Bloomberg BNA BNA's Banking Report™

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99 BBR 880

REGULATORY COMPLIANCE

A Practical Guide to CFPB Procedures for Investigation and Adjudication

By Richik Sarkar

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In 2011 and 2012, the Consumer Financial Protection Bureau (CFPB or Bureau) developed policies and procedures for three modes of operation: rule-making, supervision, and enforcement authority. One of the stated goals of the CFPB is to make it more expensive to break the law than abide by it. To that end, over the past 14 months, the CFPB has launched dozens of probes and issued more than 100 subpoenas to various financial institutions.

Future entities facing CFPB investigations and/or charges may resolve such issues before a CFPB hearing officer. When they do, they will play by the Bureau's investigative and adjudicative rules and undertake a process designed to wrap up administratively, in many cases, within a year.

I. Investigation Initiated

Investigations may arise from the Bureau's examinations, which are scheduled and conducted by the Office of Supervision. [1] The Bureau's supervisory priorities are governed by its mandate to reduce risk to consumers, and culminates with the assignment of a compliance rating and a final report. Meanwhile, at the Bureau, the Office of Supervision reports to the director and staff. On review by director-level officials at the CFPB, an unfavorable report may give rise to an investigation by the Office of Enforcement. The Bureau explains: "Whether… formal enforcement action is necessary will depend on the type of problem(s) found and the severity of harm to consumers."

[1] The examination process is described in detail in the Bureau's Supervision and Examination Manual ("Manual") available through the Bureau's website, http://www.consumerfinance.gov/

Outside the examination context, investigations may be triggered by, among other things, reported consumer law violations, a glut of consumer complaints to the CFPB, agency referrals, and whistleblowing. The Bureau's priorities can be discerned from its proactive requests for information from banks and the public. For example, in February 2012, the Bureau requested input about bank overdraft charges based on trends in developing state case law. [2] In May 2012, the Bureau issued a

request for input about practices in the marketing and service of reloadable prepaid cards. These and other initiatives reveal a focus on fees often incurred and products often used by low-income and/or less sophisticated consumers.

[2] *E.g., Gutierrez v. Wells Fargo Bank, N.A.,* 730 F. Supp. 2d 1080, 1140 (N.D. Cal. 2010) (ordering $203 million in restitution under California deceptive practices law for bank customers who paid multiple overdraft fees due to bank's manipulation of batch-processing order); *see also Swift v. BancorpSouth Bank*, no. 09-md-02036-JLK, doc. no. 2673) (S.D.Fla. May 4, 2012) (certifying class of customers injured in same fashion for action under the Arkansas Deceptive Trade Practice Act).

Such emphasis accords with the Bureau's unique obligation to develop and enforce rules against "abusive" practices. Unlike "unfair" and "deceptive" practices, which are policed by the prudential regulators and the Federal Trade Commission (FTC), "abusive" practices are defined statutorily with reference to the tendencies of specific customer groups. The Bureau is the sole agency tasked with identifying marketing practices that may not rise to the level of deception, but unreasonably take advantage of unsophisticated customers. As such, its focus will be to protect consumers who (a) fail to understand the material risks of a product; (b) are unable to protect their interests (in light of diminished resources or time); or (c) tend to rely on a service provider to act in their best interests.

Only an assistant director or deputy assistant director of the Office of Enforcement (hereinafter "director-level officials") can initiate an investigation. Rule 1080.4. The Rules affirm that the CFPB Office of Enforcement, like the Office of Supervision, does not act on behalf of any complaining person. It "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." Rule 1080.3.

After an investigation is triggered, the process that follows is governed by the newly finalized rules in 12 CFR Part 1080. These rules are modeled on procedural regimes used by prudential regulators pursuant to the *Financial Institutions Reform, Recovery, and Enforcement Act* of 1989 (56 FR 38024), by the Securities and Exchange Commission (SEC) (17 CFR part 201), and by the FTC (16 CFR part 3). Many elements of those procedures are adopted unchanged, so precedents from those bodies may be useful in predicting how events unfold.

II. Fact Finding: Civil Investigative Demands

CFPB investigators' primary tool is the civil investigative demand (CID) for documents, testimony, or other evidence. They may be issued to an entity under investigation or to third parties. The authority to issue CIDs resides solely in the director, assistant directors, and deputy assistant directors. Rule 1080.6 (a). CIDs can be enforced in federal court. Rule 1080.10(b).

A CID must inform its recipient of the alleged conduct being investigated, and the law that conduct may have violated. Rule 1080.5. "Bureau investigations generally are non-public, [but] Bureau investigators may disclose the existence of an investigation to potential witnesses or third parties to the extent necessary to advance the investigation." Rule 1080.14(b).

6(c) Meeting on CID Compliance

Unless a director-level official decides otherwise, the CID recipient must meet with investigators (in person or by phone) to discuss compliance within 10 calendar days after receipt. Rule 1080.6(c). Those participating must include people with knowledge of the recipient's information systems, including an appropriate IT officer for discussion of electronic discovery. Arrangements for compliance may include extensions of time or a rolling document production schedule. Rule 1080.6(d). The CID will include a deadline for compliance, which can be discussed at the 6(c) meeting.

Petition Objecting to CID

Once the CID recipient has participated in the meeting and registered any objections, it may file objections in a petition. Rule 1080.6(e). Objections not raised in the 6(c) meeting cannot be raised in the petition. Rule 1080.6(c)(3). The petition must include a recital describing the recipient's efforts to resolve disputed disclosure issues, including a description of the 6(c) meeting and any disputes resolved there. Rule 1080.6(e)(1). Unless a stricter deadline is set in the CID, this petition to modify or set aside the CID must be filed within 20 calendar days after the demand is received. The attorney must sign objections, and supporting documentation must be attached.

A petition stops the clock on the production deadline set in the CID, but only for the elements of the

demand to which objections have been raised. Rule 1080.6(f). The production deadline is unchanged for other elements of the CID. Director-level officials can grant extensions of CID deadlines. Rule 1080.6(d). However, "requests for extension of time are disfavored." Rule 1080.6(e)(2).

Claims of privilege may not be the basis for a petition to modify the order; instead, the CID recipient must produce all responsive unprivileged documents along with a privilege log. Rule 1080.8(b) and (a). Inadvertent and intentional waivers of privilege are handled per the Federal Rules of Civil Procedure.

