions located outside the territorial United States by signing the Consent to Release of Financial Records attached to this Order as Attachment C.

XII.

NONINTERFERENCE WITH REPATRIATION

IT IS FURTHER ORDERED that Defendants and their successors, assigns, officers, agents, servants, employees, independent contractors, and attorneys, and those persons in active concert or participation with any of them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any corporation, subsidiary, division, or other device, are hereby temporarily restrained and enjoined from taking any action, directly or indirectly, which may result in the encumbrance or dissipation of foreign Assets, or in the hindrance of the repatriation required by the preceding Section XI of this Order, including, but not limited to:

A. Sending any statement, letter, fax, email or wire transmission, or telephoning or engaging in any other act, directly or indirectly, that results in

a determination by a foreign trustee or other entity that a "duress" event has occurred under the terms of a foreign trust agreement until such time that all Assets have been fully repatriated pursuant to Section XI of this Order; or

B. Notifying any trustee, protector, or other agent of any foreign trust or other related entities of either the existence of this Order, or of the fact that repatriation is required pursuant to a court order, until such time that all Assets have been fully repatriated pursuant to Section XI of this Order.

XIII.

APPOINTMENT OF A TEMPORARY RECEIVER

IT IS FURTHER ORDERED that _____ is appointed Temporary Receiver for the business activities of Receivership Defendants with the full power of an equity receiver. The Temporary Receiver shall be the agent of this Court and solely the agent of this Court in acting as Temporary Receiver under this Order. The Temporary Receiver shall be accountable directly to this Court. The Temporary Receiver shall comply with all laws and Local Rules of this Court governing federal equity receivers (list specific local rules if any by stating "including, but not limited to L.R. xxxxx).

XIV.

DUTIES AND AUTHORITY OF TEMPORARY RECEIVER

IT IS FURTHER ORDERED that the Temporary Receiver is directed and authorized to accomplish the following:

A. Assume full control of the Receivership Defendants by removing, as the Temporary Receiver deems necessary or advisable, any director, officer, independent contractor, employee, or agent of any of the Receivership

Defendants, including any named Defendant, from control of, management of, or participation in, the affairs of the Receivership Defendants;

B. Take exclusive custody, control, and possession of all Assets and Documents of, or in the possession, custody, or under the control of, the Receivership Defendants, wherever situated. The Temporary Receiver shall have full power to divert mail and to sue for, collect, receive, take into possession, hold, and manage all Assets and Documents of the Receivership Defendants and other persons whose interests are now held by or under the direction, possession, custody, or control of the Receivership Defendants. *Provided, however,* that the Temporary Receiver shall not attempt to collect or receive any amount from a consumer if the Temporary Receiver believes the consumer was a victim of the unlawful conduct alleged in the complaint in this matter;

C. Take all steps necessary to secure the business premises of the Receivership Defendants. Such steps may include, but are not limited to, the following, as the Temporary Receiver deems necessary or advisable:

1. serving and filing this Order;
2. completing a written inventory of all Receivership Assets;
3. obtaining pertinent information from all employees and other agents of the Receivership Defendants, including, but not limited to, the name, home address, social security number, job description, method of compensation, and all accrued and unpaid commissions and compensation of each such employee or agent, and all computer hardware and software passwords;
4. videotaping and/or photographing all portions of the location;

5. securing the location by changing the locks and disconnecting any computer modems or other means of access to the computer or other records maintained at that location;

6. requiring any persons present on the premises at the time this Order is served to leave the premises, to provide the Temporary Receiver with proof of identification, or to demonstrate to the satisfaction of the Temporary Receiver that such persons are not removing from the premises Documents or Assets of the Receivership Defendants; and

7. requiring all employees, independent contractors, and consultants of the Receivership Defendants to complete a Questionnaire submitted by the Temporary Receiver;

D. Conserve, hold, and manage all Receivership Assets, and perform all acts necessary or advisable to preserve the value of those Assets, in order to prevent any irreparable loss, damage, or injury to consumers or to creditors of the Receivership Defendants, including, but not limited to, obtaining an accounting of the Assets and preventing transfer, withdrawal, or misapplication of Assets;

E. Liquidate any and all securities or commodities owned by or for the benefit of the Receivership Defendants as the Temporary Receiver deems to be advisable or necessary;

F. Enter into contracts and purchase insurance as the Temporary Receiver deems to be advisable or necessary;

G. Prevent the inequitable distribution of Assets and determine, adjust, and protect the interests of consumers and creditors who have transacted business with the Receivership Defendants;

H. Manage and administer the business of the Receivership Defendants until further order of this Court by performing all incidental acts that the Temporary Receiver deems to be advisable or necessary, which includes retaining, hiring, or dismissing any employees, independent contractors, or agents;

I. Choose, engage, and employ attorneys, accountants, appraisers, and other independent contractors and technical specialists, as the Temporary Receiver deems advisable or necessary in the performance of duties and responsibilities under the authority granted by this Order;

J. Make payments and disbursements from the Receivership estate that are necessary or advisable for carrying out the directions of, or exercising the authority granted by, this Order. The Temporary Receiver shall apply to the Court for prior approval of any payment of any debt or obligation incurred by the Receivership Defendants prior to the date of entry of this Order, except payments that the Temporary Receiver deems necessary or advisable to secure assets of the Receivership Defendants, such as rental payments;

K. Determine and implement measures to ensure that the Receivership Defendants comply with, and prevent violations of, this Order and all other applicable laws, including, but not limited to, revising sales materials and implementing monitoring procedures;

L. Institute, compromise, adjust, appear in, intervene in, or become party to such actions or proceedings in state, federal, or foreign courts that the Temporary Receiver deems necessary and advisable to preserve or recover the Assets of the Receivership Defendants, or that the Temporary Receiver deems necessary and advisable to carry out the Temporary Receiver's mandate under this Order;

M. Defend, compromise, adjust, or otherwise dispose of any or all actions or proceedings instituted in the past or in the future against the Temporary Receiver in his role as Temporary Receiver, or against the Receivership Defendants, that the Temporary Receiver deems necessary and advisable to preserve the Assets of the Receivership Defendants or that the Temporary Receiver deems necessary and advisable to carry out the Temporary Receiver's mandate under this Order;

N. Continue and conduct the business of the Receivership Defendants in such manner, to such extent, and for such duration as the Temporary Receiver may in good faith deem to be necessary or appropriate to operate the business profitably and lawfully, if at all; *provided, however,* that the continuation and conduct of the business shall be conditioned upon the Temporary Receiver's good faith determination that the businesses can be lawfully operated at a profit using the Assets of the receivership estate;

O. Take depositions and issue subpoenas to obtain Documents and records pertaining to the receivership estate and compliance with this Order. Subpoenas may be served by agents or attorneys of the Temporary Receiver and by agents of any process server retained by the Temporary Receiver;

P. Open one or more bank accounts as designated depositories for funds of the Receivership Defendants. The Temporary Receiver shall deposit all funds of the Receivership Defendants in such a designated account and shall make all payments and disbursements from the receivership estate from such account(s);

Q. Maintain accurate records of all receipts and expenditures that he makes as Temporary Receiver;

R. Cooperate with reasonable requests for information or assistance from any state or federal law enforcement agency; and

S. Maintain the chain of custody of all of Defendants' records in their possession.

XV.

IMMEDIATE ACCESS TO BUSINESS PREMISES AND RECORDS

IT IS FURTHER ORDERED that the Bureau, the Temporary Receiver, and their respective representatives, agents, contractors, or assistants, are permitted immediate access to Defendants' business premises; and

IT IS FURTHER ORDERED that the Defendants and their successors, assigns, officers, directors, agents, servants, employees, attorneys, and all other persons directly or indirectly, in whole or in part, under their control, and all other persons in active concert or participation with them who receive actual notice of this Order by personal service, facsimile, email, or otherwise, whether acting directly or through any corporation, subsidiary, division, or other entity, shall:

A. Allow the Bureau and the Temporary Receiver, and their respective representatives, agents, attorneys, investigators, paralegals, contractors, or assistants immediate access to:

1. All of the Defendants' business premises, including but not limited to:

a) (List main business location and any other business locations – do NOT list any residences or non-commercial properties);

b) Any storage facilities; and

c) such other business locations that are wholly or partially owned, rented, leased, or under the temporary or permanent control of any Defendant;

2. Any other premises where the Defendants conduct business, sales operations, or customer service operations (again, provided not a residential location where defendants are domiciled);

3. Any premises where Documents related to the Defendants' businesses are stored or maintained, including but not limited to a storage unit;

4. Any premises where Assets belonging to any Defendant are stored or maintained; and

5. Any Documents located at any of the locations described in this Section.

B. Immediately identify to the Bureau's counsel and the Temporary Receiver:

1. All of Defendants' business premises and storage facilities;

2. Any non-residence premises where any Defendant conducts business, sales operations, or customer service operations;

3. Any non-residence premises where Documents related to the business, sales operations, or customer service operations of any Defendant are hosted, stored, or otherwise maintained, including but not limited to the name and location of any electronic data hosts; and

4. Any non-residence premises where Assets belonging to any Defendant are stored or maintained.

C. Provide the Bureau and the Temporary Receiver, and their respective representatives, agents, attorneys, investigators, paralegals, contractors, or assistants with any necessary means of access to, copying of, and forensic

imaging of Documents, including, without limitation, the locations of Receivership Defendants' business premises, keys and combinations to business premises locks, passwords to devices that hold Electronically Stored Information, computer access codes of all computers used to conduct Receivership Defendants' business, access to (including but not limited to execution of any Documents necessary for access to and forensic imaging of) any data stored, hosted or otherwise maintained by an electronic data host, and storage area access information.

D. The Bureau and the Temporary Receiver are authorized to employ the assistance of law enforcement officers, including, but not limited to, _____(federal agencies), and the Sheriff or deputy of any county or other federal or state law enforcement office to effect service, to implement peacefully the provisions of this Order, and to keep the peace. The Temporary Receiver shall immediately allow the Bureau and its representatives, agents, contractors, or assistants into the premises and facilities described in this Section to inspect, inventory, image, and copy Documents relevant to any matter contained in this Order, wherever they may be situated and whether they are on the person of Defendants _____, or others. The Temporary Receiver may exclude Defendants and their agents and employees from the business premises and facilities during the immediate access. No one shall interfere with the Bureau's or Temporary Receiver's inspection of the Defendants' premises or documents.

