

*Comments of Legal Academics on Docket No. CFPB-2018-0001*

April 25, 2018

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

Dear Ms. Jackson:

Please see the submission below in response to the Consumer Financial Protection Bureau's Request for Information ("RFI") Regarding Bureau Civil Investigative Demands and Associated Processes (Docket No. CFPB-2018-0001). We are legal academics who research and teach about consumer protection law, public enforcement of civil law, administrative law and related topics.<sup>1</sup> Many of the below signatories also have experience in public enforcement of consumer protection laws. We appreciate the opportunity to submit these comments for your consideration.

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<sup>1</sup> Affiliations of signatories are for identifications only and do not represent the views of the various institutions.

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## SUMMARY

The statutory authority and regulations for Bureau CID issuance are modeled on FTC powers. Decades of experience by the FTC and state attorneys general with substantially similar CID authority support broad discretion and flexibility in CID use for effective public enforcement of UDAP laws. Courts have consistently so held.

The Bureau's enforcement actions to date have produced remarkable results for consumers. Even if the Bureau decides to shift its enforcement strategy, there is no need to change its CID procedures to accomplish this new direction, especially given the Bureau's statutory mandate to enforce consumer protection under a plethora of different federal laws.

The Office of the Inspector General of the Federal Reserve Board recently conducted an independent examination of the Bureau's use of CIDs and concluded that its procedures maintained an appropriate balance between the Bureau's investigatory needs and the burden on CID recipients, and found no substantial irregularities or deficiencies in Bureau CID use.

### **THE BUREAU NEEDS BROAD AND FLEXIBLE CID AUTHORITY TO SUPPORT EFFECTIVE UDAP AND OTHER CIVIL LAW ENFORCEMENT.**

One of the most salient features of public enforcement of federal and state UDAP law is the authority of public enforcers to engage in pre-complaint investigations. Numerous public enforcement officials and academic commentators have remarked on the importance of Civil Investigative Demand ("CID") authority to effective public enforcement.<sup>2</sup>

Although the Bureau is a relatively recent creation, its CID authority reflects decades of experience in public enforcement of UDAP laws, and in particular the experience of the other

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<sup>2</sup> Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 Notre Dame L. Rev. 747, 761 (2016) (Professor Citron is the Morton & Sophia Macht Professor of Law, University of Maryland Carey School of Law; an Affiliate Scholar, Stanford Center on Internet & Society; and an Affiliate Fellow, Yale Information Society Project. Writing about UDAP actions on privacy issues, she observes that "...civil investigative demands (CIDs), are crucial to investigations."); Pamela H. Bucy, *Federalism and False Claims*, 28 Cardozo L. Rev. 1599, 1608 (2007) (Professor Bucy, Research Professor of Law, University of Alabama School of Law, is a former Assistant United States Attorney. She completed a study of thirteen states with state laws similar to the federal False Claims Act. Based on interviews, she concluded based on interviews that "[a]ll of the offices with CID authority agree that CIDs are extremely powerful prosecutorial tools. In the Attorney General's offices in the eight states without CID powers, all but two indicated that such powers would be helpful."); Darren Bush, *The Incentive and Ability of the Federal Trade Commission to Investigate Real Estate Markets: An Exercise in Political Economy*, 35 Real Est. L.J. 33, 37 (2006) (Professor Bush, University of Houston Law School, holds a Ph.D. in economics and J.D. and is a former DOJ attorney in antitrust enforcement. He notes that "the FTC's ability to obtain complete and accurate information primarily rests with the Civil Investigative Demand (CID) and subpoena.")

primary federal UDAP regulator, the Federal Trade Commission (FTC).<sup>3</sup> The Bureau's CID powers also align with the authority given to state attorneys general to enforce UDAP laws. We urge the new leadership of the Bureau to consider any reforms to CID processes in light of the accumulated knowledge gained from decades of public enforcement experience of UDAP laws by a diverse range of public officials.