In response to a petition challenging a CID, investigators may file their own memo with the CFPB director. Rule 1080.6(e)(3). The party that has objected to the CID has no opportunity to read or respond to this document and the director faces no deadline in ruling on the petition.

Some CIDs require oral testimony. A properly filed petition objecting to any part of such a CID can be filed with the hearing officer, but "no arguments in support thereof will be allowed at the hearing." Rule 1080.9(b)(4). Hence, even if raised in a duly filed petition, objections not related to a constitutional privilege cannot prevent an investigator from requiring testimony on those topics. If the petition is granted, relief will have to be retroactive.

Recently, in rejecting a petition to modify a CID filed by PHH Corporation, Director Richard Cordray noted that initial CIDs will be "crafted broadly because the enforcement team needs to be thorough and comprehensive about its inquiries into possible violations of law that harm consumers." The Director also clarified that in reviewing the scope of such demands the issue "is not whether all such information is actionable; rather, the issue is whether such information is relevant to conduct for which liability can be lawfully imposed." Director Cordray considered this a precedential ruling designed to demonstratethe CFPB's thought process in reviewing CID modification requests.

Production Deadlines

- ***Production of Documents and Tangible Things***

Under Rule 1080.6(a)(1), the CID must specify documents as a class "with such definiteness and certainty as to permit such material to be fairly identified." When produced, someone with "knowledge of the facts and circumstances" of the production process must execute a sworn certification that nothing has been withheld.

- ***Interrogatories***

Under Rule 1080.6(a)(3), reports and interrogatory answers demanded in a CID must be provided in writing and under oath, with a sworn certification of completeness.

- ***Oral Testimony***

A CID may order a hearing for the purpose of sworn oral testimony from any person. Typically, the entity under investigation is not present or represented at this hearing. "Bureau investigators shall exclude" from the hearing room any party except the testifying witness (with counsel), unless the witness consents and the investigator conducting the hearing exercises his or her own discretion to allow someone else to attend. Rule 1080.7(c).

At the hearing, a witness is allowed to consult with counsel about a question only to consider a claim of privilege. Except to assert privilege, counsel may not object, and the witness may not refuse to answer. Rules 1080.9(b)(1)-(2). At the conclusion of testimony, the officer has discretion to grant a request from the witness's attorney that the witness be allowed to clarify some aspect of the testimony. Rule 1080.9(b)(4).

Afterward, the witness is allotted 30 days to review and certify the accuracy of the transcript. Rule 1080.9(a). After the witness reviews and corrects the transcript or waives the opportunity to do so, it is "promptly" sent to the entity. Rule 1080.7(c).

III. Entity Notified of Impending Charges; May Respond with Legal Arguments

Early Warning Notice

If the investigation provides a basis for further enforcement action, the Bureau typically contacts the respondent by telephone and with a follow-up letter known as an "early warning notice." See CFPB Bulletin 2011-04. This notice is not required by the rules, and may be forgone "when the Office of

Enforcement needs to act quickly."

This "early warning notice submission," is due 14 days after the initial phone notification of potential enforcement action. Supporting facts should be attached in affidavits based on firsthand knowledge, but the submission should focus on legal and policy reasons the Bureau should not move forward and address consumer risk rather than the rights or intentions of the respondent. If enforcement action proceeds, this document will accompany the Office of Enforcement's referral of the matter to the adjudicatory body.

IV. Civil Charges Brought

If the early warning notice submission is rejected, the Office of Enforcement can bring an action in court, refer the matter to another agency, or refer it to the CFPB's Office of Administrative Adjudication. Rules 1052-54; 1080.11. In the latter scenario, described below, the new rules of CFR Chapter X, Part 1081 will govern. Other regulatory regimes may become involved; through CFPB collaboration or collaterally. [3]

[3] In addition to bringing claims directly, the CFPB will also be an active "friend" of the Court. This amicus practice is consistent with the CFPB's general intent to be an active regulator and to influence judicial proceedings, especially when asked to interpret laws and regulations.

If the investigated entity communicates proactively with the CFPB prior to charges, a settlement may be reached before formal action. Such negotiations may not be used to bring an investigation to a premature close, but, if the respondent agrees to a settlement before charges are filed, a proceeding may be commenced and resolved by filing a stipulation and a consent order. Rule 1081.200(d).

Notice of Charges

The Office of Administrative Adjudication serves a notice of charges by overnight delivery or registered mail. Subsequent filings can be made by e-mail. Service is effective when the item is sent. Time limits are then calculated by counting every calendar day after the day of service, then extending time through a weekend if necessary. Rule 1081.114(a). The director and the hearing officer can grant extensions of time limits, but have "a policy of strongly disfavoring" them. Rule 1081.115(b).

Publication of Charges

The fact that charges have been filed can be published on the Bureau's website and in the Federal Register 10 days from the notice of charges, unless the respondent files a motion for a protective order during that time. Rule 1081.200(c); *see also* below on protective orders under Rule 1081.119.

Answer to Notice of Charges

An answer to the notice of charges is due 14 days from the day of service of process. Rule 1081.201 (a). [4] It must contain denials of all allegations the respondent does not wish to concede, and any affirmative defenses the respondent intends to raise. Rule 1081.201(b). The answer must be accompanied by a statement of financial interest. Rule 1081.201(e).

[4] A motion to dismiss does not alter the requirement to meet this deadline for an answer. Rule 1081.212(a).

The hearing officer also has a deadline: a decision recommending action to the director is expected "no later than 300 days" after the filing of the notice of charges. Rule 1081.400(a). This deadline is not altered by any extensions granted to parties for intermediate time limits. Rule 1081.115(d). The director can extend this deadline upon request of the hearing officer, but only if a request is filed by 30 days before the deadline. Rule 1081.400(b).

V. Bureau Provides Evidence to Respondent, And Confidentiality is Addressed

Unlike the investigative process, the administrative adjudication process requires transparency and the respondent is entitled to virtually all factual material used by the CFPB to press charges.