E. The Temporary Receiver and the Bureau shall have the right to remove any Documents, including any devices containing Electronically Stored Information, related to Defendants' business practices from the premises in order that they may be inspected, inventoried, and copied. The materials so removed shall be returned within five (5) business days of

completing said inventory and copying. If any property, records, Documents, or computer files relating to the Receivership Defendants' finances or business practices are located in the residence of any Defendant or are otherwise in the custody or control of any Defendant, then such Defendant shall produce them to the Temporary Receiver within twenty-four (24) hours of service of this Order. In order to prevent the destruction of computer data, upon service of this Order upon Defendants, any such computers may be powered down (turned off) in the normal course for the operating systems used on such computers and shall not be powered up or used again until produced for copying and inspection, along with any codes needed for access. The Bureau's and the Temporary Receiver's representatives may also photograph and videotape the inside and outside of all premises to which they are permitted access by this Order, and all Documents and other items found on such premises.

F. The Bureau's access to the Defendants' Documents pursuant to this provision shall not provide grounds for any Defendant to object to any subsequent request for Documents served by the Bureau.

G. The Temporary Receiver shall allow the Defendants and their representatives reasonable access to the premises of the Receivership Defendants. The purpose of this access shall be to inspect, inventory, and copy any and all Documents and other property owned by or in the possession of the Receivership Defendants, provided that those Documents and property are not removed from the premises. The Temporary Receiver shall have the discretion to determine the time, manner, and reasonable conditions of such access.

XVI.

COOPERATION WITH TEMPORARY RECEIVER

IT IS FURTHER ORDERED that:

A. Defendants, and their successors, assigns, officers, agents, directors, servants, employees, salespersons, independent contractors, attorneys, and corporations, and all other persons or entities in active concert or participation with them, who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any trust, corporation, subsidiary, division, or other device, or any of them, shall fully cooperate with and assist the Temporary Receiver. Defendants' cooperation and assistance shall include, but not be limited to:

1. Providing any information to the Temporary Receiver that the Temporary Receiver deems necessary to exercising the authority and discharging the responsibilities of the Temporary Receiver under this Order, including but not limited to allowing the Temporary Receiver to inspect Documents and Assets and to partition office space;

2. Providing any username or password and executing any documents required to access any computer or electronic files in any medium, including but not limited to electronically stored information stored, hosted or otherwise maintained by an electronic data host; and

3. Advising all persons who owe money to the Receivership Defendants that all debts should be paid directly to the Temporary Receiver.

B. Defendants and their successors, assigns, officers, directors, agents, servants, employees, attorneys, and all other persons or entities directly or

indirectly, in whole or in part, under their control, and all other persons in active concert or participation with who receive actual notice of this Order by personal service or otherwise, shall not interfere in any manner, directly or indirectly with the custody, possession, management, or control by the Temporary Receiver of Assets and Documents, and are hereby temporarily restrained and enjoined from directly or indirectly:

1. Transacting any of the business of the Receivership Defendants;

2. Destroying, secreting, erasing, mutilating, defacing, concealing, altering, transferring or otherwise disposing of, in any manner, directly or indirectly, any Documents or equipment of the Receivership Defendants, including but not limited to contracts, agreements, consumer files, consumer lists, consumer addresses and telephone numbers, correspondence, advertisements, brochures, sales material, sales presentations, Documents evidencing or referring to Defendants' services, training materials, scripts, data, computer tapes, disks, or other computerized records, books, written or printed records, handwritten notes, telephone logs, "verification" or "compliance" tapes or other audio or video tape recordings, receipt books, invoices, postal receipts, ledgers, personal and business canceled checks and check registers, bank statements, appointment books, copies of federal, state or local business or personal income or property tax returns, photographs, mobile devices, electronic storage media, accessories, and any other Documents, records or equipment of any kind that relate to the business practices or business or personal finances of the Receivership Defendants or any other entity directly or indirectly under the control of the Receivership Defendants;

3. Transferring, receiving, altering, selling, encumbering, pledging, assigning, liquidating, or otherwise disposing of any Assets owned, controlled, or in the possession or custody of, or in which an interest is held or claimed by, the Receivership Defendants, or the Temporary Receiver;

4. Excusing debts owed to the Receivership Defendants;

5. Failing to notify the Temporary Receiver of any Asset, including accounts, of a Receivership Defendant held in any name other than the name of the Receivership Defendant, or by any person or entity other than the Receivership Defendant, or failing to provide any assistance or information requested by the Temporary Receiver in connection with obtaining possession, custody, or control of such Assets;

6. Failing to create and maintain books, records, and accounts which, in reasonable detail, accurately, fairly, and completely reflect the incomes, assets, disbursements, transactions and use of monies by the Defendants or any other entity directly or indirectly under the control of the Defendants;

7. Doing any act or refraining from any act whatsoever to interfere with the Temporary Receiver's taking custody, control, possession, or managing of the Assets or Documents subject to this Receivership; or to harass or to interfere with the Temporary Receiver in any way; or to interfere in any manner with the exclusive jurisdiction of this Court over the Assets or Documents of the Receivership Defendants; or to refuse to cooperate with the Temporary Receiver or the Temporary Receiver's duly authorized agents in the exercise of their duties or authority under any Order of this Court; and

8. Filing, or causing to be filed, any petition on behalf of the Receivership Defendants for relief under the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.,* without prior permission from this Court.

XVII.

DELIVERY OF RECEIVERSHIP PROPERTY

IT IS FURTHER ORDERED that immediately upon service of this Order upon them or upon their otherwise obtaining actual knowledge of this Order, or within a period permitted by the Temporary Receiver, Defendants and any other person or entity, including but not limited to financial institutions and electronic data hosts, shall transfer or deliver access to, possession, custody, and control of the following to the Temporary Receiver:

A. All Assets of the Receivership Defendants;

B. All Documents of the Receivership Defendants, including, but not limited to, books and records of accounts, all financial and accounting records, balance sheets, income statements, bank records (including monthly statements, canceled checks, records of wire transfers, records of ACH transactions, and check registers), client or customer lists, title documents and other papers;

C. All Assets belonging to members of the public now held by the Receivership Defendants;

D. All keys, computer and other passwords, user names, entry codes, combinations to locks required to open or gain or secure access to any Assets or Documents of the Receivership Defendants, wherever located, including, but not limited to, access to their business premises, means of communication, accounts, computer systems, or other property; and

E. Information identifying the accounts, employees, properties, or other assets or obligations of the Receivership Defendants.

In the event any person or entity fails to deliver or transfer immediately any asset or otherwise fails to comply with any provision of this Section XVII, the Temporary Receiver may file *ex parte* with the Court an Affidavit of Non-Compliance regarding the failure. Upon filing of the affidavit, the Court may authorize, without additional process or demand, Writs of Possession or Sequestration or other equitable writs requested by the Temporary Receiver. The writs shall authorize and direct the United States Marshal or any sheriff or deputy sheriff of any county to seize the Asset, Document, or other thing and to deliver it to the Temporary Receiver.

XVIII.

COMPENSATION FOR TEMPORARY RECEIVER

IT IS FURTHER ORDERED that the Temporary Receiver and all personnel hired by the Temporary Receiver as herein authorized, including counsel to the Temporary Receiver and accountants, are entitled to reasonable compensation for the performance of duties pursuant to this Order, and for the cost of actual out-of-pocket expenses incurred by them, from the assets now held by or in the possession or control of, or which may be received by, the Receivership Defendants. The Temporary Receiver shall file with the Court and serve on the parties periodic requests for the payment of such reasonable compensation, with the first such request filed no more than sixty (60) days after the date of this Order. The Temporary Receiver shall not increase the hourly rates used as the bases for such fee applications without prior approval of the Court.

XIX.

TEMPORARY RECEIVER'S REPORTS

IT IS FURTHER ORDERED that the Temporary Receiver shall report to this Court on or before the date set for the hearing to Show Cause regarding the Preliminary Injunction, regarding: (l) the steps taken by the Temporary Receiver to implement the terms of this Order; (2) the value of all liquidated and unliquidated assets of the Receivership Defendants; (3) the sum of all liabilities of the Receivership Defendants; (4) the steps the Temporary Receiver intends to take in the future to: (a) prevent any diminution in the value of assets of the Receivership Defendants, (b) pursue receivership assets from third parties, and (c) adjust the liabilities of the Receivership Defendants, if appropriate; (5) the Temporary Receiver's assessment of whether the business can be operated in compliance with this Order; and (6) any other matters which the Temporary Receiver believes should be brought to the Court's attention. *Provided, however,* if any of the required information would hinder the Temporary Receiver's ability to pursue receivership assets, the portions of the Temporary Receiver's report containing such information may be filed under seal and not served on the parties.

XX.

WITHDRAWAL OF TEMPORARY RECEIVER

IT IS FURTHER ORDERED that the Temporary Receiver and any Professional retained by the Temporary Receiver, including but not limited to his or her attorneys and accountants, be and are hereby authorized to withdraw from his or her respective appointments or representations and apply for payment of their professional fees and costs at any time after the date of this Order, for any reason in their sole and absolute discretion, by sending written notice seven (7) days prior to the date of the intended withdrawal to the Court and to the parties along with a written report reflecting the Temporary Receiver's work, findings, and recommendations, as well as an accounting for all funds and assets in possession or control of the Temporary Receiver. The Temporary Receiver and

Professionals shall be relieved of all liabilities and responsibilities, and the Temporary Receiver shall be exonerated and the receivership deemed closed seven (7) days from the date of the mailing of such notice of withdrawal. The Court will retain jurisdiction to consider the fee applications, report, and accounting submitted by the Temporary Receiver and the Professionals. The written notice shall include an interim report indicating the Temporary Receiver's actions and reflect the knowledge gained along with the fee applications of the Temporary Receiver and his or her Professionals. The report shall also contain the Temporary Receiver's recommendations, if any.

XXI .

TEMPORARY RECEIVER'S BOND/LIABILITY

IT IS FURTHER ORDERED that no bond shall be required in connection with the appointment of the Temporary Receiver. Except for an act of gross negligence, the Temporary Receiver and the Professionals shall not be liable for any loss or damage incurred by any of the Defendants, their officers, agents, servants, employees, and attorneys or any other person, by reason of any act performed or omitted to be performed by the Temporary Receiver and the Professionals in connection with the discharge of his or her duties and responsibilities, including but not limited to their withdrawal from the case under Section XX.

XXII.

PROHIBITION ON RELEASE OF CONSUMER INFORMATION

IT IS FURTHER ORDERED that, except as required by a law enforcement agency law, regulation or court order, Defendants, and their successors, assigns, officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them who receive actual

notice of this Order by personal service or otherwise, are temporarily restrained and enjoined from disclosing, using, or benefitting from consumer information, including the name, address, telephone number, email address, social security number, other identifying information, or any data that enables access to a consumer's account (including a credit card, bank account, or other financial account), of any person which any Defendant obtained prior to entry of this Order in connection with any mortgage assistance relief product.