**A. The Bureau's CID Authority Parallels the CID Authority of the FTC and Other Public Enforcers of Consumer Protection Laws.**

Any consideration of possible changes to the CID authority of the Bureau must start with an understanding of the place of pre-complaint investigatory procedures in public enforcement. The specific CID authority of the Bureau and its procedures for exercising that authority, as articulated in the Dodd-Frank Act and in the Bureau's regulations, are substantially similar to the authority and procedures that govern other public enforcers.

The other primary federal regulator with UDAP authority, the FTC, is the closest point of comparison. The substance of what constitutes a deceptive or unfair practice for Bureau-regulated entities mirrors the UDAP standards developed by the FTC in the early 1980s.<sup>4</sup> Similarly, the CID authority of the Bureau in the Dodd-Frank Act is substantially derived from and comparable to the FTC's CID authority.<sup>5</sup>

The same is true of the Bureau's regulations implementing its CID authority. In adopting its CID regulations, the Bureau expressly noted its reliance on existing FTC procedures:

[T]he Final Rule is modeled on investigative procedures of other law enforcement agencies. For guidance, the Bureau reviewed the procedures currently used by the FTC, the Securities and Exchange Commission (SEC), and the prudential regulators, as well as the FTC's recently proposed amendments to its nonadjudicative procedures. In light of the similarities between section 1052 of the Dodd-Frank Act and section 20 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 et seq., the Bureau drew most heavily from the FTC's nonadjudicative procedures in constructing the rules.<sup>6</sup>

The Office of the Inspector General of the Federal Reserve Board of Governors concluded in its recent report on the Bureau's use of CIDs that, "the FTC's CID authority is similar to the CFPB's."<sup>7</sup>

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<sup>3</sup> We use the abbreviation "UDAP" to mean either Unfair or Deceptive Acts or Practices, the law enforced by the FTC, or any other federal or state variant of that law, including the Bureau's authority over abusive conduct.

<sup>4</sup> Compare 12 U.S.C. § 5531(c) with FTC Policy Statement on Unfairness (appended to International Harvester Co., 104 F.T.C. 949, 1070 (1984)); Compare CFPB Supervision and Examination Manual UDAAP 5-7 (August 2017) with FTC Policy Statement on Deception, 103 F.T.C. 174 (1984).

<sup>5</sup> Compare 12 U.S.C. § 5562 (CFPB Authority) with 15 U.S.C. § 57b-1 (FTC authority)

<sup>6</sup> 77 Fed. Reg. 39101 (June 29, 2012).

<sup>7</sup> The Office of Inspector General of the Board of Governors of the Federal Reserve System, *The CFPB Generally Complies with Requirements for Issuing Civil Investigative Demands but Can Improve Certain Guidance and Centralize Recordkeeping*, Evaluation Report 2017-SR-015 at 5 n.9 (September 2017) [hereinafter "Inspector

Courts resolving disputes over the proper use of CID authority by the FTC have consistently upheld the need for a broad and flexible application of this investigative authority. In the seminal case on the use of CIDs by federal agencies, *U.S. v. Morton Salt Co.*,<sup>8</sup> the United States Supreme Court made clear that CID authority of the FTC is not to be confused with, and thus cannot be restricted by, the limits on discovery in judicial actions. As the Court explained:

The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.<sup>9</sup>

Federal courts have consistently given a wide berth to the FTC in structuring its CIDs and rejected challenges from CID recipients premised on the relevance of the requested information. These judicial opinions note the importance of not prematurely limiting the flexibility and scope of FTC investigations. As one court observed, it is improper to ask the FTC to “prove what it is investigating as a condition of the legitimacy of the investigation.”<sup>10</sup> In an oft-cited *en banc* decision of the United States Court of Appeals for the District of Columbia, rejecting a challenge to a CID issued by the FTC, the court held that, “a wide range of investigation is necessary and appropriate where, as here, multifaceted activities are involved, and the precise character of possible violations cannot be known in advance,”<sup>11</sup> and the CID was proper because it was not “obviously wrong.”<sup>12</sup>

