April 26, 2018

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: RFI Regarding Bureau Civil Investigative Demands and Associated Processes [Docket No. Bureau- 2018-0001]

Dear Ms. Jackson:

The American Financial Services Association ("AFSA")[1] appreciates the Bureau of Consumer Financial Protection's request for comments and information ("RFI") to assist the Bureau in considering whether and how to amend its Civil Investigative Demands ("CID") and associated processes. After operating under the CID process for several years, it is appropriate to review the process and how it fits within the overall enforcement regime.

We are grateful for this opportunity to discuss how the Bureau's processes and associated rules could be updated, streamlined, or revised to better achieve the Bureau's statutory objectives; minimize burdens, impacts, or costs on financial institutions; and align the Bureau's rules and processes more closely with those of other agencies, particularly the U.S. Securities and Exchange Commission ("SEC").

The proper role of CIDs are as one investigative tool within the enforcement regime. There are a variety of investigative tools that the Bureau could use, and it is more efficient and effective to use all the tools rather than this single process. Reasons for a more limited use of CIDs include the fact that they are expensive, time-consuming and often inefficient. Thus, CIDs should not be used as the primary investigative tool. Instead, as will be explained more fully in our response to the RFI regarding Bureau enforcement processes, AFSA recommends that the Bureau overhaul its enforcement process and institute an informal investigative process to complement its formal investigation process.

Even if the enforcement regime remains unchanged, we believe that many of our CID recommendations should be implemented to improve efficiency and effectiveness, as well as reduce unnecessary costs, burdens, and unintended consequences to the Bureau and the subjects of investigations.

Before explaining our recommendations and suggestions, we emphasize that only systemic, structural change can genuinely accomplish lasting reform. The Acting Director of the Bureau can change procedure, policy, and even possibly agency culture. With the Bureau's current structure, however, all this can be reversed with a new administration. AFSA urges the Bureau to endorse legislation to replace the current single regulator structure with

[1] Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

a bipartisan, five-member commission similar to that in place in other independent regulatory agencies. Only a commission structure will provide the necessary safeguards to stop the Bureau from exceeding its statutory authority.

I. Proper Role of CIDs As One Investigative Tool Within Enforcement Regime

The Bureau uses the CID process as the investigative tool rather than an investigative tool. AFSA strongly recommends overhauling the enforcement regime. Part of this sea change should be a significant change in the application of, and processes surrounding, the CIDs. There are a variety of investigative tools that the Bureau could use, and it is more efficient and effective to use all the tools rather than this single process. There is no one-size-fits-all investigative process and Bureau staff needs options for most effectively and efficiently investigating different circumstances.

Absent extraordinary circumstances, for federal- or state-licensed or regulated entities, an informal process should be conducted before the Bureau launches a formal investigation. Moreover, enforcement staff should have a more cooperative approach with CID recipients, particularly federal- or state-licensed or regulated entities. The unique circumstances and incentives surrounding regulated and/or licensed entities versus unregulated or unlicensed entities may generally warrant informal investigations and voluntary requests for the former.

Less burdensome and costly investigative tools should be used when possible and prior to the formal CID process. Regulated entities will generally treat voluntary requests and CIDs the same, so the Bureau will generally get the same information without the collateral consequences of formal action. Bureau staff should use voluntary requests and discussions with financial institutions and their counsel prior to any formal process.[2] Conversations and initial documentation often can resolve issues, narrow concerns, or dispel misconceptions in a more cost-effective manner for both the Bureau and financial institutions.

Informal conversations between Bureau staff and the financial institution are crucial to educate investigators on the business and industry, as well as address misperceptions (which will save tremendous time and expense for the Bureau and the financial institution). While many Bureau staff have a depth of experience in the banking world, some are less familiar with nonbank financial institutions. For instance, some institutions have reported that Bureau staff insisted that a company had control over an unrelated entity because of a lack of understanding of how the marketplace works. More specifically, enforcement staff have labored under the mistaken belief that indirect vehicle finance companies have control over auto dealers.

II. The Costs of a CID

While CIDs are an important tool for the Bureau's Office of Enforcement, they are not the only one. The reason that AFSA recommends they be one tool, and not the exclusive means of investigation, is that they impose serious costs on the recipients. CIDs are expensive, time-consuming and have significant consequences. The Bureau should recognize and minimize costs imposed on financial institutions under investigation. This will, in turn, streamline the process for the Bureau, conserving scarce sparse time and resources.