XXIII.

STAY OF ACTIONS

IT IS FURTHER ORDERED that:

A. Except by leave of this Court, during pendency of the Receivership ordered herein, Defendants and all other persons and entities be and hereby are stayed from taking any action to establish or enforce any claim, right, or interest for, against, on behalf of, in, or in the name of, the Receivership Defendants, any of their subsidiaries, affiliates, partnerships, Assets, Documents, or the Temporary Receiver or the Temporary Receiver's duly authorized agents acting in their capacities as such, including, but not limited to, the following actions:

1. Commencing, prosecuting, continuing, entering, or enforcing any suit or proceeding, except that such actions may be filed to toll any applicable statute of limitations;

2. Accelerating the due date of any obligation or claimed obligation; filing or enforcing any lien; taking or attempting to take possession, custody, or control of any asset; attempting to foreclose, forfeit, alter, or terminate any interest in any asset, whether such acts are part of a judicial proceeding, are acts of self-help, or otherwise;

3. Executing, issuing, serving, or causing the execution, issuance or service of, any legal process, including, but not limited to, attachments, garnishments, subpoenas, writs of replevin, writs of execution, or any other form of process whether specified in this Order or not; or

4. Doing any act or thing whatsoever to interfere with the Temporary Receiver taking custody, control, possession, or management of the Assets or Documents subject to this Receivership, or to harass or interfere with the Temporary Receiver in any way, or to interfere in any manner with the exclusive jurisdiction of this Court over the Assets or Documents of the Receivership Defendants;

B. This Section XXIII does not stay:

1. The commencement or continuation of a criminal action or proceeding;

2. The commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

3. The enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power; or

4. The issuance to a Receivership Defendant of a notice of tax deficiency; and

C. Except as otherwise provided in this Order, all persons and entities in need of documentation from the Temporary Receiver shall in all instances first attempt to secure such information by submitting a formal written request to the Temporary Receiver, and, if such request has not been responded to within thirty (30) days of receipt by the Temporary Receiver,

any such person or entity may thereafter seek an Order of this Court with regard to the relief requested.

XXIV.

LIMITED EXPEDITED DISCOVERY

IT IS FURTHER ORDERED that the Bureau is granted leave to conduct certain expedited discovery, and that, commencing with the time and date of this Order, in lieu of the time periods, notice provisions, and other requirements of Rules 19, 26, 30, 34, and 45 of the Federal Rules of Civil Procedure, and applicable Local Rules, the Bureau is granted leave to:

A. Take the deposition, on three (3) days' notice, of any person or entity, whether or not a party, for the purpose of discovering: (1) the nature, location, status, and extent of Assets of Defendants or their affiliates or subsidiaries; (2) the nature and location of Documents and business records of Defendants or their affiliates or subsidiaries; and (3) compliance with this Order. The limitations and conditions set forth in Fed. R. Civ. P. 30(a)(2) and 31(a)(2) regarding subsequent depositions shall not apply to depositions taken pursuant to this Section. In addition, any such depositions taken pursuant to this Section shall not be counted toward the ten deposition limit set forth in Fed. R. Civ. P. 30(a)(2)(A)(i) and 31(a)(2)(A)(i) and shall not preclude the Bureau from subsequently deposing the same person or entity in accordance with the Federal Rules of Civil Procedure. Service of discovery upon a party, taken pursuant to this Section, shall be sufficient if made by facsimile, email or by overnight delivery. Any deposition taken pursuant to this sub-section that has not been reviewed and signed by the deponent may be used by any party for purposes of the preliminary injunction hearing;

B. Serve upon parties requests for production of documents or inspection that require production or inspection within three (3) calendar days of service, and may serve subpoenas upon non-parties that direct production or inspection within five (5) calendar days of service, for the purpose of discovering: (1) the nature, location, status, and extent of assets of Defendants or their affiliates or subsidiaries; (2) the nature and location of Documents and business records of Defendants or their affiliates or subsidiaries; and (3) compliance with this Order, *provided that* twenty-four (24) hours' notice shall be deemed sufficient for the production of any such Documents that are maintained or stored only as electronic data;

C. Serve deposition notices and other discovery requests upon the parties to this action by facsimile or overnight courier, and take depositions by telephone or other remote electronic means; and

D. If a Defendant fails to appear for a properly noticed deposition or fails to comply with a request for production or inspection, seek to prohibit that Defendant from introducing evidence at any subsequent hearing.

XXV.

MONITORING

IT IS FURTHER ORDERED that agents or representatives of the Bureau may contact Defendants directly or anonymously for the purpose of monitoring compliance with this Order, and may tape record any oral communications that occur in the course of such contacts.

XXVI.

DEFENDANTS' DUTY TO DISTRIBUTE ORDER

IT IS FURTHER ORDERED that Defendants shall immediately provide a copy of this Order to each affiliate, subsidiary, division, sales entity, successor, assign, officer, director, employee, independent contractor, client company,

electronic data host, agent, attorney, spouse, and representative of Defendants and shall, within three (3) calendar days from the date of entry of this Order, provide counsel for the Bureau with a sworn statement that: (a) confirms that Defendants have provided copies of the Order as required by this Section and (b) lists the names and addresses of each entity or person to whom Defendants provided a copy of the Order. Furthermore, Defendants shall not take any action that would encourage officers, agents, directors, employees, salespersons, independent contractors, attorneys, subsidiaries, affiliates, successors, assigns, or other persons or entities in active concert or participation with Defendants to disregard this Order or believe that they are not bound by its provisions.

XXVII.

DURATION OF TEMPORARY RESTRAINING ORDER

IT IS FURTHER ORDERED that the Temporary Restraining Order granted herein shall expire on the ____day of _____, 2012, at _____ o'clock __.m., unless within such time, the Order, for good cause shown, is extended with the consent of the parties, or for an additional period not to exceed fourteen (14) calendar days, or unless it is further extended pursuant to Federal Rule of Civil Procedure 65.

XXVIII.

ORDER TO SHOW CAUSE REGARDING PRELIMINARY INJUNCTION

IT IS FURTHER ORDERED that, pursuant to Federal Rule of Civil Procedure 65(b), each of the Defendants shall appear before this Court on the _____day of

_____, 2012 at __ o'clock __.m., to show cause, if there is any, why this Court should not enter a preliminary injunction enjoining the violations of law alleged in the Bureau's Complaint, continuing the freeze of their assets, and imposing such additional relief as may be appropriate.

XXIX.

SERVICE OF PLEADINGS, MEMORANDA, AND OTHER EVIDENCE

IT IS FURTHER ORDERED that Defendants shall file any answering affidavits, pleadings, or legal memoranda with the Court and serve the same on counsel for the Bureau no later than five (5) business days prior to the preliminary injunction hearing in this matter. The Bureau may file responsive or supplemental pleadings, materials, affidavits, or memoranda with the Court and serve the same on counsel for Defendants no later than one (1) business day prior to the preliminary injunction hearing in this matter. *Provided that* service shall be performed by personal or overnight delivery, facsimile, or email, and documents shall be delivered so that they shall be received by the other parties no later than 4 p.m. (Pacific Time) on the appropriate dates listed in this Section XXIX.

XXX.

LIVE TESTIMONY; WITNESS IDENTIFICATION

IT IS FURTHER ORDERED that the question of whether this Court should enter a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining the Defendants during the pendency of this action shall be resolved on the pleadings, declarations, exhibits, and memoranda filed by, and oral argument of, the parties. Live testimony shall be heard only on further order of this Court on motion filed with the Court and served on counsel for the other parties at least five (5) business days prior to the preliminary injunction hearing in this matter. Such motion shall set forth the name, address, and telephone number of each proposed witness, a detailed summary or affidavit disclosing the substance of each proposed witness' expected testimony, and an explanation of why the taking of live testimony would be helpful to this Court. Any papers opposing a timely

motion to present live testimony or to present live testimony in response to live testimony to be presented by another party shall be filed with this Court and served on the other parties at least three (3) business days prior to the preliminary injunction hearing in this matter. *Provided that* service shall be performed by personal or overnight delivery or by facsimile or email, and documents shall be delivered so that they shall be received by the other parties no later than 4 p.m. (Pacific Time) on the appropriate dates listed in this Subsection. *Provided further,* however, that an evidentiary hearing on the Bureau's request for a preliminary injunction is not necessary unless Defendants demonstrate that they have, and intend to introduce, evidence that raises a genuine material factual issue.

XXXI.

CORRESPONDENCE WITH PLAINTIFF

IT IS FURTHER ORDERED that, for the purposes of this Order, because mail addressed to the Bureau is subject to delay due to heightened security screening, all correspondence and service of pleadings on Plaintiff shall be sent either via electronic submission or via overnight express delivery to:

LEAD ATTORNEY'S NAME
Consumer Financial Protection Bureau
1700 G Street, NW, ATTN: 1750 PA
Washington, DC 20552
ATTN: Office of Enforcement
xxx.xxxxx@cfpb.gov

with a copy to:

Local Counsel (if any)

XXXII.

SERVICE OF THIS ORDER

IT IS FURTHER ORDERED that copies of this Order may be served by facsimile transmission, email, personal or overnight delivery, or U.S. Mail, by agents and employees of the Bureau or any state or federal law enforcement agency or by private process server, upon any financial institution or other entity or person that may have possession, custody, or control of any Documents or Assets of any Defendant, or that may otherwise be subject to any provision of this Order. Service upon any branch or office of any financial institution shall effect service upon the entire financial institution.

XXXIII.

RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes of construction, modification, and enforcement of this Order.

IT IS SO ORDERED, this _____ day of _____, 2012, at ____ o'clock __.m.