Similar CID authority also is a cornerstone of the power that state attorneys general hold as public enforcers of state UDAP laws. Almost every state attorney general can use CIDs when investigating possible violations of state laws.<sup>13</sup> While the specific powers and requirements vary by state,<sup>14</sup> the need for some general statement of notice as to the possible violations and the

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General Report”]. The Inspector General also observed that: “[t]he CFPB modeled the investigation rules on the investigative procedures of other federal agencies with enforcement authority, such as the FTC and the U.S. Securities and Exchange Commission.” *Id.* at 5. Compare 12 C.F.R. 1080.5-6 (CFPB CID regulations) with 16 C.F.R. 2.7 (FTC CID regulations).

<sup>8</sup> 338 U.S. 632 (1950).

<sup>9</sup> *Id.* at 633-634.

<sup>10</sup> *F.T.C. v. Church & Dwight Co.*, 747 F. Supp. 2d 3, 6 (D.D.C. 2010), *aff'd*, 665 F.3d 1312 (D.C. Cir. 2011),

<sup>11</sup> *FTC v. Texaco*, 555 F.2d 862, 877 INTERNAL (D.C.Cir.1977) (en banc).

<sup>12</sup> *Id.* at 877 n.32.

<sup>13</sup> National Association of Attorneys General (Emily Myers, Ed. And Principal Author) , *State Attorney General Powers and Responsibilities* 232-233 (3d Ed. 2013) (noting that all but four state attorneys general have CID authority for consumer protection enforcement, and in two of those states the CID authority rests with a different consumer protection regulator).

<sup>14</sup> See generally National Consumer Law Center, *Unfair and Deceptive Acts and Practices* §13. 3 (9<sup>th</sup> Ed. 2016) (analyzing requirements of varying state CID laws).

power to compel document production and testimony are common.<sup>15</sup> Like their federal counterparts, state courts reviewing CID requests typically allow state attorneys general a broad purview in their use of CIDs. As Professors Dee Pridgen and Richard Alderman observe, state “pre-complaint discovery power is usually construed quite liberally by the courts to allow the state attorney general's office to effectively enforce the state consumer protection statute.”<sup>16</sup>

Judicial decisions on the Bureau’s authority to enforce its CIDs reflect the broad discretion afforded the agency to pursue its investigations. Federal courts have overwhelmingly granted enforcement of Bureau CIDs.<sup>17</sup> As a district court observed in a February 28, 2018 decision granting a Bureau petition to enforce a CID, “like every other administrative agency, the CFPB can define the contours of its investigation ‘quite generally’ while still complying with its statutory obligations.”<sup>18</sup> Of course, CID authority has limits. In particular, courts will not enforce a CID that describes an investigation beyond the authority of the agency, which occurred with the Bureau when a court rejected enforcement of a CID on determining the Bureau lacked authority over the CID recipient.<sup>19</sup>

## **B. Discretion and Flexibility in CID Authority Allows the Bureau to Tailor CID Requirements to Specific Applications of Its Broad Enforcement Authority.**

Decades of experience with CID use by a variety of federal and state enforcers demonstrate that broad and flexible CID authority is critical to effective, efficient and fair public enforcement of consumer protection laws. A concern raised by the focus of the RFI solely on the rights of investigatory targets is that the Bureau will consider promulgating rules that would later prevent it from adapting its investigatory procedures to the needs of the different sorts of investigations undertaken by the Bureau. Even if rules restricting CID use were consistent with the Bureau’s substantial statutory investigative authority in the Dodd-Frank Act, it is difficult imagine how the Bureau can impose limitations on the use of CIDs that would be equally appropriate in the wide variety of enforcement contexts for which it is responsible to act under the Dodd-Frank Act.