CIDs are expensive for the recipients, regardless of whether an enforcement case proceeds or a violation is found. In one instance, a financial institution spent at least $2.1 million responding to a CID—not litigating an

[2] While voluntary requests and discussions with financial institutions and their counsel should be used as general practice, this is especially true if the recipient of the CID is not the intended subject of the investigation and is merely a witness.

enforcement action, but just responding to a CID. In another matter, a financial institution spent over $1 million in a four-year investigation that was ultimately closed with no action. When dealing with government regulators, companies usually hire counsel with experience. Often, counsel means a large law firm and with a team of lawyers devoted to the CID. Billing rates start at $500-600 per hour but are often higher than that. Generally a team of lawyers works on a matter, attends meetings, reviews and quality checks the same documents and privilege logs, and so forth—not a single attorney—thus, the collective fees could be $2,000 per hour or more.

E-discovery costs add to the expense. One CID request from the Bureau was for emails for all employees for a timeframe well beyond the statute of limitations. This required the financial institution to retain a third-party vendor who was authorized by the Bureau as a depository for these documents. The fees for this vendor alone exceeded $100,000. And again, these costs relate only to a CID, not to an entire enforcement action.

Furthermore, a financial institution could incur these costs while only serving as a witness that did not commit any wrongdoing and might never have an enforcement action brought against it. The costs sustained by financial institutions that have committed no violations are not justified, especially if the Bureau is engaging in a broad, ill-defined investigation.

In addition to being extremely costly, responding to CIDs is incredibly time-consuming. Throughout one Bureau investigation, several employees at a financial institution dedicated thousands of hours to the investigation. The financial institution dedicated two full-time employees to respond to the CID for 18 months. Other employees from each line of the business were also needed to assist with responses. These costs include not only the direct financial costs and the cost from diverting resources, but the costs the financial institution bears from the time, money, and resources that it cannot spend on the business due to the investigation. In another investigation, the financial institution was required to devote substantial resources to an investigation lasting over four years, which ultimately closed with no action by the Bureau. Again, this is four years of time, financial burdens, and diverted resources.

As indicated above, CIDs are not solely expensive and time-consuming, they also carry collateral consequences. CIDs can trigger default, disclosure, and other contract clauses that financial institutions have with third-parties. After receiving a CID, a publicly-held financial institution will likely have to disclose that it received the CID. Financial institutions that are under a CID may also have difficulty raising capital. It is important to note that these collateral consequences likely would not occur with voluntary requests (and informal investigations). That is, the Bureau could obtain the same information as a CID, without imposing the significant costs and negative impact on businesses, simply by using different tools.

AFSA asks that the Bureau recognize and minimize costs imposed on financial institutions under investigation. Bureau staff should receive training to understand these costs and minimize them when possible. A circumscribed use of CIDs will conserve Bureau resources, as well as those of the recipient, and will be less likely to be contested by the recipient. AFSA's recommendations are outlined in more detail below. In short, to minimize production costs and improve efficiency, AFSA recommends that Bureau staff:

- Employ a consistent, cooperative approach;
- Work with recipients to minimize the amount and cost of document production, which in turn will likely decrease the duration of an investigation;
- Allow recipients adequate time to produce documents;
- View requests for time extensions more favorably;

- Use more narrowly-tailored document requests;
- Fully explain the bases of concerns;
- Allow for phased/staged production;
- Permit recipients to assist with explaining/finding information;
- Not conduct fishing expeditions; and
- Limit the timeframe of the CID. (An initial CID should not request information dating back more than three years, or the applicable statute of limitations. At a minimum, CID procedures should instruct investigators to expect that the financial institution may only be able to provide limited information, especially given the passage of time, information retention policies, personnel and leadership changes, etc.)

III. The Bureau's Processes for Initiating Investigations and the Delegation of Authority to Initiate Investigations

AFSA recommends that the Bureau reform its process for opening investigations. CIDs should not necessarily be used at the start of investigations. Instead, AFSA recommends that the Bureau institute an informal process that is generally initiated first, and followed, if needed, by a formal process.