_____

United States District Judge

Submitted by:

KENT MARKUS, OH Bar #16005
Enforcement Director
LEAD ENFORCEMENT ATTORNEY, ST Bar #xxxxxxxx
(Phone: 202-xxx-xxxx)
(Email: xxxx.xxxxx@cfpb.gov)
OTHER ATTORNEYS NAMES (same format)
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
Fax: (202) 435-7722

Local Counsel (if required)

Attorneys for Plaintiff
Consumer Financial Protection Bureau

CIDs				
II.A	ENF response to petition to modify or set aside CIDs and confidentiality requests	**Notice:** Legal	Enforcement Director	Enforcement
II.B	Bureau ruling on petition to modify or set-aside CIDs		Director (or delegate)	Director
II.C	Bureau ruling on CID confidentiality requests		SEFL Associate Director (as delegated by Director)	SEFL Front Office
II.D	Filing petition to enforce CIDs in district court	**Notice:** Legal	Enforcement Director	Enforcement
ADMINISTRATIVE ACTIONS				
II.E	Response to motions to ALJ to modify or quash Enforcement subpoenas		Enforcement Director	Enforcement
II.F	Filing petition to enforce Enforcement subpoenas in district court	**Notice:** Legal	Enforcement Director	Enforcement
II.F	Filing petition to enforce subpoenas issued on behalf of non-Bureau parties in district court	**Notice:** Enforcement	General Counsel	Legal
II.G	Authorize and file appeal of ALJ decision to Director		Enforcement Director	Enforcement
DISTRICT COURT ACTIONS				
II.H	Represent Bureau in judicial appeal of administrative decision	**Notice:** Enforcement	General Counsel	Legal
II.I	Bureau filing appeal from final district court decision	**Notice:** Enforcement and relevant Bureau components	Director	Legal
II.J	Initiating contempt proceedings re: enforcement of final court orders	**Notice:** Legal	Enforcement Director	Enforcement
II.O	Represent Bureau in appeals from bankruptcy court to district court	**Notice:** Legal	Director	Enforcement
OTHER				
II.K	Required referrals for criminal proceedings		Delegates in Legal and Enforcement	Enforcement
I.C	Close Investigation/Litigation	**Notice:** EAP List	Supervising ENF Deputy	Enforcement

Civil Investigative Demands

Revised 9.03.13

In an investigation, Staff may choose to seek information from companies and individuals by issuing civil investigative demands (CIDs). CIDs are compulsory demands for documentary material, tangible things, reports and answers to written questions, and/or oral testimony, which the Bureau can enforce in federal court, if necessary. Depending on the circumstances surrounding a particular investigation, Staff may consider sending a voluntary request for information in lieu of a CID.

The Bureau's rules for issuing and enforcing CIDs are in Section 1052 of the Dodd Frank Act and in the Rules Relating to Investigations in 12 CFR part 1080 (the Rules). Among other things, the statute and Rules specify the procedures that recipients of CIDs should follow when seeking to modify or set aside a CID. This policy is intended to provide guidance for handling issues relating to CIDs, but Staff should review the relevant portions of the statute and Rules prior to issuing a CID.

I. Issuing Civil Investigative Demands

1. The CID Form

Procedure: The operative demand document in a CID package is the CID form that the Enforcement Director or a Deputy Enforcement Director signs. The form may be found here. Staff must fill in the CID recipient's full name and address in the "To" field. Staff should research the company's corporate records to ensure the use of the company's full legal name, including "Corp." or similar endings, as well as any appropriate additional designations such as "also d/b/a" or "formerly known as." If the company consists of more than one legal entity, Staff should send separate CIDS to each entity at the outset to reduce the risk that the recipient will consider certain materials to be beyond the scope of the CID because they are retained by a different legal entity.

Staff should check the appropriate box(es) in the "Action Required" section of the CID form. If sending a CID for oral testimony, Staff should include under "Bureau Investigators" the names of each individual who may take testimony during the hearing. For additional guidance, including information about the Location of Investigational Hearing, Staff should review the "Taking Testimony" policy.

In the "Notification of Purpose" section of the CID form, Staff is required to describe the nature of the conduct constituting the alleged violation under investigation and the applicable provisions of law. *See* 12 C.F.R. § 1080.5. This description should match the "Statement of Purpose" included in the Investigation Opening Memorandum. If the scope or circumstances of the investigation has changed since opening, however, Staff should consult with the investigation's supervising Deputy Enforcement Director or Assistant Litigation Deputy about making any appropriate changes to the description.

For additional guidance, Staff should review the "Complying with Rule of Investigation 1080.5 (Notification of Purpose)" policy.

Staff should generally list the Deputy Enforcement Director as the Custodian and the investigation's paralegal as the Deputy Custodian, unless other designation is deemed appropriate. Staff should list the all attorneys assigned to the investigation as Bureau Counsel.

2. The Requests

Procedure: In an investigation, Staff may decide to compel the subject of the investigation or a third-party to produce documents, tangible things, reports and answers to written questions, and/or oral testimony. Staff should carefully consider the requests for information to include in a CID, seeking what is needed, but always considering the burden the CID will impose. A CID should be narrowly tailored to solicit the information necessary for the investigation. In the event that Staff later determines that additional information is needed from the recipient, Staff may request that the CID recipient provide it voluntarily or seek another CID.

Staff should use the CID templates for the definitions, instructions, and other potentially relevant items found here. (There is a template for requesting documents, interrogatories, and written reports – found here – and a separate template for seeking oral testimony – found here.)

In a CID for the production of documentary material or tangible things, Staff should describe each class of material requested with definiteness and certainty and provide a reasonable return date for the material. CID recipients should comply with the detailed instructions relating to the productions of documents, including the Document Submission Standards (found here), which should be attached to each CID. Similarly, in a CID for written reports or answers to questions, the CID requests should describe the material requested with definiteness and certainty and prescribe a return date.

CIDs for oral testimony should provide the date, time, and place for the investigational hearing and identify the Bureau investigator(s) who will take the testimony. CIDs for oral testimony may either identify a specific individual from whom Staff seeks testimony, or describe particular matters for examination for which the entity must designate one or more individuals to testify on its behalf. As described in Rule 1080.6(a)(4)(ii), the testimony of the designated individual(s) is binding on the entity. Staff should consider on a case-by case basis which type of CID for oral testimony is best-suited to the investigation. Additional procedures for investigational hearings can be found in Rules 1080.7 and 1080.9 and in the policy found here.

Guidance: Staff may want to gather information from third parties in cases in which Staff is considering proceeding ex parte and does not wish to provide notice to the subject of the investigation. CIDs to third parties include a request to the recipient in the "Instructions" section to keep the CID confidential. The confidentiality of CIDs is not always assured. For example, as noted in the policy relating to ECPA referenced in Section I.3, below, electronic service providers may inform their clients about information requests under ECPA.

Furthermore, even in noticed investigations, it is often helpful to gather facts from other sources to ensure the evidence is complete. Examples of third-party requests include CIDs to:

- ISPs, web hosts, or domain name registrars to determine who controls a particular website (e.g. GoDaddy, Domains by Proxy);

- telephone companies to determine who owns certain telephone numbers;
- banks for account information;
- Federal Express for account information; and
- marketing, advertising, payment processing, building management, office equipment leasing or other service providers.

3. ECPA, RFPA, and SBREFA

Procedure: Staff should ensure that each CID request complies with the Electronic Communications Privacy Act (a criminal statute) and the Right to Financial Privacy Act. More information and our policies on these statutes can be found here and here.

As part of its compliance obligations under the Small Business Regulatory Enforcement Fairness Act of 1996, the Bureau should provide small businesses with notice that they can contact the Small Business Administration's National Ombusdsman about the fairness of our enforcement and compliance activities. This notice is included in the CID form and thus will be provided to all entities to which Staff sends a CID. To the extent Staff sends an informal request for information to a small business, however, Staff should include the following notice in the access letter:

> RIGHT TO REGULATORY ENFORCEMENT FAIRNESS
> The CFPB 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.

4. CID Approval

Procedure: A CID must be signed by the Enforcement Director or a Deputy Enforcement Director.

Staff should consult their Deputy Enforcement Director as to contents of the Justification Memo that they may be required to submit, if any. Once a CID has been signed, Staff should forward the CID package (see description in section 5, below), including the signed CID form, to the Enforcement Director via the Litigation Review Inbox (Litigation_Review_Inbox@cfpb.gov). Staff are responsible for updating the matter management system regarding each CID, including linking to the saved CID package. Staff should provide notice to Supervision before serving a CID under the circumstances identified in the "Giving a 'Heads Up' to Supervision" protocol found here.

5. The CID Package

Procedure: Staff should prepare a CID package to serve on the CID recipient. This CID package may include the following items, as appropriate:

- Signed CID Form (found here)
- CID definitions and instructions (templates found here)

- Certificates of Compliance (found here)
- Business Records Certificate (found here)
- Document Submission Standards (found here)
- Rules Relating to Investigations (12 CFR Part 1080) (found here)
- Certificate of Compliance with RFPA (found here and policy found here)
- Notice to Persons Supplying Information (found here and policy found here)

Guidance: Staff may choose to send a cover letter with the CID package. For additional information regarding the items in the CID package, see related policies and the CID checklist found here.

6. Service

Procedure: Once the CID has been signed, Staff should serve one copy of the CID package on the CID recipient consistent with the service procedures in Section 1052(c)(8). In most situations, Staff should send the CID package by certified mail, return receipt requested to the CID recipient's principal place of business. *See* 12 U.S.C. 5562(c)(8)(C). Service in person upon a person authorized to accept service or to the principal office or place of business is also permissible. *See* 12 U.S.C. 5562(c)(8)(A)-(B).

Staff may also, in addition to certified mail, send a courtesy copy of the CID package by another method – UPS overnight mail, email, fax, etc. – depending on whether Staff has prior contact with the CID recipient and/or its counsel and whether Staff knows how the CID recipient agrees to accept service. If Staff obtains agreement from the company or from opposing counsel to accept service through another method, Staff should memorialize the agreement in writing.

Whichever method(s) of service are used, Staff should request and retain the tracking information so, if necessary, it can later be used to demonstrate service. If Staff have difficulty serving the intended recipient, they should consider hiring a process server to effect service.

Guidance: It also may be helpful for Staff to check with colleagues to see whether they have issued CIDs to the recipient in the past. Information about past CIDs should be available through the matter management system.

7. Meet and Confer

Procedure: Once Staff have served the CID on the recipient, the Rules require the recipient to meet-and-confer with Staff within 10 calendar days after receipt of the CID or before the deadline for filing a petition to modify or set aside the CID to discuss compliance with the CID, unless the meet-and-confer requirement has been waived by a Deputy Enforcement Director. *See* Rule 1080.6(c). This initial meet-and-confer is often the juncture at which Staff will address any requests for extensions or alterations, which are discussed in more detail in Section II, below.

The Rules require that the CID recipient make available at the meet-and-confer personnel with the knowledge necessary to resolve any issues relevant to compliance with the CID, including individuals knowledgeable about the CID recipient's information or records management systems and organizational structure. *See* Rule 1080.6(c)(1). Staff may include additional colleagues, including

members of the Litigation Support Team, in the meet-and-confer to fully discuss and address records management and document submission issues.