### **1. Varying Enforcement Cases Require Varying Uses of CID Authority.**

The Bureau has an exceptionally broad enforcement mandate. To fulfill that mandate, its CID authority cannot be bound by the kinds of rigid rules that govern litigation. In some situations, the Bureau needs to request relatively small amounts of material from an investigatory target. In

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<sup>15</sup> *Id.*

<sup>16</sup> Dee Pridgen and Richard Alderman, *Consumer Protection and the Law* § 7:2 (2017).

<sup>17</sup> *Consumer Fin. Prot. Bureau v. Great Plains Lending, LLC*, 846 F.3d 1049 (9th Cir.), cert. denied, 138 S. Ct. 555 (2017) (affirming district court refusal to set aside Bureau CID); *Consumer Financial Protection Bureau, V. Heartland Campus Solutions, Esci.*, No. CV 17-1502, 2018 WL 1089806 (W.D. Pa. Feb. 28, 2018) (granting Bureau petition to enforce CID); *Consumer Fin. Prot. Bureau v. Seila Law, LLC*, No. 817CV01081JLSJEM, 2017 WL 6536586 (C.D. Cal. Aug. 25, 2017) (granting Bureau petition to enforce CID); *Consumer Fin. Prot. Bureau v. Source for Pub. Data, LP*, No. 3:17-MC-16-G-BN, 2017 WL 2443135 (N.D. Tex. June 6, 2017) (same).

<sup>18</sup> *Consumer Financial Protection Bureau, V. Heartland Campus Solutions, Esci.*, No. CV 17-1502, 2018 WL 1089806, at \*3 (W.D. Pa. Feb. 28, 2018) (quoting the district court in *Seila Law*, which cited FTC cases).

<sup>19</sup> *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colleges & Sch.*, 854 F.3d 683 (D.C. Cir. 2017) (affirming district court refusal to grant Bureau petition to enforce CID for lack of authority over the CID recipient).

others, particularly where there are multiple potential legal claims, numerous institutions, or very large targets, the CIDs must reflect the complexity of the investigation.

The Bureau combines authority to enforce its UDAP law with the authority to enforce violations of numerous product specific or area specific consumer finance regulatory regimes. The Bureau's enforcement reach varies across multiple dimensions, including the following:

*Investigatory Stage.* Public enforcement investigations are initiated with varying amounts of information acquired from an array of possible sources. One source is the Bureau's complaint portal which receives millions of complaints. The FTC Bureau of Consumer Protection, for instance, "reported receiving over 3 million complaints, not including Do Not Call Registry complaints, during 2016. And staff commence investigations based on information uncovered in other investigations; requests from Congress, other federal agencies, and state enforcers; the staff's own experiences as consumers; and after monitoring industry activities, particularly after issuing new guidance."<sup>20</sup> The same is true of the Bureau.

*Focusing its investigatory resources:* The Bureau, like other government entities, cannot pursue all the possible violations of the law that come to its attention. While it has the authority to bring enforcement actions against entities of various sizes, compared to other public UDAP enforcers, the Bureau rarely proceeds against small companies.<sup>21</sup> Similarly, the Bureau typically does not target individuals except as part of an investigation of a targeted entity with which the individuals are connected.<sup>22</sup> The Bureau has been judicious in its selection of targets and use of CIDs.

*Supervisory Structure.* The Bureau has used its enforcement powers to bring cases against banks and non-banks, including-- among others-- mortgage servicers and credit reporting agencies.<sup>23</sup> The type of institution and its products or actions under investigation influence the content of the CIDs.