Information Accessible to Respondent

CFPB Disclosure of Documents

In providing factual evidence to the respondent, the CFPB has adopted the SEC's "affirmative disclosure

approach." See 17 CFR 201.230. Within seven days of the notice of charges, the Office of Administrative Adjudication makes available for copying virtually all the factual material the Bureau has compiled, including (with few exceptions) all consumer complaints, transcripts, and documents provided by third parties to the investigation. Rules 1081.206(a)(1) and (f). In addition, final reports from other offices of the Bureau must be made available if the Enforcement Office intends to introduce them in the proceeding; and all CIDs must be made available. Rule 1081.206(a)(2)(ii) and (i).

However, documents created by Bureau staff during examination proceedings, investigation, or the litigation itself are *not* made available unless the Bureau intends to introduce them in the proceeding. Rule 1081.206(b)(1)(ii). Additional safeguards protect confidential informants [5] and sister agencies who provided material under a confidentiality agreement; moreover, the officer can block access to documents he or she finds irrelevant, or "otherwise, for good cause," not to be shared with the respondent. Rule 1081.206(b)(i), (iii)-(vi).

[5] Information from a confidential source, sometimes including the source's identity, will be provided "to the extent the Bureau plans to call a source as a witness," or rely upon information provided by that source.

Notwithstanding those shields, the Bureau is required to produce "material exculpatory evidence" of any kind. Rule 1081.206(b)(2).

The hearing officer can require the CFPB Enforcement Office to produce a "list of withheld documents," analogous to a privilege log. The officer can then require production of documents on that list — but no provision grants the respondent a right to see the list or advocate for access to any document. Rule 1081.206(c). During routine examinations of large banks, Bureau personnel produce and file a wide array of "workpapers" — completed checklists and observations based on downloadable templates, spreadsheets, documentation of staff and management interviews, meeting agendas and minutes, and documentation of the examiner's compliance research and reference work. Manual at 13. Under the Bureau's analogy to the work-product doctrine, such workpapers created by Bureau staff are not discoverable, although the respondent can, presumably, attempt to assert waiver and have the hearing officer subpoena them. See Rule 1081.206(a)(3).

Information Accessible to Public

Although it allows for easy access to factual evidence, the transparency principle in adjudications also means that the respondent is exposed to negative publicity: "all papers filed in connection with an adjudication proceeding are presumed to be open to the public." Rule 1080.111(c). Confidential treatment of documents can be authorized by the director, the hearing officer, or a federal court. Otherwise, a party can file a motion for a protective order. While such a motion is pending, the documents in question are kept nonpublic. Rule 108.119(e).

Non-parties may also file motions for a protective order, and must be given a 10-day warning to afford them the opportunity to do so before the disclosure of any information obtained from them that is subject to a claim of confidentiality. Rule 1081.119(a). [6] Respondent filings that include potentially confidential information from third parties must include a certification that such a warning was duly provided.

[6] Along with such a motion, the intervenor must file its own statement of financial interest. Rule 1081.201(e).

A proposed protective order should accompany a party's motion. The order can be designed to shield information from the parties to the case, or merely from the public at large. Rule 1081.119(b). The motion itself will not be confidential, and therefore should describe the information at issue only in general terms. Rule 1081.112(b). Once the motion is filed, the hearing officer can request more information in support of the motion; a party has five days to produce that support. Rule 1081.119(d).

Motion for Protective Order as to Confidential or Injurious Materials

Protective orders are granted for four reasons: (1) all the relevant parties stipulate to them; (2) public disclosure is prohibited by law; (3) "clearly defined, serious injury" would otherwise result; or (4) the material "constitutes sensitive personal information." Rule 1081.119(c). This last category is narrowly defined to include personal identification numbers (including account numbers and full dates of birth) and individually identifiable health information. Rule 1081.112(e). Hence, confidentiality will often hinge upon category 3, and on whether the respondent can clearly define the "serious injury" threatened by

the exposure of certain documents.

Preservation of Privilege
For Materials Provided to Bureau

The CFPB maintains that respondent entities and CID recipients may provide information to the Bureau without waiving any associated privilege. Other regulatory bodies have a statutory basis for such preservation of privilege, and privileged documents they might in turn supply to other agencies cannot be used against the respondent entity. But Congress has not granted the CFPB such a basis, and while there is no ambiguity in the Bureau's position about the preservation of privilege, it is not clear that a court will enforce it against an opponent in later litigation.

VI. Pre-hearing Logistics,
Discovery, and Motion Practice

Once initial disclosures and protections are complete, the case takes on a litigation posture, with the Bureau's Enforcement Office serving as one of the parties. "As early as practicable," lawyers for the parties must meet to discuss their respective positions and consider settlement. Rule 1081.203(a). They should also prepare for a pretrial scheduling conference with the hearing officer.

Scheduling Conference

The scheduling conference takes place within 20 days of service of the notice of charges, unless postponed by assent of all parties. Rule 1081.203(b). The agenda includes scheduling the hearing, clarification of the issues in the case, settlement, discovery procedures, and the parties' intentions as to witnesses, experts, and potential summary disposition motions.

Subsequent meetings to discuss the same issues may be convened by the hearing officer. Rule 1081.214.

The Adjudication Rules (unlike the Rules for Investigations) encourage the parties to settle. [7] A written settlement offer can be extended at any time by the respondent, and will be forwarded to the director on request, along with a recommendation by the Office of Enforcement. The offer must provide for a waiver of the usual division of responsibilities with the Bureau, so that the director can communicate *ex parte* about the merits of the offer with enforcement personnel. If accepted, the offer can then be reduced to stipulations and a consent order. Rule 1081.120(d).

[7] Rule 1081.120; *cf.* 17 CFR 201.240 (similar rules for the SEC).

VII. Motion Practice

Dispositive motions — motions to dismiss or for summary disposition — are governed by the same standards as in the Federal Rules of Civil Procedure. A brief in support of such a motion may not exceed 35 pages. Rule 1801.212(e). A response, also limited to 35 pages, is then due within 20 days. Rule 1801.212(f). In turn, a reply to a response, confined to 10 pages, is then due five days later. The hearing officer is then required to rule, whether or not the officer opts to hold oral argument, within 30 days. Rule 1801.212(h).