Whether an informal investigation is converted into a formal investigation or a formal investigation is initiated from the onset, both should require the Bureau Director's or Deputy Director's approval. The approval should only be granted after Bureau staff have conducted an evaluation of the facts to determine the investigation's potential to address conduct that violates the federal consumer financial laws.

It is appropriate for the Bureau to look to the SEC as an example in revising the Bureau's enforcement process. The variety of entities over which the Bureau has jurisdiction is similar to the breadth of entities the SEC oversees. Both agencies have enforcement authority over entities they supervise and entities not subject to their supervision. The SEC has long-established enforcement policies and processes that work well.

The SEC has an informal investigative process, which we recommend the Bureau replicate. Below, we discuss the SEC's informal and formal processes and how they would work within the Bureau.

A. Opening an Informal Investigation - Matter Under Inquiry and Investigation

The SEC's informal process begins with opening a "Matter Under Inquiry and Investigation" or "MUI."

We suggest the Bureau do the same. The first step in opening a MUI is to determine if one is necessary. To do so, the Bureau should coordinate internally and with other regulators to avoid duplicative actions. It is our understanding that the Bureau maintains a database with all prior and pending examinations, investigations, and enforcement actions. Staff should check the database to determine if there are any related or related-party investigations or supervision exams. This process should be formalized and transparent to recipients.[3] In addition,

[3] Recently, the Federal Trade Commission's ("FTC") Bureau of Consumer Protection ("BCP") formed an internal Working Group on Agency Reform and Efficiency. The purpose of the Working Group was to identify best practices to streamline information requests and improve transparency in investigations. In July 2017, BCP announced that it had implemented several reforms related to CIDs, including developing and issuing business education materials and using plain language descriptions, to help small businesses understand the CID process and how to comply with CIDs. BCP also published a set of FAQs for small businesses that receive CIDs. The FAQs shed light on relevant procedures. BCP believes that these recent process reforms have been quite

the Bureau should determine whether the financial institution is undergoing or facing pending exams with other regulators, including at the state level. If so, the Bureau should coordinate with the other regulators to streamline requests and minimize unnecessary duplicative costs to the company and government.

If there is no duplication, the next step in the MUI process is to consider the possible outcome of an enforcement action. To determine whether to open a MUI, the staff attorney, in conjunction with the Assistant Director of Enforcement, should consider whether a sufficiently credible source or set of facts suggests that a MUI could lead to an enforcement action that would address a violation of federal consumer financial laws. Basic considerations used when making this determination may include, but are not limited to:

- The statutes or rules potentially violated,
- The egregiousness of the potential violation,
- The potential magnitude of the violation,
- Whether any harm resulted,
- The potential losses involved or harm to consumers,
- Whether the potentially harmed group is particularly vulnerable or at risk,
- Whether the conduct is ongoing,
- Whether the conduct can be investigated efficiently and within a reasonable time period, and
- Whether other authorities, including federal or state agencies or regulators, might be better suited to investigate the conduct.

As mentioned in Section I above, the Bureau should treat both state- and federally-regulated financial institutions differently than unregulated and non-licensed financial institutions. The former have compliance and legal departments and strive to comply with a myriad of both state and federal laws and regulations. Treating these types of financial institutions differently also avoids wasting the Bureau's time and resources. The use of CIDs in limited circumstances, namely when there is a fraudulent entity that may destroy evidence (as opposed to a regulated entity, which will not risk the liability of destroying evidence but instead will send out a litigation hold notice to the employees to keep documents), is justified. Even in the formal process, Bureau staff should generally try to obtain the requested documents by voluntary request before a CID (and all the associated consequences). Most likely, state and federally regulated entities will respond to a voluntary request the same as a formal CID—they should be given the opportunity to do so.

Within 60 days of opening a MUI the matter should either terminate or go on to a formal investigation. If there is sufficient evidence to continue, then the Bureau, through the Director or Deputy Director, would open a formal investigation. If there is not sufficient evidence to continue, then the matter should terminate.