*Type of Law Violation.* Congress charged the Bureau with enforcing a complex and diverse array of statutes. In addition to the Consumer Financial Protection Act, which Congress adopted as Title X of the Dodd-Frank Act, Congress tasked the Bureau with responsibility for eighteen "enumerated" consumer financial laws. These statutes include nearly all federal consumer credit consumer protection statutes.<sup>24</sup> The statutes

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<sup>20</sup> Howard Morse & Sarah Swain, *Defending Federal Trade Commission Consumer Protection Investigations: A How-to Guide*, Antitrust, Summer 2017, at 26, 27. See also David C. Shonka, *Responding to the Government's Civil Investigations*, 15 Sedona Conf. J. 1, 2 (2014) (noting that public enforcement actions begin with "news stories, consumer complaints, requests from Congress, leaks from informants, first-hand observations by government employees, self-reporting, or any number of other sources.")

<sup>21</sup> Prentiss Cox, Amy Widman, and Mark Totten, *Strategies of Public UDAP Enforcement*, 55 Harv. J. on Legislation 37 (providing data showing substantial gap between mean and median size of defendants by both annual revenue and number of employees, suggesting substantial variance in company size).

<sup>22</sup> *Id.*; Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 Tulane L. Rev. 1057, 1080-1083 (2016).

<sup>23</sup> Peterson, *supra* note 21 at 1084-1085.

<sup>24</sup> 12 U.S.C. § 5481(a)(12). Also, Congress later gave the CFPB enforcement authority under the Military Lending Act. 10 U.S.C. § 987(f)(6).

cover a range of subject matters that include credit, debt collection practices, payment systems, savings accounts, prepaid cards, interstate land purchases, reputational information, advertising, information sharing, discrimination, and personal privacy. Even within the topic of consumer credit, the Bureau is responsible for enforcing the law with respect to both secured and unsecured credit, large and small loans, as well as open-ended lines of credit and closed-end loans. Collectively these statutes touch the lives of virtually every American consumer. Professor Peterson's study shows that through 2016 the Bureau brought enforcement actions not only under UDAP, but also for violations of TILA, FCRA, ECOA, FDCPA, EFTA, and RESPA.<sup>25</sup>

*Remedial Purpose.* The Bureau can seek to resolve cases with injunctive or supervisory terms regulating future conduct, public compensation to consumers and/or a civil penalty. The type of relief sought also influences the material sought in CIDs. To date, the Bureau appears to seek all these forms of relief when it treats a matter as an enforcement action; however, it has the option of seeking only some forms of relief in each case.

For all the permutations of investigations based on the above and many other factors, the Bureau has one CID pre-complaint investigatory power. The experience of a systemically important national bank in responding to a CID indicating possible UDAP concerns in the sale of ancillary products through credit card or other account add-on may raise concerns that are wholly different from a CID issued in an investigation of a regional furniture rent-to-own company engaged in possible violations of the Truth in Lending Act. The CID powers provided in the Dodd-Frank Act and the Bureau's existing regulations can be adapted on a case by case basis to accommodate the proper balance between justifiable burden on the CID recipient and the need for information to protect consumers in that market or type of transaction.

Again, the long FTC experience in public UDAP enforcement is instructive when it comes to understanding the need for the Bureau to have flexible CID authority. The FTC has developed different investigatory regimes for its antitrust work and its UDAP work. Former FTC attorneys Howard Morse and Sarah Swain provide a summary of this difference:

In contrast to merger investigations, where the FTC has issued a model Second Request and announced a presumptive limit on the number of custodians to be searched and number of years to be covered, CIDs in consumer protection matters vary widely. A 2014 ABA study found the cost of responding to a Second Request ranges from \$2 million to \$9 million, with a median cost of \$4.3 million and a per custodian median cost of \$151,000. In our experience, the burden of complying with a consumer protection CID varies widely though is generally less than the burden of responding to a Second Request.<sup>26</sup>

Because the Bureau's enforcement authority is even more diverse than that of the FTC, encompassing both UDAP and a broader range of other regulatory regimes, the need for

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<sup>25</sup> Peterson, *supra* note 21 at 1090.