Non-dispositive motions are provided for in the rules as well. Failure to oppose a non-dispositive motion is deemed consent to its proposed order. Rule 1081.25(d)(3). Response briefs are due 10 days after a brief is filed, with reply briefs due three days after the filing of the response brief. Rule 1081.205(d). As mentioned below, response briefs to a motion to quash a subpoena are an exception: they are due within five days, and no reply is allowed. Rule 1081.209(f)(1).

Interlocutory review of the hearing officer's decisions is governed by Rule 1081.211; it hinges on whether subsequent review of the decision would be an inadequate remedy for an error.

VIII. Further Discovery Conducted by Respondent

In addition to accessing all the documents the Bureau has already obtained — although none of its internal deliberations — the respondent entity may request new subpoenas to be issued by the hearing officer. Rule 1081.208. The respondent may not issue or enforce such subpoenas; they must issue from the hearing officer. No depositions or interrogatories may be obtained from third parties, except in the case of witnesses who will be unavailable for the hearing. This rule is intended to prevent the use of depositions to delay resolution of the case.

Generally, sworn testimony (besides that gathered during the investigation without the respondent present) occurs only at the hearing. The only exception allows for depositions of third parties who are

unavailable for the hearing under Rule 1081.209(a)(1). On receiving such a request, the hearing officer may call for a showing that the testimony will be relevant and reasonable in scope, and will give other parties the opportunity to stipulate to the testimony to obviate the need for the deposition. Rule 1081.209(a)(3).

Parties receiving subpoenas from the hearing officer may move for them to be quashed or modified. Rules 1081.208(h), 1081.209(f). Before doing so, they must meet and confer with the party requesting the subpoena; the motion must certify that they have done so. Rule 1081.205(f). Such motions must be filed within 10 days of service of the subpoena. A response is due only five days later. Rule 1081.209(f)(1). No reply to the response is allowed. Neither brief may exceed 15 pages. Rule 1081.205 (e).

Expert discovery is conducted in advance of the hearing under Rule 1081.210. The initial schedule for expert disclosures and depositions is set at the scheduling conference. Rule 1081.203(b)(8). When the expert reports have been filed, depositions of the experts may be conducted in the following 21 days. A rebuttal expert report may then be filed within the 28 days after the expert report is filed. (If a rebuttal report goes beyond the scope of the report it is rebutting, a motion to strike or file a surrebuttal may be filed within five additional days of the rebuttal deadline.) Communications with experts and potential experts, and draft expert reports, are privileged; facts and assumptions provided to the experts by counsel are not. Rule 1081.201(e).

IX. Preliminaries to Hearing

Submission of Prehearing Statement

A prehearing statement is due 10 days before the hearing. It should include: (1) an outline or narrative summary of [the party's] 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 Rule 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.

If a party is presenting expert testimony, all of the expert's credentials must also be filed at this time, if not filed previously. Rule 1081.210.

The hearing officer may convene meetings to discuss the logistics of the hearing itself. Rule 1081.214.

X. Hearing

The burden of proof rests on the Bureau and its "enforcement counsel," with the rules of evidence relaxed to the fullest extent allowable under the Administrative Procedures Act. Evidence must be excluded only if it is privileged, irrelevant, unreliable, dilatory or cumulative, or creates inordinate danger of unfair prejudice or confusion. Rule 1081.303(a). "Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection." Rule 1081.303(e)(3).

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 [absent a showing of] unfair prejudice. The hearing officer may grant a continuance to enable the objecting party to meet such evidence. Rule 1081.202(b).

In addition to sworn statements from witnesses determined to be unavailable, other sworn statements can be proffered and will be admitted at the discretion of the hearing officer. Such evidence is disfavored, but stipulations by both parties will usually make them admissible. Rule 1081.303(h).

Any document prepared by a prudential regulator, including the CFPB, or by a state regulatory agency is presumptively admissible either with or without a sponsoring witness. Rule 1081.303(d)(2).

Production and correction of the hearing record is governed by Rule 1081.304.

XI. Motion Practice After Hearing, Decision, and Appeals

Parties' Briefs and Proposed Orders

Once the record of the hearing is filed, each party is served with notice and has 30 days to file proposed findings of fact, proposed conclusions of law, and a proposed order. Rule 1081.305(a). There is no apparent page limit for these briefs.

There is also no apparent page limit for the briefs in response, due 15 days later (which must, however,

be confined to the arguments of the other party's brief). Rule 1081.305(b).

Hearing Officer's Recommendation

Unless the 300-day deadline is sooner, the filing of the last responsive brief establishes a deadline 30 days later for the hearing officer's decision recommending action to the director. Remedies in case of an adverse decision may include restitution, disgorgement, damages, public notification about the violation, injunctions, and civil forfeitures. Manual at 6.

Appeal to the Director

A party has 10 days to file an issue-specific notice of appeal with the Director and request that the hearing officer's recommendation be overridden. Rule 1081.402(a)(1). Such an appeal is required in order to exhaust administrative remedies before bringing a matter to federal district court. Rule 1081.402(c). And before 30 days from the service of the recommendation, the party must file its brief (no more than 30 pages) with the director. Responsive briefs, also no more than 30 pages, are due 30 days later, and the appellant then has seven days to reply with a brief of no more than 15 pages. Oral argument should be requested on the first page of initial briefs. The director has the option to issue an order setting a date for oral argument. Rule 1081.404(a). Further briefing may be called for. Rule 1081.405(a).

After the deadline for reply briefs, the director has 90 days to issue a decision, which is served on the parties and published on the CFPB's website. Rule 1081.405(d)-(e). Within 14 days, a party may move for reconsideration only in light of "new questions raised by the final decision or final order." 1081.406.

Effective Date of Decision

The decision becomes effective 30 days after it is served, unless a party files a motion for stay and such stay is granted by the director. Neither the filing of such a motion nor the initiation of proceedings to seek judicial review operates as a stay of the order. Rule 1081.407.

XII. Judicial Review

Per 5 U.S.C. §703, judicial review can be sought in a "court of competent jurisdiction" which will generally be the District Court unless a cease-and-desist order is being contested, in which case it will be a U.S. Court of Appeals. 12 U.S.C. §5563(b)(4). Judicial review is governed by the Administrative Procedures Act which allows a decision to be set aside if, among other reasons, it was made "without observance of procedure required by law," or it is "unsupported by substantial evidence." In lieu or in addition to challenging the CFPB's adjudication, the appeal can also challenge CFPB's regulation as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Again, if the respondent seeks judicial review of the director's decision, it can ask the director to stay his or her final order pending that review.