B. Opening a Formal Investigation

Investigations should be opened in two ways: (1) the investigation could be opened when a MUI is converted to an investigation, or (2) an investigation could be opened independent of a MUI. In both cases, the opening of an investigation should require that the Bureau Director or Deputy Director conduct an evaluation of the facts to determine the investigation's potential to address conduct that violates the federal consumer financial laws. The

successful in lessening burdens on recipients and improving transparency. (FTC Comment at 3, available at https://www.ftc.gov/system/files/documents/advocacy_documents/comments-ftc-bureau-consumer-protection-filed-bureau-consumer-financial-protection-regarding-cfpb/p124806_ftc_bcp_comment_to_cfpb_re_civil_investigative_demands.pdf)

analysis for whether to convert a MUI to an investigation, or open an investigation, differs from the analysis for whether to open a MUI. While a MUI can be opened on the basis of very limited information, an investigation generally should be opened after the assigned staff has done some additional information gathering and analysis.

The evaluation for whether to convert a MUI to an investigation (or open an investigation) turns on whether, and to what extent, the investigation has the potential to address violative conduct. The threshold issue to consider when evaluating the facts is – do the facts suggest a possible violation of the federal consumer financial laws involving fraud or other serious misconduct? If the answer is "yes," the next question the investigators must consider is – is an investment of resources by the staff merited by: the magnitude or nature of the violation, the size of the victim group, or the amount of potential or actual losses to consumers? The investigators should also consider if the conduct is ongoing, as well as if it is within a reasonable time period.

In addition to considering those questions, investigators should determine whether the conduct is serious. To do so, we suggest that they answer the following questions:

- Is there a need for immediate action to protect consumers,
- Does the conduct affect the fairness of a consumer industry,
- Does the case involve a recidivist,
- Is the subject matter a Bureau priority,
- Does the case fulfill a programmatic goal of the Bureau, and
- Does the case involve a possibly widespread industry practice that should be addressed?

The approval of the Bureau Director or Deputy Director should be required to initiate a formal investigation. And to initiate a formal investigation, the Bureau should go through something similar to the SEC formal order process.[4] The formal order serves two important functions. First, it generally describes the nature of the investigation that has been authorized. Second, it designates specific staff members to act as officers for the purposes of the investigation and empowers them to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of documents and other materials. Formal investigative proceedings should be nonpublic unless otherwise ordered by the Director.

IV. The Bureau's Processes for the Issuance of CIDs

Once the necessity for a formal investigation has been determined, it is appropriate for the Bureau to issue a CID. Below, AFSA outlines the practices the Bureau should follow when opening a CID. We address who can issue a CID and ask for reasonable deadlines, requests, and procedures (including testimony-related procedures).

The sections below answer many of the Bureau's specific requests for comment listed in the RFI including: the steps the Bureau could take to improve CID recipients' understanding of investigations, the nature and scope of requests in CIDs, the timeframes associated with the CID process, the taking of testimony from an entity, handling privileged information, the rights afforded to witnesses, the "meet and confer" process, the requirements for responding to CIDs, and petitions to modify or set aside CIDs.

[4] *See* Enforcement Manual, U.S. Securities and Exchange Commission Division of Enforcement (Nov. 28, 2017) at 17, available at https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

A. Who Can Issue a CID

The approval for the issuance of a CID should be given by the Bureau Director or Deputy Director.[5] Given the significant costs, burdens, and collateral consequences aforementioned, this is especially important, regardless of whether the Bureau overhauls its enforcement regime. As the FTC aptly explained, "[h]aving a Commissioner, not BCP, approve the issuance of a CID also ensures that a very senior official at the agency is making a decision that may impose significant burdens and costs on recipients… Commissioner-approval ensures that there will be an independent assessment of the costs and benefits of the CID by someone who is not conducting the investigation."[6]

The FTC further explained that, "[b]ecause the FTC's approach has been successful for the Commission in balancing the need to obtain necessary information without imposing unnecessary or undue burdens, the Bureau may wish to consider the FTC's experience, including revising its delegation of authority to a more senior official or officials who are not directly involved in the investigation."[7]

However, it should be permissible for the attorneys managing the investigation to modify CIDs. Also, recipients should be able to contact the supervisors of enforcement attorneys who refuse to make any modifications or otherwise work in a cooperative nature with recipients.

B. Reasonable Deadlines

The Bureau should remove the disconnect that frequently exists between what financial institutions are asked to produce and the reality of the time and cost it takes to comply with the request. Instead, the Bureau should take a more cooperative approach, which could include rolling deadlines or rolling submissions.