<sup>26</sup> Morse and Swain, *supra* note 19, at 29.

the Bureau to maintain broad and flexible investigative powers is even greater than for the FTC. Accordingly, the CID authority of the Bureau should remain sufficiently flexible to allow for effective investigation of all types of law violations. In sum, there is no one-size-fits-all CID for Bureau investigations. Limits on the complexity and number of topics in CIDs could have the unintended consequence of privileging the entities most determined to obfuscate responses so as to prevent the Bureau from discovering the worst abuses.

The FTC requires in consumer cases that one Commissioner approve a CID prior to issuance. This process allows the FTC to have review by one official who is in the line of authority for making determinations about violations of UDAP law. The Bureau has no similar procedure. The existing Bureau procedure reflects the difference in structure between the FTC as a multi-member Commission and the Bureau with its Director. The Bureau would have no analogous higher level review by a single official who is not also the person ultimately solely responsible for enforcement decision-making.

## **2. Flexible CIDs Allow the Bureau to Adopt Differing Enforcement Strategies.**

The enforcement record of the Bureau to date has been remarkable. The Bureau's enforcement and supervision actions have led to \$11.8 billion in ordered relief for more than 29 million consumers.<sup>27</sup> There has been broad public support for the Bureau and its enforcement work.<sup>28</sup> Professor Christopher Peterson has published a detailed empirical study of Bureau enforcement actions in its first four years that reveals an agency that is both remarkably effective and completely at odds with descriptions of the agency by its critics. The study shows a balanced set of cases between banks and nonbanks and enforcement through administrative and judicial action. The study also shows that the Bureau focused less on technical rule violations and more on UDAP violations in actions that returned money to consumers, and used sparingly the new "abusiveness" power it has as part of its UDAP authority.<sup>29</sup> As the study observes:

...if the CFPB were continually overstepping its bounds, then perhaps critics of the agency ought to be able to point to many decisions of district court judges, administrative law judges, or U.S. courts of appeal dismissing the agency's unlawful actions. Yet, from its inception through 2015, the agency publicly announced 122 enforcement actions without losing a single case. And after the

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<sup>27</sup> CFPB Factsheet, *Consumer Financial Protection Bureau: By the Numbers* (December 2016)

<sup>28</sup> Steve Eder, Jessical Silver-Greenberg, & Stacy Cowley, *Republicans Want to Sideline This Regulator. But It May Be Too Popular*, N.Y. Times, Aug. 31, 2017 ("The public does not share the G.O.P.'s ire toward the agency and its mission," said Dean Clancy, a Tea Party activist who worked in the White House under President George W. Bush and is now a policy analyst who tracks actions of the consumer bureau. "It's an agency about protecting the little guy, and that is tough to oppose."); Celinda Lake, Bob Carpenter, David Mermin, and Zoe Grotophorst, *New Poll Reveals Strong Bipartisan Support for Financial Regulation; Americans Say Wall Street's Influence in Washington is Too High* (July 18, 2017), available at <http://ourfinancialsecurity.org/2017/07/afrcr/polling-memo-fifth-consecutive-year-broad-backing-cfpb-wall-street-reform/> (finding that 77 percent of independents and 66 percent of Republicans "favor somewhat" or "favor strongly" the CFPB).

<sup>29</sup> Peterson, *supra* note 21.

study period, but prior to publication of this Article, the Bureau had lost only 1 precomplaint discovery dispute.<sup>30</sup>

Even in well-publicized challenges to later Bureau actions, the Bureau retains an overwhelmingly successful track record in litigation.