XIII. Conclusion

- The CFPB has broad investigative powers to gather evidence before commencing enforcement proceedings and recipients of CIDs will have limited time to respond to CIDs. If the recipient is unable to modify the CID through the meet and confer process, it must preserve its rights through a detailed petition to modify. This is critical if the recipient wants to make modification arguments in Court.

- Institutions should create response teams to coordinate document collection and CID. Response team members should be cognizant of maintaining privilege, ensuring that all potentially relevant documents (even if not produced) are preserved — especially since the CFPB is applying a very broad definition of relevance; and that potential public disclosure obligations are followed.

- The CFPB's adjudication procedure requires careful planning and decision making at each stage of the administrative process. If respondents do not settle, they will face a discovery mechanism that is far more limited than would be available in a traditional court setting.

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[2] *E.g., Gutierrez v. Wells Fargo Bank, N.A.,* 730 F. Supp. 2d 1080, 1140 (N.D. Cal. 2010) (ordering $203 million in restitution under California deceptive practices law for bank customers who paid multiple overdraft fees due to bank's manipulation of batch-processing order); *see also Swift v. BancorpSouth Bank*, no. 09-md-02036-JLK, doc. no. 2673) (S.D.Fla. May 4, 2012) (certifying class of customers injured in same fashion for action under the Arkansas Deceptive Trade Practice Act).

Such emphasis accords with the Bureau's unique obligation to develop and enforce rules against

"abusive" practices. Unlike "unfair" and "deceptive" practices, which are policed by the prudential regulators and the Federal Trade Commission (FTC), "abusive" practices are defined statutorily with reference to the tendencies of specific customer groups. The Bureau is the sole agency tasked with identifying marketing practices that may not rise to the level of deception, but unreasonably take advantage of unsophisticated customers. As such, its focus will be to protect consumers who (a) fail to understand the material risks of a product; (b) are unable to protect their interests (in light of diminished resources or time); or (c) tend to rely on a service provider to act in their best interests.

Only an assistant director or deputy assistant director of the Office of Enforcement (hereinafter "director-level officials") can initiate an investigation. Rule 1080.4. The Rules affirm that the CFPB Office of Enforcement, like the Office of Supervision, does not act on behalf of any complaining person. It "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." Rule 1080.3.

After an investigation is triggered, the process that follows is governed by the newly finalized rules in 12 CFR Part 1080. These rules are modeled on procedural regimes used by prudential regulators pursuant to the *Financial Institutions Reform, Recovery, and Enforcement Act* of 1989 (56 FR 38024), by the Securities and Exchange Commission (SEC) (17 CFR part 201), and by the FTC (16 CFR part 3). Many elements of those procedures are adopted unchanged, so precedents from those bodies may be useful in predicting how events unfold.

II. Fact Finding: Civil Investigative Demands

CFPB investigators' primary tool is the civil investigative demand (CID) for documents, testimony, or other evidence. They may be issued to an entity under investigation or to third parties. The authority to issue CIDs resides solely in the director, assistant directors, and deputy assistant directors. Rule 1080.6 (a). CIDs can be enforced in federal court. Rule 1080.10(b).

A CID must inform its recipient of the alleged conduct being investigated, and the law that conduct may have violated. Rule 1080.5. "Bureau investigations generally are non-public, [but] Bureau investigators may disclose the existence of an investigation to potential witnesses or third parties to the extent necessary to advance the investigation." Rule 1080.14(b).

6(c) Meeting on CID Compliance

Unless a director-level official decides otherwise, the CID recipient must meet with investigators (in person or by phone) to discuss compliance within 10 calendar days after receipt. Rule 1080.6(c). Those participating must include people with knowledge of the recipient's information systems, including an appropriate IT officer for discussion of electronic discovery. Arrangements for compliance may include extensions of time or a rolling document production schedule. Rule 1080.6(d). The CID will include a deadline for compliance, which can be discussed at the 6(c) meeting.

Petition Objecting to CID

Once the CID recipient has participated in the meeting and registered any objections, it may file objections in a petition. Rule 1080.6(e). Objections not raised in the 6(c) meeting cannot be raised in the petition. Rule 1080.6(c)(3). The petition must include a recital describing the recipient's efforts to resolve disputed disclosure issues, including a description of the 6(c) meeting and any disputes resolved there. Rule 1080.6(e)(1). Unless a stricter deadline is set in the CID, this petition to modify or set aside the CID must be filed within 20 calendar days after the demand is received. The attorney must sign objections, and supporting documentation must be attached.

A petition stops the clock on the production deadline set in the CID, but only for the elements of the demand to which objections have been raised. Rule 1080.6(f). The production deadline is unchanged for other elements of the CID. Director-level officials can grant extensions of CID deadlines. Rule 1080.6(d). However, "requests for extension of time are disfavored." Rule 1080.6(e)(2).

Claims of privilege may not be the basis for a petition to modify the order; instead, the CID recipient must produce all responsive unprivileged documents along with a privilege log. Rule 1080.8(b) and (a). Inadvertent and intentional waivers of privilege are handled per the Federal Rules of Civil Procedure.

In response to a petition challenging a CID, investigators may file their own memo with the CFPB director. Rule 1080.6(e)(3). The party that has objected to the CID has no opportunity to read or respond to this document and the director faces no deadline in ruling on the petition.

Some CIDs require oral testimony. A properly filed petition objecting to any part of such a CID can be

filed with the hearing officer, but "no arguments in support thereof will be allowed at the hearing." Rule 1080.9(b)(4). Hence, even if raised in a duly filed petition, objections not related to a constitutional privilege cannot prevent an investigator from requiring testimony on those topics. If the petition is granted, relief will have to be retroactive.

Recently, in rejecting a petition to modify a CID filed by PHH Corporation, Director Richard Cordray noted that initial CIDs will be "crafted broadly because the enforcement team needs to be thorough and comprehensive about its inquiries into possible violations of law that harm consumers." The Director also clarified that in reviewing the scope of such demands the issue "is not whether all such information is actionable; rather, the issue is whether such information is relevant to conduct for which liability can be lawfully imposed." Director Cordray considered this a precedential ruling designed to demonstratethe CFPB's thought process in reviewing CID modification requests.