Staff should discuss any potential production of personally identifiable information ("PII") with the CID recipient at this meeting or another appropriate time to ensure the recipient provides it in an encrypted format and otherwise adequately protects any sensitive data. Before arranging for the receipt of sensitive PII or sensitive health information for any individual, consider whether you actually need the sensitive information. For additional guidance regarding encryption, Staff should review the Document Submission Standards.

Staff should memorialize any proposed agreements made with a CID recipient or their counsel during the meet-and-confer and any other communications through follow-up emails or letters. And whenever possible, more than one attorney or Bureau Investigator should participate in oral communications with the recipient or their counsel to take notes and be a witness to the representations made on the call.

Staff should inquire about a CID recipient's document retention or destruction policies. The model CID instructions require that the CID recipient suspend its usual document retention policies with regard to potentially relevant materials during the pendency of the investigation and any related enforcement action.

II. Requests to Alter Terms of CIDs

Procedure: A CID recipient may seek the Bureau's agreement to alter the terms of the CID by extending the time for compliance, limiting the scope of a particular request or set of requests, or otherwise changing the terms of compliance with the CID. Rule 1080.6(d) gives the Enforcement Director and Deputy Enforcement Directors the authority to negotiate and approve the terms of satisfactory compliance with a CID and extend the time to comply for good cause.

When a CID recipient makes a request for an extension or alteration to a CID, Staff should ask for the request in a letter that provides concrete evidence of the need for changes to the CID or additional time to comply. Staff should negotiate with the opposing side to the extent it is making reasonable requests for modifications or extensions of time. Staff should consider negotiating a staggered production schedule that permits a CID recipient to produce specified information on a rolling basis. To the extent Staff are negotiating about the form of production of ESI, Staff should include a member of the Litigation Support Team in the discussions. At all times, however, Staff should make clear that any agreement is subject to final approval by the Enforcement Director or Deputy Enforcement Directors. The letter describing the modifications and/or permitting additional time to comply with the CID should be signed by the Enforcement Director or Deputy Enforcement Directors.

III. Petitions to Modify or Set Aside CIDs

Procedure: Pursuant to Rule 1080.6(e), the CID recipient may file a petition with the Executive Secretary (with a copy to the Enforcement Director) to modify or set aside a CID within 20 days of service of a CID (or by the return date if it is less than 20 days from service). Prior to filing a petition, counsel for the petitioner must confer with Staff in good faith to try to resolve the issues by agreement. The Enforcement Director and Deputy Enforcement Directors are authorized to extend

the time within which to file a petition to modify or set aside a CID, but such requests are disfavored. *See* Rule 1080.6(e)(2). Petitions and Bureau decisions thereon are made public unless the Bureau determines otherwise for good cause. *See* Rule 1080.6(g).

Staff should refer to the Interim Process for Petitions to Modify CIDs found here for a detailed explanation of procedures, responsibilities, and timing related to petitions to modify or set aside a CID.

Guidance: Whenever possible, Staff should undertake steps to reduce the likelihood of a petition to modify or set aside a CID. One strategy is to ensure at the outset that the CID is suitably tailored to the needs of the investigation and is not overbroad. Staff should also be amenable to working with the CID recipient to narrow CIDs, as described above, consistent with the needs of the investigation.

IV. Enforcing Civil Investigative Demands

Guidance: If a CID recipient fails to comply with a CID, Staff may seek enforcement in federal district court. Enforcement will typically represent the Bureau in CID enforcement actions, in coordination and consultation with Legal, unless there is a specific reason for Legal to staff the matter.

V. Productions

Procedure: CID recipients must make CID responses under a sworn certificate to the effect that all of the requested information in the recipient's possession, custody, or control has been produced. (There is a Certificate of Compliance for Requests for Documents and a separate Certificate of Compliance for Interrogatory Answers and Reports, both of which are found here.) If a recipient withholds responsive information they must provide a privilege log describing all items withheld. *See* Rule 1080.8(a). The person submitting the log must sign it, and the attorney making the claim of privilege also must sign. Rule 1080.8(c) details the procedures that apply for clawing back inadvertently disclosed privileged materials.

Material produced pursuant to a CID is confidential and any disclosure of the information outside the Bureau must proceed pursuant to the Bureau's Rules on the Disclosure of Records and Information at 12 CFR Part 1070.

Guidance: If the circumstances are appropriate, Staff may negotiate an agreement whereby the CID recipient produces its privilege log on a rolling basis that tracks any agreed-upon staggered production of documents. CID recipients also may request a deferral agreement that provides that they do not have to produce a privilege log until the Bureau files a complaint in the matter and proceeds to litigation. You should consult with your Deputy Enforcement Director or Assistant Litigation Deputy about any such request.

As stated in the model CID instructions and described in the Document Submission Standards, CID recipients should produce all materials in electronic format. Staff should make a plan for the intake of materials – particularly electronically stored information – in advance (e.g. loading them into Clearwell, coordinating with litigation support).

The Consumer Financial Protection Bureau ("Bureau") created this policy solely for the internal administrative use of its employees. It is not intended to nor should it be construed to: (1) restrict or limit in any way the Bureau's discretion in exercising its authorities; (2) constitute an interpretation of law; or (3) create or confer upon any person, including one who is the subject of a Bureau investigation or enforcement action, any substantive or procedural rights or defenses that are enforceable in any manner.

Civil Investigative Demands

Revised 9.03.13

In an investigation, Staff may choose to seek information from companies and individuals by issuing civil investigative demands (CIDs). CIDs are compulsory demands for documentary material, tangible things, reports and answers to written questions, and/or oral testimony, which the Bureau can enforce in federal court, if necessary. Depending on the circumstances surrounding a particular investigation, Staff may consider sending a voluntary request for information in lieu of a CID.

The Bureau's rules for issuing and enforcing CIDs are in Section 1052 of the Dodd Frank Act and in the Rules Relating to Investigations in 12 CFR part 1080 (the Rules). Among other things, the statute and Rules specify the procedures that recipients of CIDs should follow when seeking to modify or set aside a CID. This policy is intended to provide guidance for handling issues relating to CIDs, but Staff should review the relevant portions of the statute and Rules prior to issuing a CID.

I. Issuing Civil Investigative Demands

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Procedure: The operative demand document in a CID package is the CID form that the Enforcement Director or a Deputy Enforcement Director signs. The form may be found here. Staff must fill in the CID recipient's full name and address in the "To" field. Staff should research the company's corporate records to ensure the use of the company's full legal name, including "Corp." or similar endings, as well as any appropriate additional designations such as "also d/b/a" or "formerly known as." If the company consists of more than one legal entity, Staff should send separate CIDS to each entity at the outset to reduce the risk that the recipient will consider certain materials to be beyond the scope of the CID because they are retained by a different legal entity.

Staff should check the appropriate box(es) in the "Action Required" section of the CID form. If sending a CID for oral testimony, Staff should include under "Bureau Investigators" the names of each individual who may take testimony during the hearing. For additional guidance, including information about the Location of Investigational Hearing, Staff should review the "Taking Testimony" policy.

In the "Notification of Purpose" section of the CID form, Staff is required to describe the nature of the conduct constituting the alleged violation under investigation and the applicable provisions of law. *See* 12 C.F.R. § 1080.5. This description should match the "Statement of Purpose" included in the Investigation Opening Memorandum. If the scope or circumstances of the investigation has changed since opening, however, Staff should consult with the investigation's supervising Deputy Enforcement Director or Assistant Litigation Deputy about making any appropriate changes to the description.

For additional guidance, Staff should review the "Complying with Rule of Investigation 1080.5 (Notification of Purpose)" policy.

Staff should generally list the Deputy Enforcement Director as the Custodian and the investigation's paralegal as the Deputy Custodian, unless other designation is deemed appropriate. Staff should list the all attorneys assigned to the investigation as Bureau Counsel.

2. The Requests

Procedure: In an investigation, Staff may decide to compel the subject of the investigation or a third-party to produce documents, tangible things, reports and answers to written questions, and/or oral testimony. Staff should carefully consider the requests for information to include in a CID, seeking what is needed, but always considering the burden the CID will impose. A CID should be narrowly tailored to solicit the information necessary for the investigation. In the event that Staff later determines that additional information is needed from the recipient, Staff may request that the CID recipient provide it voluntarily or seek another CID.

Staff should use the CID templates for the definitions, instructions, and other potentially relevant items found here. (There is a template for requesting documents, interrogatories, and written reports – found here – and a separate template for seeking oral testimony – found here.)

In a CID for the production of documentary material or tangible things, Staff should describe each class of material requested with definiteness and certainty and provide a reasonable return date for the material. CID recipients should comply with the detailed instructions relating to the productions of documents, including the Document Submission Standards (found here), which should be attached to each CID. Similarly, in a CID for written reports or answers to questions, the CID requests should describe the material requested with definiteness and certainty and prescribe a return date.

CIDs for oral testimony should provide the date, time, and place for the investigational hearing and identify the Bureau investigator(s) who will take the testimony. CIDs for oral testimony may either identify a specific individual from whom Staff seeks testimony, or describe particular matters for examination for which the entity must designate one or more individuals to testify on its behalf. As described in Rule 1080.6(a)(4)(ii), the testimony of the designated individual(s) is binding on the entity. Staff should consider on a case-by case basis which type of CID for oral testimony is best-suited to the investigation. Additional procedures for investigational hearings can be found in Rules 1080.7 and 1080.9 and in the policy found here.

Guidance: Staff may want to gather information from third parties in cases in which Staff is considering proceeding ex parte and does not wish to provide notice to the subject of the investigation. CIDs to third parties include a request to the recipient in the "Instructions" section to keep the CID confidential. The confidentiality of CIDs is not always assured. For example, as noted in the policy relating to ECPA referenced in Section I.3, below, electronic service providers may inform their clients about information requests under ECPA.

Furthermore, even in noticed investigations, it is often helpful to gather facts from other sources to ensure the evidence is complete. Examples of third-party requests include CIDs to:

- ISPs, web hosts, or domain name registrars to determine who controls a particular website (e.g. GoDaddy, Domains by Proxy);

- telephone companies to determine who owns certain telephone numbers;
- banks for account information;
- Federal Express for account information; and
- marketing, advertising, payment processing, building management, office equipment leasing or other service providers.

3. ECPA, RFPA, and SBREFA

Procedure: Staff should ensure that each CID request complies with the Electronic Communications Privacy Act (a criminal statute) and the Right to Financial Privacy Act. More information and our policies on these statutes can be found here and here.