An example of the positive impact on consumer markets of Bureau enforcement actions is the series of cases it brought to curb a practice variously known as credit card add-on, data pass, or pre-acquired account charges.<sup>31</sup> In short, the nation's largest banks have sold to direct marketing companies special contract rights allowing them to charge a range of consumer bank accounts (including credit card, checking and mortgage accounts) without obtaining traditional forms of consent from the consumer, such as having the consumer provide his or her account number. Predictably, the result has been massive deception of consumers charged for unwanted membership clubs and insurance policies of dubious value. The elderly and those with limited English language capacity were especially hard hit by this deceptive practice.<sup>32</sup>

Years of UDAP enforcement cases by state attorneys general to attack this problem made progress, but they were unable to comprehensively attack this deceptive conduct.<sup>33</sup> The Bureau, however, has effectively used its enforcement authority to systematically constrain this deception. Starting with its first enforcement action in 2012, the Bureau brought a series of cases against the nation's largest financial institutions challenging this conduct as a UDAP violation, resulting in over \$2 billion in returned account charges to consumers.<sup>34</sup>

High levels of monetary recoveries and expansive injunctive and supervisory relief by the Bureau contrast with the approach of other public enforcers with substantially similar UDAP authority. A study of all public UDAP enforcement actions completed in 2014 by all federal and state entities with primary UDAP enforcement authority found different strategies employed by different public entities.<sup>35</sup> Compared to other UDAP enforcers, the Bureau brought cases against defendants of much larger size and consistently obtained much larger public compensation dollars returned to consumers and much larger civil penalties. FTC enforcement showed a preference for cases against larger defendants to resolve with only injunctive relief, and effectively used asset freezes and appointment of receivers to ensure public compensation in

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<sup>30</sup> *Id.* at 1094.

<sup>31</sup> See General Accounting Office, *Credit Cards: Consumer Costs for Debt Protection Products Can Be Substantial Relative to Benefits but Are Not a Focus of Regulatory Oversight* (March 2011) (describing credit card add-on products); Prentiss Cox, *The Invisible Hand of Preacquired Account Marketing*, 47 Harv. J. on Legislation 425 (2010) (describing how seller "preacquired account" rights obtained from account issuers result in consumer deception); Staff Of The Senate Comm. On Commerce, Science, And Education, *Aggressive Sales Tactics On The Internet And Their Impact On American Consumers* (Comm. Print 2009) (discussing the problem of "data pass" of account charging rights from retailers causes consumer deception).

<sup>32</sup> Cox, *supra* note 30 at 445-446 and 452 (providing data showing, among other things, that the elderly proportion of those charged was twice the expected rate).

<sup>33</sup> *Id.* at 439-441 and 467-468.

<sup>34</sup> CFPB Factsheet, *Consumer Financial Protection Bureau: Enforcing Federal Consumer Protection Laws 2-4* (July 13, 2016) (listing the following add-on enforcement actions with associated consumer refunds in million \$: Bank of America/727; Citibank/700; Chase/309; Discover/200; Capital One/140; American Express/59.5; Fifth Third/3).

<sup>35</sup> Cox, Widman and Totten, *supra* note 20.

cases with numerous small entity and individual defendants engaged in fraudulent schemes. State enforcers (primarily state attorneys general), in contrast, varied widely in their approach to UDAP enforcement. For example, almost a third of the states, including even some large states, showed relatively little use of their UDAP authority, while another group of states brought a substantial number of cases against tiny defendants. In all, the study identified eight different enforcement strategies employed by groups of states.<sup>36</sup>

Importantly, these various public enforcers used different strategies for UDAP enforcement while maintaining similar, flexible CID procedures. Nothing in the current CID procedures of the Bureau prevent a re-focus of enforcement priorities on one of the other types of enforcement strategies, including the less active enforcement strategies employed by some state attorneys general. Broad discretion and flexibility in CID procedures are consistent with both the Bureau enforcement strategy to date and other approaches to public UDAP enforcement.

As the Bureau looked to the FTC and other agencies with similar authority in developing its initial CID rules, we encourage this review of CID procedures to engage with and be judged against the experience of decades of public enforcement use of pre-complaint investigative procedures in enforcement of UDAP and other consumer protection laws.