Production Deadlines

- ***Production of Documents and Tangible Things***

Under Rule 1080.6(a)(1), the CID must specify documents as a class "with such definiteness and certainty as to permit such material to be fairly identified." When produced, someone with "knowledge of the facts and circumstances" of the production process must execute a sworn certification that nothing has been withheld.

- ***Interrogatories***

Under Rule 1080.6(a)(3), reports and interrogatory answers demanded in a CID must be provided in writing and under oath, with a sworn certification of completeness.

- ***Oral Testimony***

A CID may order a hearing for the purpose of sworn oral testimony from any person. Typically, the entity under investigation is not present or represented at this hearing. "Bureau investigators shall exclude" from the hearing room any party except the testifying witness (with counsel), unless the witness consents and the investigator conducting the hearing exercises his or her own discretion to allow someone else to attend. Rule 1080.7(c).

At the hearing, a witness is allowed to consult with counsel about a question only to consider a claim of privilege. Except to assert privilege, counsel may not object, and the witness may not refuse to answer. Rules 1080.9(b)(1)-(2). At the conclusion of testimony, the officer has discretion to grant a request from the witness's attorney that the witness be allowed to clarify some aspect of the testimony. Rule 1080.9(b)(4).

Afterward, the witness is allotted 30 days to review and certify the accuracy of the transcript. Rule 1080.9(a). After the witness reviews and corrects the transcript or waives the opportunity to do so, it is "promptly" sent to the entity. Rule 1080.7(c).

III. Entity Notified of Impending Charges; May Respond with Legal Arguments

Early Warning Notice

If the investigation provides a basis for further enforcement action, the Bureau typically contacts the respondent by telephone and with a follow-up letter known as an "early warning notice." See CFPB Bulletin 2011-04. This notice is not required by the rules, and may be forgone "when the Office of Enforcement needs to act quickly."

This "early warning notice submission," is due 14 days after the initial phone notification of potential enforcement action. Supporting facts should be attached in affidavits based on firsthand knowledge, but the submission should focus on legal and policy reasons the Bureau should not move forward and address consumer risk rather than the rights or intentions of the respondent. If enforcement action proceeds, this document will accompany the Office of Enforcement's referral of the matter to the adjudicatory body.

IV. Civil Charges Brought

If the early warning notice submission is rejected, the Office of Enforcement can bring an action in court, refer the matter to another agency, or refer it to the CFPB's Office of Administrative Adjudication.

Rules 1052-54; 1080.11. In the latter scenario, described below, the new rules of CFR Chapter X, Part 1081 will govern. Other regulatory regimes may become involved; through CFPB collaboration or collaterally. [3]

[3] In addition to bringing claims directly, the CFPB will also be an active "friend" of the Court. This amicus practice is consistent with the CFPB's general intent to be an active regulator and to influence judicial proceedings, especially when asked to interpret laws and regulations.

If the investigated entity communicates proactively with the CFPB prior to charges, a settlement may be reached before formal action. Such negotiations may not be used to bring an investigation to a premature close, but, if the respondent agrees to a settlement before charges are filed, a proceeding may be commenced and resolved by filing a stipulation and a consent order. Rule 1081.200(d).

Notice of Charges

The Office of Administrative Adjudication serves a notice of charges by overnight delivery or registered mail. Subsequent filings can be made by e-mail. Service is effective when the item is sent. Time limits are then calculated by counting every calendar day after the day of service, then extending time through a weekend if necessary. Rule 1081.114(a). The director and the hearing officer can grant extensions of time limits, but have "a policy of strongly disfavoring" them. Rule 1081.115(b).

Publication of Charges

The fact that charges have been filed can be published on the Bureau's website and in the Federal Register 10 days from the notice of charges, unless the respondent files a motion for a protective order during that time. Rule 1081.200(c); *see also* below on protective orders under Rule 1081.119.

Answer to Notice of Charges

An answer to the notice of charges is due 14 days from the day of service of process. Rule 1081.201 (a). [4] It must contain denials of all allegations the respondent does not wish to concede, and any affirmative defenses the respondent intends to raise. Rule 1081.201(b). The answer must be accompanied by a statement of financial interest. Rule 1081.201(e).

[4] A motion to dismiss does not alter the requirement to meet this deadline for an answer. Rule 1081.212(a).

The hearing officer also has a deadline: a decision recommending action to the director is expected "no later than 300 days" after the filing of the notice of charges. Rule 1081.400(a). This deadline is not altered by any extensions granted to parties for intermediate time limits. Rule 1081.115(d). The director can extend this deadline upon request of the hearing officer, but only if a request is filed by 30 days before the deadline. Rule 1081.400(b).

V. Bureau Provides Evidence to Respondent, And Confidentiality is Addressed

Unlike the investigative process, the administrative adjudication process requires transparency and the respondent is entitled to virtually all factual material used by the CFPB to press charges.

Information Accessible to Respondent

CFPB Disclosure of Documents

In providing factual evidence to the respondent, the CFPB has adopted the SEC's "affirmative disclosure approach." See 17 CFR 201.230. Within seven days of the notice of charges, the Office of Administrative Adjudication makes available for copying virtually all the factual material the Bureau has compiled, including (with few exceptions) all consumer complaints, transcripts, and documents provided by third parties to the investigation. Rules 1081.206(a)(1) and (f). In addition, final reports from other offices of the Bureau must be made available if the Enforcement Office intends to introduce them in the proceeding; and all CIDs must be made available. Rule 1081.206(a)(2)(ii) and (i).

However, documents created by Bureau staff during examination proceedings, investigation, or the litigation itself are *not* made available unless the Bureau intends to introduce them in the proceeding. Rule 1081.206(b)(1)(ii). Additional safeguards protect confidential informants [5] and sister agencies who provided material under a confidentiality agreement; moreover, the officer can block access to documents he or she finds irrelevant, or "otherwise, for good cause," not to be shared with the

respondent. Rule 1081.206(b)(i), (iii)-(vi).