As part of its compliance obligations under the Small Business Regulatory Enforcement Fairness Act of 1996, the Bureau should provide small businesses with notice that they can contact the Small Business Administration's National Ombusdsman about the fairness of our enforcement and compliance activities. This notice is included in the CID form and thus will be provided to all entities to which Staff sends a CID. To the extent Staff sends an informal request for information to a small business, however, Staff should include the following notice in the access letter:

> RIGHT TO REGULATORY ENFORCEMENT FAIRNESS
> The CFPB 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.

4. CID Approval

Procedure: A CID must be signed by the Enforcement Director or a Deputy Enforcement Director.

Staff should consult their Deputy Enforcement Director as to contents of the Justification Memo that they may be required to submit, if any. Once a CID has been signed, Staff should forward the CID package (see description in section 5, below), including the signed CID form, to the Enforcement Director via the Litigation Review Inbox (Litigation_Review_Inbox@cfpb.gov). Staff are responsible for updating the matter management system regarding each CID, including linking to the saved CID package. Staff should provide notice to Supervision before serving a CID under the circumstances identified in the "Giving a 'Heads Up' to Supervision" protocol found here.

5. The CID Package

Procedure: Staff should prepare a CID package to serve on the CID recipient. This CID package may include the following items, as appropriate:

- Signed CID Form (found here)
- CID definitions and instructions (templates found here)

- Certificates of Compliance (found here)
- Business Records Certificate (found here)
- Document Submission Standards (found here)
- Rules Relating to Investigations (12 CFR Part 1080) (found here)
- Certificate of Compliance with RFPA (found here and policy found here)
- Notice to Persons Supplying Information (found here and policy found here)

Guidance: Staff may choose to send a cover letter with the CID package. For additional information regarding the items in the CID package, see related policies and the CID checklist found here.

6. Service

Procedure: Once the CID has been signed, Staff should serve one copy of the CID package on the CID recipient consistent with the service procedures in Section 1052(c)(8). In most situations, Staff should send the CID package by certified mail, return receipt requested to the CID recipient's principal place of business. *See* 12 U.S.C. 5562(c)(8)(C). Service in person upon a person authorized to accept service or to the principal office or place of business is also permissible. *See* 12 U.S.C. 5562(c)(8)(A)-(B).

Staff may also, in addition to certified mail, send a courtesy copy of the CID package by another method – UPS overnight mail, email, fax, etc. – depending on whether Staff has prior contact with the CID recipient and/or its counsel and whether Staff knows how the CID recipient agrees to accept service. If Staff obtains agreement from the company or from opposing counsel to accept service through another method, Staff should memorialize the agreement in writing.

Whichever method(s) of service are used, Staff should request and retain the tracking information so, if necessary, it can later be used to demonstrate service. If Staff have difficulty serving the intended recipient, they should consider hiring a process server to effect service.

Guidance: It also may be helpful for Staff to check with colleagues to see whether they have issued CIDs to the recipient in the past. Information about past CIDs should be available through the matter management system.

7. Meet and Confer

Procedure: Once Staff have served the CID on the recipient, the Rules require the recipient to meet-and-confer with Staff within 10 calendar days after receipt of the CID or before the deadline for filing a petition to modify or set aside the CID to discuss compliance with the CID, unless the meet-and-confer requirement has been waived by a Deputy Enforcement Director. *See* Rule 1080.6(c). This initial meet-and-confer is often the juncture at which Staff will address any requests for extensions or alterations, which are discussed in more detail in Section II, below.

The Rules require that the CID recipient make available at the meet-and-confer personnel with the knowledge necessary to resolve any issues relevant to compliance with the CID, including individuals knowledgeable about the CID recipient's information or records management systems and organizational structure. *See* Rule 1080.6(c)(1). Staff may include additional colleagues, including

members of the Litigation Support Team, in the meet-and-confer to fully discuss and address records management and document submission issues.

Staff should discuss any potential production of personally identifiable information ("PII") with the CID recipient at this meeting or another appropriate time to ensure the recipient provides it in an encrypted format and otherwise adequately protects any sensitive data. Before arranging for the receipt of sensitive PII or sensitive health information for any individual, consider whether you actually need the sensitive information. For additional guidance regarding encryption, Staff should review the Document Submission Standards.

Staff should memorialize any proposed agreements made with a CID recipient or their counsel during the meet-and-confer and any other communications through follow-up emails or letters. And whenever possible, more than one attorney or Bureau Investigator should participate in oral communications with the recipient or their counsel to take notes and be a witness to the representations made on the call.

Staff should inquire about a CID recipient's document retention or destruction policies. The model CID instructions require that the CID recipient suspend its usual document retention policies with regard to potentially relevant materials during the pendency of the investigation and any related enforcement action.

II. Requests to Alter Terms of CIDs

Procedure: A CID recipient may seek the Bureau's agreement to alter the terms of the CID by extending the time for compliance, limiting the scope of a particular request or set of requests, or otherwise changing the terms of compliance with the CID. Rule 1080.6(d) gives the Enforcement Director and Deputy Enforcement Directors the authority to negotiate and approve the terms of satisfactory compliance with a CID and extend the time to comply for good cause.

When a CID recipient makes a request for an extension or alteration to a CID, Staff should ask for the request in a letter that provides concrete evidence of the need for changes to the CID or additional time to comply. Staff should negotiate with the opposing side to the extent it is making reasonable requests for modifications or extensions of time. Staff should consider negotiating a staggered production schedule that permits a CID recipient to produce specified information on a rolling basis. To the extent Staff are negotiating about the form of production of ESI, Staff should include a member of the Litigation Support Team in the discussions. At all times, however, Staff should make clear that any agreement is subject to final approval by the Enforcement Director or Deputy Enforcement Directors. The letter describing the modifications and/or permitting additional time to comply with the CID should be signed by the Enforcement Director or Deputy Enforcement Directors.

III. Petitions to Modify or Set Aside CIDs

Procedure: Pursuant to Rule 1080.6(e), the CID recipient may file a petition with the Executive Secretary (with a copy to the Enforcement Director) to modify or set aside a CID within 20 days of service of a CID (or by the return date if it is less than 20 days from service). Prior to filing a petition, counsel for the petitioner must confer with Staff in good faith to try to resolve the issues by agreement. The Enforcement Director and Deputy Enforcement Directors are authorized to extend

the time within which to file a petition to modify or set aside a CID, but such requests are disfavored. *See* Rule 1080.6(e)(2). Petitions and Bureau decisions thereon are made public unless the Bureau determines otherwise for good cause. *See* Rule 1080.6(g).

Staff should refer to the Interim Process for Petitions to Modify CIDs found here for a detailed explanation of procedures, responsibilities, and timing related to petitions to modify or set aside a CID.

Guidance: Whenever possible, Staff should undertake steps to reduce the likelihood of a petition to modify or set aside a CID. One strategy is to ensure at the outset that the CID is suitably tailored to the needs of the investigation and is not overbroad. Staff should also be amenable to working with the CID recipient to narrow CIDs, as described above, consistent with the needs of the investigation.

IV. Enforcing Civil Investigative Demands

Guidance: If a CID recipient fails to comply with a CID, Staff may seek enforcement in federal district court. Enforcement will typically represent the Bureau in CID enforcement actions, in coordination and consultation with Legal, unless there is a specific reason for Legal to staff the matter.

V. Productions

Procedure: CID recipients must make CID responses under a sworn certificate to the effect that all of the requested information in the recipient's possession, custody, or control has been produced. (There is a Certificate of Compliance for Requests for Documents and a separate Certificate of Compliance for Interrogatory Answers and Reports, both of which are found here.) If a recipient withholds responsive information they must provide a privilege log describing all items withheld. *See* Rule 1080.8(a). The person submitting the log must sign it, and the attorney making the claim of privilege also must sign. Rule 1080.8(c) details the procedures that apply for clawing back inadvertently disclosed privileged materials.

Material produced pursuant to a CID is confidential and any disclosure of the information outside the Bureau must proceed pursuant to the Bureau's Rules on the Disclosure of Records and Information at 12 CFR Part 1070.

Guidance: If the circumstances are appropriate, Staff may negotiate an agreement whereby the CID recipient produces its privilege log on a rolling basis that tracks any agreed-upon staggered production of documents. CID recipients also may request a deferral agreement that provides that they do not have to produce a privilege log until the Bureau files a complaint in the matter and proceeds to litigation. You should consult with your Deputy Enforcement Director or Assistant Litigation Deputy about any such request.

As stated in the model CID instructions and described in the Document Submission Standards, CID recipients should produce all materials in electronic format. Staff should make a plan for the intake of materials – particularly electronically stored information – in advance (e.g. loading them into Clearwell, coordinating with litigation support).

The Consumer Financial Protection Bureau ("Bureau") created this policy solely for the internal administrative use of its employees. It is not intended to nor should it be construed to: (1) restrict or limit in any way the Bureau's discretion in exercising its authorities; (2) constitute an interpretation of law; or (3) create or confer upon any person, including one who is the subject of a Bureau investigation or enforcement action, any substantive or procedural rights or defenses that are enforceable in any manner.

Civil Investigative Demands

Revised 9.03.13

In an investigation, Staff may choose to seek information from companies and individuals by issuing civil investigative demands (CIDs). CIDs are compulsory demands for documentary material, tangible things, reports and answers to written questions, and/or oral testimony, which the Bureau can enforce in federal court, if necessary. Depending on the circumstances surrounding a particular investigation, Staff may consider sending a voluntary request for information in lieu of a CID.

The Bureau's rules for issuing and enforcing CIDs are in Section 1052 of the Dodd Frank Act and in the Rules Relating to Investigations in 12 CFR part 1080 (the Rules). Among other things, the statute and Rules specify the procedures that recipients of CIDs should follow when seeking to modify or set aside a CID. This policy is intended to provide guidance for handling issues relating to CIDs, but Staff should review the relevant portions of the statute and Rules prior to issuing a CID.

I. Issuing Civil Investigative Demands

1. The CID Form

Procedure: The operative demand document in a CID package is the CID form that the Enforcement Director or a Deputy Enforcement Director signs. The form may be found here. Staff must fill in the CID recipient's full name and address in the "To" field. Staff should research the company's corporate records to ensure the use of the company's full legal name, including "Corp." or similar endings, as well as any appropriate additional designations such as "also d/b/a" or "formerly known as." If the company consists of more than one legal entity, Staff should send separate CIDS to each entity at the outset to reduce the risk that the recipient will consider certain materials to be beyond the scope of the CID because they are retained by a different legal entity.