Initially, AFSA requests that the Bureau extend the time between when the CID is received and when the "meet and confer" takes place. Currently, it is only ten days. In that ten days, the financial institution: usually finds and hires counsel, must raise all potential objections to enforcement of the CID, and attempt to obtain modifications from the Bureau. Some finance companies under the Bureau's jurisdiction are small companies with limited resources to devote to a CID. Some, with only a few branches, may have only one attorney. Others rely exclusively on outside counsel. If an executive is out of town when the CID is received, it would be even more difficult to respond.[8] AFSA suggests that the Bureau set the "meet and confer" for no earlier than 30 days after the CID is received.

Even if the deadline for the "meet and confer" is 30 days, but especially if it ends up being less, enforcement staff should have the authority to extend the "meet and confer" deadline. Equally as important, requests for extensions of time to file a petition should not be "disfavored," as the current rules say, but rather such requests should be granted so long as the CID recipient is acting in good faith to resolve the issues and provide the information needed by the enforcement staff.

[5] This is especially important if CIDs play the significant role that they do now. If the CIDs are amended to be less significant and more of requests without collateral consequences, then delegation is more appropriate.
[6] FTC Comment at 4.
[7] *Ibid.*
[8] It is AFSA's understanding that CIDs have been sent on the eve of major holidays when staff was out of the office, and time was calculated while most people are on leave for holidays.

AFSA also asks that the Bureau favorable view requests for extensions of time to petition the Bureau to set aside the CID. Currently, the petition must be filed within 20 days of receipt of the CID. It must include all factual and legal objections to the CID, including all appropriate arguments, affidavits, and other supporting documentation. In addition, the petition needs to contain a signed statement that the recipient met with enforcement staff and made a good faith effort to resolve the objections prior to filing the petition. As with requests for time to extend the "meet and confer" deadline, the deadline requests for extensions of time to file a petition should not be "disfavored," as they currently are. Requests for extensions should be granted as long as the recipient is acting in good faith and providing information to the Bureau. These timelines should be more consistent with subpoena requirements and pleadings and motions practice under the Federal Rules of Civil Procedure. The current timelines are plainly too short for anyone to obtain counsel and comply.

Document production deadlines at the beginning of the CID process and additional document production requests should be reasonable and based on the facts and circumstances. The Bureau should generally grant reasonable requests for extensions of time to respond, including requests to produce information on a rolling basis. Currently, the deadline requests for document production are too short. In some instances, financial institutions have had less than 24 hours to pull additional information together for the Bureau.

In addition to extending deadlines, it would help the efficiency of the CID process to grant line attorneys (the enforcement staff running the investigation) the authority to modify CIDs themselves instead of having to appeal to their supervisors. The lack of authority to extend deadlines or tailor document requests works against the Bureau and the CID recipient having a productive, candid exchange. This practice further leaves recipients in a state of unpredictability of whether they need to spend the resources to hire more people, work around the clock, cancel leave requests, and the like to respond to requests. Empowering staff to make adjustments and grant extensions would allow recipients to know more quickly, and thus more predictably, the parameters of their responses and productions.

C. Reasonable Requests

CIDs should be reasonable. They should be narrowly tailored, not fishing expeditions. In past CIDs, the Bureau has demonstrated a penchant for broad, written requests – including for data that is not collected and maintained by the financial institution. These broad requests slow the process down, increase the cost of the CID, and may take the investigation in the wrong direction.

AFSA believes that a CID should disclose, with specificity, the nature of the conduct constituting the alleged violation. The "notification of purpose" in a CID should be explicit, not vague. It should not be permissible for the Bureau to say there may be an "unfair, deceptive, or abusive act or practice" ("UDAAP") violation or that the investigation is to determine whether the company has engaged in acts or practices in violation of several enumerated statutes or "any other Federal consumer financial law." The purpose and scope of the CID must be clearly stated.

An example of the broad nature of the Bureau's CIDs can be found in *Bureau v. Accrediting Council for Independent Colleges & Schools (ACICS),* No. 15-1838 (D.C. Cir. April 21, 2017).