[5] Information from a confidential source, sometimes including the source's identity, will be provided "to the extent the Bureau plans to call a source as a witness," or rely upon information provided by that source.

Notwithstanding those shields, the Bureau is required to produce "material exculpatory evidence" of any kind. Rule 1081.206(b)(2).

The hearing officer can require the CFPB Enforcement Office to produce a "list of withheld documents," analogous to a privilege log. The officer can then require production of documents on that list — but no provision grants the respondent a right to see the list or advocate for access to any document. Rule 1081.206(c). During routine examinations of large banks, Bureau personnel produce and file a wide array of "workpapers" — completed checklists and observations based on downloadable templates, spreadsheets, documentation of staff and management interviews, meeting agendas and minutes, and documentation of the examiner's compliance research and reference work. Manual at 13. Under the Bureau's analogy to the work-product doctrine, such workpapers created by Bureau staff are not discoverable, although the respondent can, presumably, attempt to assert waiver and have the hearing officer subpoena them. See Rule 1081.206(a)(3).

Information Accessible to Public

Although it allows for easy access to factual evidence, the transparency principle in adjudications also means that the respondent is exposed to negative publicity: "all papers filed in connection with an adjudication proceeding are presumed to be open to the public." Rule 1080.111(c). Confidential treatment of documents can be authorized by the director, the hearing officer, or a federal court. Otherwise, a party can file a motion for a protective order. While such a motion is pending, the documents in question are kept nonpublic. Rule 108.119(e).

Non-parties may also file motions for a protective order, and must be given a 10-day warning to afford them the opportunity to do so before the disclosure of any information obtained from them that is subject to a claim of confidentiality. Rule 1081.119(a). [6] Respondent filings that include potentially confidential information from third parties must include a certification that such a warning was duly provided.

[6] Along with such a motion, the intervenor must file its own statement of financial interest. Rule 1081.201(e).

A proposed protective order should accompany a party's motion. The order can be designed to shield information from the parties to the case, or merely from the public at large. Rule 1081.119(b). The motion itself will not be confidential, and therefore should describe the information at issue only in general terms. Rule 1081.112(b). Once the motion is filed, the hearing officer can request more information in support of the motion; a party has five days to produce that support. Rule 1081.119(d).

Motion for Protective Order as to Confidential or Injurious Materials

Protective orders are granted for four reasons: (1) all the relevant parties stipulate to them; (2) public disclosure is prohibited by law; (3) "clearly defined, serious injury" would otherwise result; or (4) the material "constitutes sensitive personal information." Rule 1081.119(c). This last category is narrowly defined to include personal identification numbers (including account numbers and full dates of birth) and individually identifiable health information. Rule 1081.112(e). Hence, confidentiality will often hinge upon category 3, and on whether the respondent can clearly define the "serious injury" threatened by the exposure of certain documents.

Preservation of Privilege
For Materials Provided to Bureau

The CFPB maintains that respondent entities and CID recipients may provide information to the Bureau without waiving any associated privilege. Other regulatory bodies have a statutory basis for such preservation of privilege, and privileged documents they might in turn supply to other agencies cannot be used against the respondent entity. But Congress has not granted the CFPB such a basis, and while there is no ambiguity in the Bureau's position about the preservation of privilege, it is not clear that a court will enforce it against an opponent in later litigation.

VI. Pre-hearing Logistics,

Discovery, and Motion Practice

Once initial disclosures and protections are complete, the case takes on a litigation posture, with the Bureau's Enforcement Office serving as one of the parties. "As early as practicable," lawyers for the parties must meet to discuss their respective positions and consider settlement. Rule 1081.203(a). They should also prepare for a pretrial scheduling conference with the hearing officer.

Scheduling Conference

The scheduling conference takes place within 20 days of service of the notice of charges, unless postponed by assent of all parties. Rule 1081.203(b). The agenda includes scheduling the hearing, clarification of the issues in the case, settlement, discovery procedures, and the parties' intentions as to witnesses, experts, and potential summary disposition motions.

Subsequent meetings to discuss the same issues may be convened by the hearing officer. Rule 1081.214.

The Adjudication Rules (unlike the Rules for Investigations) encourage the parties to settle. [7] A written settlement offer can be extended at any time by the respondent, and will be forwarded to the director on request, along with a recommendation by the Office of Enforcement. The offer must provide for a waiver of the usual division of responsibilities with the Bureau, so that the director can communicate *ex parte* about the merits of the offer with enforcement personnel. If accepted, the offer can then be reduced to stipulations and a consent order. Rule 1081.120(d).

[7] Rule 1081.120; *cf.* 17 CFR 201.240 (similar rules for the SEC).

VII. Motion Practice

Dispositive motions — motions to dismiss or for summary disposition — are governed by the same standards as in the Federal Rules of Civil Procedure. A brief in support of such a motion may not exceed 35 pages. Rule 1801.212(e). A response, also limited to 35 pages, is then due within 20 days. Rule 1801.212(f). In turn, a reply to a response, confined to 10 pages, is then due five days later. The hearing officer is then required to rule, whether or not the officer opts to hold oral argument, within 30 days. Rule 1801.212(h).

Non-dispositive motions are provided for in the rules as well. Failure to oppose a non-dispositive motion is deemed consent to its proposed order. Rule 1081.25(d)(3). Response briefs are due 10 days after a brief is filed, with reply briefs due three days after the filing of the response brief. Rule 1081.205(d). As mentioned below, response briefs to a motion to quash a subpoena are an exception: they are due within five days, and no reply is allowed. Rule 1081.209(f)(1).

Interlocutory review of the hearing officer's decisions is governed by Rule 1081.211; it hinges on whether subsequent review of the decision would be an inadequate remedy for an error.

VIII. Further Discovery Conducted by Respondent

In addition to accessing all the documents the Bureau has already obtained — although none of its internal deliberations — the respondent entity may request new subpoenas to be issued by the hearing officer. Rule 1081.208. The respondent may not issue or enforce such subpoenas; they must issue from the hearing officer. No depositions or interrogatories may be obtained from third parties, except in the case of witnesses who will be unavailable for the hearing. This rule is intended to prevent the use of depositions to delay resolution of the case.