Staff should check the appropriate box(es) in the "Action Required" section of the CID form. If sending a CID for oral testimony, Staff should include under "Bureau Investigators" the names of each individual who may take testimony during the hearing. For additional guidance, including information about the Location of Investigational Hearing, Staff should review the "Taking Testimony" policy.

In the "Notification of Purpose" section of the CID form, Staff is required to describe the nature of the conduct constituting the alleged violation under investigation and the applicable provisions of law. *See* 12 C.F.R. § 1080.5. This description should match the "Statement of Purpose" included in the Investigation Opening Memorandum. If the scope or circumstances of the investigation has changed since opening, however, Staff should consult with the investigation's supervising Deputy Enforcement Director or Assistant Litigation Deputy about making any appropriate changes to the description.

For additional guidance, Staff should review the "Complying with Rule of Investigation 1080.5 (Notification of Purpose)" policy.

Staff should generally list the Deputy Enforcement Director as the Custodian and the investigation's paralegal as the Deputy Custodian, unless other designation is deemed appropriate. Staff should list the all attorneys assigned to the investigation as Bureau Counsel.

2. The Requests

Procedure: In an investigation, Staff may decide to compel the subject of the investigation or a third-party to produce documents, tangible things, reports and answers to written questions, and/or oral testimony. Staff should carefully consider the requests for information to include in a CID, seeking what is needed, but always considering the burden the CID will impose. A CID should be narrowly tailored to solicit the information necessary for the investigation. In the event that Staff later determines that additional information is needed from the recipient, Staff may request that the CID recipient provide it voluntarily or seek another CID.

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Guidance: Staff may want to gather information from third parties in cases in which Staff is considering proceeding ex parte and does not wish to provide notice to the subject of the investigation. CIDs to third parties include a request to the recipient in the "Instructions" section to keep the CID confidential. The confidentiality of CIDs is not always assured. For example, as noted in the policy relating to ECPA referenced in Section I.3, below, electronic service providers may inform their clients about information requests under ECPA.

Furthermore, even in noticed investigations, it is often helpful to gather facts from other sources to ensure the evidence is complete. Examples of third-party requests include CIDs to:

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Procedure: Staff should ensure that each CID request complies with the Electronic Communications Privacy Act (a criminal statute) and the Right to Financial Privacy Act. More information and our policies on these statutes can be found here and here.

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4. CID Approval

Procedure: A CID must be signed by the Enforcement Director or a Deputy Enforcement Director.

Staff should consult their Deputy Enforcement Director as to contents of the Justification Memo that they may be required to submit, if any. Once a CID has been signed, Staff should forward the CID package (see description in section 5, below), including the signed CID form, to the Enforcement Director via the Litigation Review Inbox (Litigation_Review_Inbox@cfpb.gov). Staff are responsible for updating the matter management system regarding each CID, including linking to the saved CID package. Staff should provide notice to Supervision before serving a CID under the circumstances identified in the "Giving a 'Heads Up' to Supervision" protocol found here.

5. The CID Package

Procedure: Staff should prepare a CID package to serve on the CID recipient. This CID package may include the following items, as appropriate:

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- CID definitions and instructions (templates found here)

- Certificates of Compliance (found here)
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- Certificate of Compliance with RFPA (found here and policy found here)
- Notice to Persons Supplying Information (found here and policy found here)

Guidance: Staff may choose to send a cover letter with the CID package. For additional information regarding the items in the CID package, see related policies and the CID checklist found here.

6. Service

Procedure: Once the CID has been signed, Staff should serve one copy of the CID package on the CID recipient consistent with the service procedures in Section 1052(c)(8). In most situations, Staff should send the CID package by certified mail, return receipt requested to the CID recipient's principal place of business. *See* 12 U.S.C. 5562(c)(8)(C). Service in person upon a person authorized to accept service or to the principal office or place of business is also permissible. *See* 12 U.S.C. 5562(c)(8)(A)-(B).

Staff may also, in addition to certified mail, send a courtesy copy of the CID package by another method – UPS overnight mail, email, fax, etc. – depending on whether Staff has prior contact with the CID recipient and/or its counsel and whether Staff knows how the CID recipient agrees to accept service. If Staff obtains agreement from the company or from opposing counsel to accept service through another method, Staff should memorialize the agreement in writing.

Whichever method(s) of service are used, Staff should request and retain the tracking information so, if necessary, it can later be used to demonstrate service. If Staff have difficulty serving the intended recipient, they should consider hiring a process server to effect service.

Guidance: It also may be helpful for Staff to check with colleagues to see whether they have issued CIDs to the recipient in the past. Information about past CIDs should be available through the matter management system.

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Procedure: Once Staff have served the CID on the recipient, the Rules require the recipient to meet-and-confer with Staff within 10 calendar days after receipt of the CID or before the deadline for filing a petition to modify or set aside the CID to discuss compliance with the CID, unless the meet-and-confer requirement has been waived by a Deputy Enforcement Director. *See* Rule 1080.6(c). This initial meet-and-confer is often the juncture at which Staff will address any requests for extensions or alterations, which are discussed in more detail in Section II, below.

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members of the Litigation Support Team, in the meet-and-confer to fully discuss and address records management and document submission issues.

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Procedure: A CID recipient may seek the Bureau's agreement to alter the terms of the CID by extending the time for compliance, limiting the scope of a particular request or set of requests, or otherwise changing the terms of compliance with the CID. Rule 1080.6(d) gives the Enforcement Director and Deputy Enforcement Directors the authority to negotiate and approve the terms of satisfactory compliance with a CID and extend the time to comply for good cause.

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III. Petitions to Modify or Set Aside CIDs

Procedure: Pursuant to Rule 1080.6(e), the CID recipient may file a petition with the Executive Secretary (with a copy to the Enforcement Director) to modify or set aside a CID within 20 days of service of a CID (or by the return date if it is less than 20 days from service). Prior to filing a petition, counsel for the petitioner must confer with Staff in good faith to try to resolve the issues by agreement. The Enforcement Director and Deputy Enforcement Directors are authorized to extend

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Guidance: If a CID recipient fails to comply with a CID, Staff may seek enforcement in federal district court. Enforcement will typically represent the Bureau in CID enforcement actions, in coordination and consultation with Legal, unless there is a specific reason for Legal to staff the matter.

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Procedure: CID recipients must make CID responses under a sworn certificate to the effect that all of the requested information in the recipient's possession, custody, or control has been produced. (There is a Certificate of Compliance for Requests for Documents and a separate Certificate of Compliance for Interrogatory Answers and Reports, both of which are found here.) If a recipient withholds responsive information they must provide a privilege log describing all items withheld. *See* Rule 1080.8(a). The person submitting the log must sign it, and the attorney making the claim of privilege also must sign. Rule 1080.8(c) details the procedures that apply for clawing back inadvertently disclosed privileged materials.

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Civil Investigative Demands

Revised 9.03.13

In an investigation, Staff may choose to seek information from companies and individuals by issuing civil investigative demands (CIDs). CIDs are compulsory demands for documentary material, tangible things, reports and answers to written questions, and/or oral testimony, which the Bureau can enforce in federal court, if necessary. Depending on the circumstances surrounding a particular investigation, Staff may consider sending a voluntary request for information in lieu of a CID.

The Bureau's rules for issuing and enforcing CIDs are in Section 1052 of the Dodd Frank Act and in the Rules Relating to Investigations in 12 CFR part 1080 (the Rules). Among other things, the statute and Rules specify the procedures that recipients of CIDs should follow when seeking to modify or set aside a CID. This policy is intended to provide guidance for handling issues relating to CIDs, but Staff should review the relevant portions of the statute and Rules prior to issuing a CID.

I. Issuing Civil Investigative Demands

1. The CID Form

Procedure: The operative demand document in a CID package is the CID form that the Enforcement Director or a Deputy Enforcement Director signs. The form may be found here. Staff must fill in the CID recipient's full name and address in the "To" field. Staff should research the company's corporate records to ensure the use of the company's full legal name, including "Corp." or similar endings, as well as any appropriate additional designations such as "also d/b/a" or "formerly known as." If the company consists of more than one legal entity, Staff should send separate CIDS to each entity at the outset to reduce the risk that the recipient will consider certain materials to be beyond the scope of the CID because they are retained by a different legal entity.

Staff should check the appropriate box(es) in the "Action Required" section of the CID form. If sending a CID for oral testimony, Staff should include under "Bureau Investigators" the names of each individual who may take testimony during the hearing. For additional guidance, including information about the Location of Investigational Hearing, Staff should review the "Taking Testimony" policy.

In the "Notification of Purpose" section of the CID form, Staff is required to describe the nature of the conduct constituting the alleged violation under investigation and the applicable provisions of law. *See* 12 C.F.R. § 1080.5. This description should match the "Statement of Purpose" included in the Investigation Opening Memorandum. If the scope or circumstances of the investigation has changed since opening, however, Staff should consult with the investigation's supervising Deputy Enforcement Director or Assistant Litigation Deputy about making any appropriate changes to the description.

For additional guidance, Staff should review the "Complying with Rule of Investigation 1080.5 (Notification of Purpose)" policy.

Staff should generally list the Deputy Enforcement Director as the Custodian and the investigation's paralegal as the Deputy Custodian, unless other designation is deemed appropriate. Staff should list the all attorneys assigned to the investigation as Bureau Counsel.

2. The Requests

Procedure: In an investigation, Staff may decide to compel the subject of the investigation or a third-party to produce documents, tangible things, reports and answers to written questions, and/or oral testimony. Staff should carefully consider the requests for information to include in a CID, seeking what is needed, but always considering the burden the CID will impose. A CID should be narrowly tailored to solicit the information necessary for the investigation. In the event that Staff later determines that additional information is needed from the recipient, Staff may request that the CID recipient provide it voluntarily or seek another CID.

Staff should use the CID templates for the definitions, instructions, and other potentially relevant items found here. (There is a template for requesting documents, interrogatories, and written reports – found here – and a separate template for seeking oral testimony – found here.)

In a CID for the production of documentary material or tangible things, Staff should describe each class of material requested with definiteness and certainty and provide a reasonable return date for the material. CID recipients should comply with the detailed instructions relating to the productions of documents, including the Document Submission Standards (found here), which should be attached to each CID. Similarly, in a CID for written reports or answers to questions, the CID requests should describe the material requested with definiteness and certainty and prescribe a return date.