The court stated:

> "We cannot determine, for example, whether the information sought in the CID is reasonably relevant to the Bureau's investigation without knowing what 'unlawful acts and practices' are under investigation. That is to say, where, as in this case, the Notification of Purpose gives no description whatsoever of the conduct the Bureau is interested in investigating, we need not and probably cannot accurately determine whether the inquiry is within the authority of the agency and whether the information sought is reasonably relevant. In short, we reach the same conclusion as the district court—albeit on narrower grounds—that is, the CID does not comply with the requirements of the statute."[9]

The court also noted that "the Bureau's ability to define its scope of investigation broadly 'does not afford it unfettered authority to cast about for potential wrongdoing,'" citing *In re Sealed Case (Admin. Subpoena).*[10]

AFSA suggests the following considerations for narrowing a CID:

- Restrict the collection of data to a reasonable time period, generally three years or less;
- Do not require the production of redundant or superfluous documents (for all identical contracts, accept a template or sample document and list of parties to such a contract);
- Restrict the number of custodians covered in the request; and
- For privileged and confidential information, exclude company counsel as a custodian and allow for simplified privilege logs.

If enforcement staff and the recipient are unable to come to an agreement on narrowing the CID, the financial institution should be permitted to appeal to a supervisor in advance of the deadline for filing a petition to set aside the CID.

D. Reasonable Procedures

In addition to reasonable deadlines and requests, there should be other reasonable procedures surrounding a CID.

First, AFSA recommends that the Bureau remove the requirement to have a master certification for all documents. No one person, or even two people, at a large institution has the knowledge to certify all the documents required in a broad CID. Certification should be done by department.

Second, identifying information regarding a CID and the recipient's response (including a petition to modify or set aside the CID) should be nonpublic. The fact that a CID is contested should have no bearing on its confidentiality. In other words, it would be acceptable to release redacted petitions or a summary of a petition and decision. But, it should not be possible to identify the recipient from the publicly-released information.

Third, there should not be any negative consequences to contesting a CID, as checks and balances on all agencies are required to ensure fair treatment and best practices.

---

[9] *Bureau v. Accrediting Council for Independent Colleges & Schools (ACICS)*, No. 15-1838, at 13 (D.C. Cir. April 21, 2017).
[10] *Id.* at 9.

Fourth, inadvertent production of privileged information should be handled by the Bureau consistent with the standards applicable to the Federal Rules of Evidence (Rule 502). The Bureau's processes and 12 CFR 1080.8(c) should be modified to make expressly clear that the standards applicable to Federal Rule of Evidence 502[11] also apply to documents inadvertently produced in response to a CID.

Last, AFSA suggestions that the Bureau follow the example of the FTC's BCP and develop business education materials that use plain language descriptions to help business, particularly small businesses, understand the CID process and how to comply with CIDs. BCP believes that these materials, along with other procedural reforms, have been successful in lessening the burdens on CID recipients and improving transparency.[12]

E. Testimony-Related Procedures

In order to ensure a fair process, AFSA recommends that the rules permit witnesses to consult with counsel and that counsel may lodge objections. Objections should not be limited to issues of privilege. We further recommend that the rule clarify that witnesses may have access both transcripts and testimony exhibits.

[11] FRE Rule 502, "Attorney-Client Privilege and Work Product; Limitations on Waiver," reads in relevant part:

> The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.
>
> (a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:
> (1) the waiver is intentional;
> (2) the disclosed and undisclosed communications or information concern the same subject matter; and
> (3) they ought in fairness to be considered together.
>
> (b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:
> (1) the disclosure is inadvertent;
> (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
> (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26 (b)(5)(B).

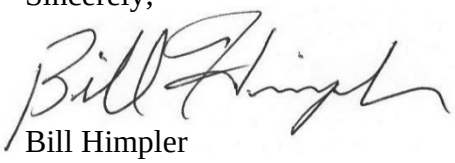
[12] FTC Comment at 3.

V. Conclusion

While a CID can be a powerful tool, it should not be the only tool that the Bureau uses in an investigation. AFSA recommends that the Bureau begin investigations informally, as the SEC often does. CIDs are expensive, time-consuming, and may be inefficient. However, after an informal investigation, a formal investigation may be warranted. If that is the case, a CID may be the proper tool. Even so, AFSA recommends that the Bureau update its CID procedures.

We appreciate the opportunity to make recommendations and are happy to discuss them further. Please contact me by phone, 202-466-8616, or email, bhimpler@afsamail.org, with any questions.

Sincerely,



Bill Himpler
Executive Vice President
American Financial Services Association