Generally, sworn testimony (besides that gathered during the investigation without the respondent present) occurs only at the hearing. The only exception allows for depositions of third parties who are unavailable for the hearing under Rule 1081.209(a)(1). On receiving such a request, the hearing officer may call for a showing that the testimony will be relevant and reasonable in scope, and will give other parties the opportunity to stipulate to the testimony to obviate the need for the deposition. Rule 1081.209(a)(3).

Parties receiving subpoenas from the hearing officer may move for them to be quashed or modified. Rules 1081.208(h), 1081.209(f). Before doing so, they must meet and confer with the party requesting the subpoena; the motion must certify that they have done so. Rule 1081.205(f). Such motions must be filed within 10 days of service of the subpoena. A response is due only five days later. Rule 1081.209(f)(1). No reply to the response is allowed. Neither brief may exceed 15 pages. Rule 1081.205 (e).

Expert discovery is conducted in advance of the hearing under Rule 1081.210. The initial schedule for expert disclosures and depositions is set at the scheduling conference. Rule 1081.203(b)(8). When the expert reports have been filed, depositions of the experts may be conducted in the following 21 days. A rebuttal expert report may then be filed within the 28 days after the expert report is filed. (If a rebuttal report goes beyond the scope of the report it is rebutting, a motion to strike or file a surrebuttal may be filed within five additional days of the rebuttal deadline.) Communications with experts and potential experts, and draft expert reports, are privileged; facts and assumptions provided to the experts by counsel are not. Rule 1081.201(e).

IX. Preliminaries to Hearing

Submission of Prehearing Statement

A prehearing statement is due 10 days before the hearing. It should include: (1) an outline or narrative summary of [the party's] 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 Rule 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.

If a party is presenting expert testimony, all of the expert's credentials must also be filed at this time, if not filed previously. Rule 1081.210.

The hearing officer may convene meetings to discuss the logistics of the hearing itself. Rule 1081.214.

X. Hearing

The burden of proof rests on the Bureau and its "enforcement counsel," with the rules of evidence relaxed to the fullest extent allowable under the Administrative Procedures Act. Evidence must be excluded only if it is privileged, irrelevant, unreliable, dilatory or cumulative, or creates inordinate danger of unfair prejudice or confusion. Rule 1081.303(a). "Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection." Rule 1081.303(e)(3).

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 [absent a showing of] unfair prejudice. The hearing officer may grant a continuance to enable the objecting party to meet such evidence. Rule 1081.202(b).

In addition to sworn statements from witnesses determined to be unavailable, other sworn statements can be proffered and will be admitted at the discretion of the hearing officer. Such evidence is disfavored, but stipulations by both parties will usually make them admissible. Rule 1081.303(h).

Any document prepared by a prudential regulator, including the CFPB, or by a state regulatory agency is presumptively admissible either with or without a sponsoring witness. Rule 1081.303(d)(2).

Production and correction of the hearing record is governed by Rule 1081.304.

XI. Motion Practice After Hearing, Decision, and Appeals

Parties' Briefs and Proposed Orders

Once the record of the hearing is filed, each party is served with notice and has 30 days to file proposed findings of fact, proposed conclusions of law, and a proposed order. Rule 1081.305(a). There is no apparent page limit for these briefs.

There is also no apparent page limit for the briefs in response, due 15 days later (which must, however, be confined to the arguments of the other party's brief). Rule 1081.305(b).

Hearing Officer's Recommendation

Unless the 300-day deadline is sooner, the filing of the last responsive brief establishes a deadline 30 days later for the hearing officer's decision recommending action to the director. Remedies in case of an adverse decision may include restitution, disgorgement, damages, public notification about the violation, injunctions, and civil forfeitures. Manual at 6.

Appeal to the Director

A party has 10 days to file an issue-specific notice of appeal with the Director and request that the hearing officer's recommendation be overridden. Rule 1081.402(a)(1). Such an appeal is required in

order to exhaust administrative remedies before bringing a matter to federal district court. Rule 1081.402(c). And before 30 days from the service of the recommendation, the party must file its brief (no more than 30 pages) with the director. Responsive briefs, also no more than 30 pages, are due 30 days later, and the appellant then has seven days to reply with a brief of no more than 15 pages. Oral argument should be requested on the first page of initial briefs. The director has the option to issue an order setting a date for oral argument. Rule 1081.404(a). Further briefing may be called for. Rule 1081.405(a).

After the deadline for reply briefs, the director has 90 days to issue a decision, which is served on the parties and published on the CFPB's website. Rule 1081.405(d)-(e). Within 14 days, a party may move for reconsideration only in light of "new questions raised by the final decision or final order." 1081.406.

Effective Date of Decision

The decision becomes effective 30 days after it is served, unless a party files a motion for stay and such stay is granted by the director. Neither the filing of such a motion nor the initiation of proceedings to seek judicial review operates as a stay of the order. Rule 1081.407.

XII. Judicial Review

Per 5 U.S.C. §703, judicial review can be sought in a "court of competent jurisdiction" which will generally be the District Court unless a cease-and-desist order is being contested, in which case it will be a U.S. Court of Appeals. 12 U.S.C. §5563(b)(4). Judicial review is governed by the Administrative Procedures Act which allows a decision to be set aside if, among other reasons, it was made "without observance of procedure required by law," or it is "unsupported by substantial evidence." In lieu or in addition to challenging the CFPB's adjudication, the appeal can also challenge CFPB's regulation as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Again, if the respondent seeks judicial review of the director's decision, it can ask the director to stay his or her final order pending that review.

XIII. Conclusion

- The CFPB has broad investigative powers to gather evidence before commencing enforcement proceedings and recipients of CIDs will have limited time to respond to CIDs. If the recipient is unable to modify the CID through the meet and confer process, it must preserve its rights through a detailed petition to modify. This is critical if the recipient wants to make modification arguments in Court.

- Institutions should create response teams to coordinate document collection and CID. Response team members should be cognizant of maintaining privilege, ensuring that all potentially relevant documents (even if not produced) are preserved — especially since the CFPB is applying a very broad definition of relevance; and that potential public disclosure obligations are followed.

- The CFPB's adjudication procedure requires careful planning and decision making at each stage of the administrative process. If respondents do not settle, they will face a discovery mechanism that is far more limited than would be available in a traditional court setting.

ISSN 1522-5984