CIDs for oral testimony should provide the date, time, and place for the investigational hearing and identify the Bureau investigator(s) who will take the testimony. CIDs for oral testimony may either identify a specific individual from whom Staff seeks testimony, or describe particular matters for examination for which the entity must designate one or more individuals to testify on its behalf. As described in Rule 1080.6(a)(4)(ii), the testimony of the designated individual(s) is binding on the entity. Staff should consider on a case-by case basis which type of CID for oral testimony is best-suited to the investigation. Additional procedures for investigational hearings can be found in Rules 1080.7 and 1080.9 and in the policy found here.

Guidance: Staff may want to gather information from third parties in cases in which Staff is considering proceeding ex parte and does not wish to provide notice to the subject of the investigation. CIDs to third parties include a request to the recipient in the "Instructions" section to keep the CID confidential. The confidentiality of CIDs is not always assured. For example, as noted in the policy relating to ECPA referenced in Section I.3, below, electronic service providers may inform their clients about information requests under ECPA.

Furthermore, even in noticed investigations, it is often helpful to gather facts from other sources to ensure the evidence is complete. Examples of third-party requests include CIDs to:

- ISPs, web hosts, or domain name registrars to determine who controls a particular website (e.g. GoDaddy, Domains by Proxy);

- telephone companies to determine who owns certain telephone numbers;
- banks for account information;
- Federal Express for account information; and
- marketing, advertising, payment processing, building management, office equipment leasing or other service providers.

3. ECPA, RFPA, and SBREFA

Procedure: Staff should ensure that each CID request complies with the Electronic Communications Privacy Act (a criminal statute) and the Right to Financial Privacy Act. More information and our policies on these statutes can be found here and here.

As part of its compliance obligations under the Small Business Regulatory Enforcement Fairness Act of 1996, the Bureau should provide small businesses with notice that they can contact the Small Business Administration's National Ombusdsman about the fairness of our enforcement and compliance activities. This notice is included in the CID form and thus will be provided to all entities to which Staff sends a CID. To the extent Staff sends an informal request for information to a small business, however, Staff should include the following notice in the access letter:

> RIGHT TO REGULATORY ENFORCEMENT FAIRNESS
> The CFPB 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.

4. CID Approval

Procedure: A CID must be signed by the Enforcement Director or a Deputy Enforcement Director.

Staff should consult their Deputy Enforcement Director as to contents of the Justification Memo that they may be required to submit, if any. Once a CID has been signed, Staff should forward the CID package (see description in section 5, below), including the signed CID form, to the Enforcement Director via the Litigation Review Inbox (Litigation_Review_Inbox@cfpb.gov). Staff are responsible for updating the matter management system regarding each CID, including linking to the saved CID package. Staff should provide notice to Supervision before serving a CID under the circumstances identified in the "Giving a 'Heads Up' to Supervision" protocol found here.

5. The CID Package

Procedure: Staff should prepare a CID package to serve on the CID recipient. This CID package may include the following items, as appropriate:

- Signed CID Form (found here)
- CID definitions and instructions (templates found here)

- Certificates of Compliance (found here)
- Business Records Certificate (found here)
- Document Submission Standards (found here)
- Rules Relating to Investigations (12 CFR Part 1080) (found here)
- Certificate of Compliance with RFPA (found here and policy found here)
- Notice to Persons Supplying Information (found here and policy found here)

Guidance: Staff may choose to send a cover letter with the CID package. For additional information regarding the items in the CID package, see related policies and the CID checklist found here.

6. Service

Procedure: Once the CID has been signed, Staff should serve one copy of the CID package on the CID recipient consistent with the service procedures in Section 1052(c)(8). In most situations, Staff should send the CID package by certified mail, return receipt requested to the CID recipient's principal place of business. *See* 12 U.S.C. 5562(c)(8)(C). Service in person upon a person authorized to accept service or to the principal office or place of business is also permissible. *See* 12 U.S.C. 5562(c)(8)(A)-(B).

Staff may also, in addition to certified mail, send a courtesy copy of the CID package by another method – UPS overnight mail, email, fax, etc. – depending on whether Staff has prior contact with the CID recipient and/or its counsel and whether Staff knows how the CID recipient agrees to accept service. If Staff obtains agreement from the company or from opposing counsel to accept service through another method, Staff should memorialize the agreement in writing.

Whichever method(s) of service are used, Staff should request and retain the tracking information so, if necessary, it can later be used to demonstrate service. If Staff have difficulty serving the intended recipient, they should consider hiring a process server to effect service.

Guidance: It also may be helpful for Staff to check with colleagues to see whether they have issued CIDs to the recipient in the past. Information about past CIDs should be available through the matter management system.

7. Meet and Confer

Procedure: Once Staff have served the CID on the recipient, the Rules require the recipient to meet-and-confer with Staff within 10 calendar days after receipt of the CID or before the deadline for filing a petition to modify or set aside the CID to discuss compliance with the CID, unless the meet-and-confer requirement has been waived by a Deputy Enforcement Director. *See* Rule 1080.6(c). This initial meet-and-confer is often the juncture at which Staff will address any requests for extensions or alterations, which are discussed in more detail in Section II, below.

The Rules require that the CID recipient make available at the meet-and-confer personnel with the knowledge necessary to resolve any issues relevant to compliance with the CID, including individuals knowledgeable about the CID recipient's information or records management systems and organizational structure. *See* Rule 1080.6(c)(1). Staff may include additional colleagues, including

members of the Litigation Support Team, in the meet-and-confer to fully discuss and address records management and document submission issues.

Staff should discuss any potential production of personally identifiable information ("PII") with the CID recipient at this meeting or another appropriate time to ensure the recipient provides it in an encrypted format and otherwise adequately protects any sensitive data. Before arranging for the receipt of sensitive PII or sensitive health information for any individual, consider whether you actually need the sensitive information. For additional guidance regarding encryption, Staff should review the Document Submission Standards.

Staff should memorialize any proposed agreements made with a CID recipient or their counsel during the meet-and-confer and any other communications through follow-up emails or letters. And whenever possible, more than one attorney or Bureau Investigator should participate in oral communications with the recipient or their counsel to take notes and be a witness to the representations made on the call.

Staff should inquire about a CID recipient's document retention or destruction policies. The model CID instructions require that the CID recipient suspend its usual document retention policies with regard to potentially relevant materials during the pendency of the investigation and any related enforcement action.

II. Requests to Alter Terms of CIDs

Procedure: A CID recipient may seek the Bureau's agreement to alter the terms of the CID by extending the time for compliance, limiting the scope of a particular request or set of requests, or otherwise changing the terms of compliance with the CID. Rule 1080.6(d) gives the Enforcement Director and Deputy Enforcement Directors the authority to negotiate and approve the terms of satisfactory compliance with a CID and extend the time to comply for good cause.

When a CID recipient makes a request for an extension or alteration to a CID, Staff should ask for the request in a letter that provides concrete evidence of the need for changes to the CID or additional time to comply. Staff should negotiate with the opposing side to the extent it is making reasonable requests for modifications or extensions of time. Staff should consider negotiating a staggered production schedule that permits a CID recipient to produce specified information on a rolling basis. To the extent Staff are negotiating about the form of production of ESI, Staff should include a member of the Litigation Support Team in the discussions. At all times, however, Staff should make clear that any agreement is subject to final approval by the Enforcement Director or Deputy Enforcement Directors. The letter describing the modifications and/or permitting additional time to comply with the CID should be signed by the Enforcement Director or Deputy Enforcement Directors.

III. Petitions to Modify or Set Aside CIDs

Procedure: Pursuant to Rule 1080.6(e), the CID recipient may file a petition with the Executive Secretary (with a copy to the Enforcement Director) to modify or set aside a CID within 20 days of service of a CID (or by the return date if it is less than 20 days from service). Prior to filing a petition, counsel for the petitioner must confer with Staff in good faith to try to resolve the issues by agreement. The Enforcement Director and Deputy Enforcement Directors are authorized to extend

the time within which to file a petition to modify or set aside a CID, but such requests are disfavored. *See* Rule 1080.6(e)(2). Petitions and Bureau decisions thereon are made public unless the Bureau determines otherwise for good cause. *See* Rule 1080.6(g).

Staff should refer to the Interim Process for Petitions to Modify CIDs found here for a detailed explanation of procedures, responsibilities, and timing related to petitions to modify or set aside a CID.

Guidance: Whenever possible, Staff should undertake steps to reduce the likelihood of a petition to modify or set aside a CID. One strategy is to ensure at the outset that the CID is suitably tailored to the needs of the investigation and is not overbroad. Staff should also be amenable to working with the CID recipient to narrow CIDs, as described above, consistent with the needs of the investigation.

IV. Enforcing Civil Investigative Demands

Guidance: If a CID recipient fails to comply with a CID, Staff may seek enforcement in federal district court. Enforcement will typically represent the Bureau in CID enforcement actions, in coordination and consultation with Legal, unless there is a specific reason for Legal to staff the matter.

V. Productions

Procedure: CID recipients must make CID responses under a sworn certificate to the effect that all of the requested information in the recipient's possession, custody, or control has been produced. (There is a Certificate of Compliance for Requests for Documents and a separate Certificate of Compliance for Interrogatory Answers and Reports, both of which are found here.) If a recipient withholds responsive information they must provide a privilege log describing all items withheld. *See* Rule 1080.8(a). The person submitting the log must sign it, and the attorney making the claim of privilege also must sign. Rule 1080.8(c) details the procedures that apply for clawing back inadvertently disclosed privileged materials.

Material produced pursuant to a CID is confidential and any disclosure of the information outside the Bureau must proceed pursuant to the Bureau's Rules on the Disclosure of Records and Information at 12 CFR Part 1070.

Guidance: If the circumstances are appropriate, Staff may negotiate an agreement whereby the CID recipient produces its privilege log on a rolling basis that tracks any agreed-upon staggered production of documents. CID recipients also may request a deferral agreement that provides that they do not have to produce a privilege log until the Bureau files a complaint in the matter and proceeds to litigation. You should consult with your Deputy Enforcement Director or Assistant Litigation Deputy about any such request.

As stated in the model CID instructions and described in the Document Submission Standards, CID recipients should produce all materials in electronic format. Staff should make a plan for the intake of materials – particularly electronically stored information – in advance (e.g. loading them into Clearwell, coordinating with litigation support).

The Consumer Financial Protection Bureau ("Bureau") created this policy solely for the internal administrative use of its employees. It is not intended to nor should it be construed to: (1) restrict or limit in any way the Bureau's discretion in exercising its authorities; (2) constitute an interpretation of law; or (3) create or confer upon any person, including one who is the subject of a Bureau investigation or enforcement action, any substantive or procedural rights or defenses that are enforceable in any manner.