**C. The Report of the Office of Inspector General of the Federal Reserve Board Confirms Bureau Policies and Practices Appropriately Balance the Bureau’s Need for Information with the Burden on CID Recipients.**

The many signatories to this letter who have extensive experience in public enforcement actions, and UDAP public enforcement specifically, know the importance of balancing the burdens imposed on the CID recipient against the possible gain in the specific enforcement investigation at hand. A public enforcer who asks too much given the likely value to the investigation will face an administrative or judicial challenge to the demand. If the enforcer asks too little, the investigation can be unreasonably delayed or the enforcer may fail to obtain information that would alert the agency to a violation of a consumer protection law, and thus fail in its essential public protection mission.

After a thorough and independent review of the Bureau’s issuance of CIDs, the Office of the Inspector General of the Federal Reserve Board found no deficiencies in the Bureau’s policies, procedures and conduct in balancing these concerns, concluding that:

Preparing and modifying a CID involves significant professional judgment to carefully balance the burden the CID places on the recipient against the CFPB’s need to obtain information necessary to conduct an investigation. The Office of Enforcement’s processes for CID approval and modification seek to strike that balance by allowing for substantial input from the CID recipient.<sup>37</sup>

The Inspector General reached its conclusion after examining the Bureau’s rules and policies, including its “records management policy and the file plans for Office of Enforcement and

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<sup>36</sup> *Id.*

<sup>37</sup> Inspector General Report, *supra* note 6, at 10.

Office of the Director records,” and the Bureau’s actual practice of CID use, including a random selection of CIDs issued over a three year period along with “related documentation, such as CIDs, petitions, recommendation memorandums, and communications between the Office of Enforcement and the CID recipient.”<sup>38</sup>

The report found that the Bureau’s Enforcement Office effectively identified the information needed for the investigation as part of each CID sampled by the Inspector General.<sup>39</sup> It also found procedural compliance with all reviewed CIDs.<sup>40</sup> As noted above, the Inspector General found the Bureau carefully weighed investigative need and the burden on the CID recipient. It also determined that after issuance the Bureau appropriately uses “modifications and extensions of time to alleviate some of the potential burden associated with CID requests.”<sup>41</sup> The report described this practice as follows: “[W]e found that Office of Enforcement attorneys engage CID recipients in continuous dialogue during the CID issuance process, using meet and confers, modification letters, extension letters, and extension emails to address the potential burden and allow the recipient to successfully comply with the CID.”<sup>42</sup> The only recommendations for change to Bureau CID procedures concerned a reminder to the staff in the Guidance concerning crafting notices of CID purposes and two record-keeping items.<sup>43</sup>

To the extent that the RFI suggests a broad policy realignment of enforcement priorities toward the needs and concerns of CID recipients, rather than a review akin to the evaluation of the Federal Reserve Board’s Inspector General, it is important that the Bureau carefully weigh how such changes would impact the extraordinary results achieved by the Bureau’s enforcement actions to date. The complaints of CID recipients-- an inevitable feature of public enforcers actively doing their job-- should be carefully weighed against the impact of any shift in enforcement efforts that have to date focused primarily on the needs of American consumers. We urge that any proposed rule or guidance changes be accompanied by an analysis of specific examples of past Bureau enforcement outcomes that realistically would have been affected by restricted CID use in the context of the uncertain information available to Bureau enforcement staff at the time of CID issuance. Of course, it also is critical that the Bureau implement any such policy changes in a manner consistent with the law for CID use enunciated in the Dodd-Frank Act.

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<sup>38</sup> *Id.* at Appendix A.

<sup>39</sup> *Id.* at 8 (“We found that each of the sampled CIDs had a complete and accurate Action Required section, in which the litigation team indicated the appropriate types of information requested for each CID.”)

<sup>40</sup> *Id.* at 9-10.

<sup>41</sup> *Id.* at 10.

<sup>42</sup> *Id.* at 10-11. In describing these Bureau practices, the Inspector General noted that the FTC and Bureau use “similar safeguards to help alleviate potential burdens in its CIDs.” *Id.* at 11.

<sup>43</sup> *Id.* at 8-9 and 13-15.