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Subcommittee on Financial Institutions
Committee on Financial Services
United States House of Representatives

Hearing on "A New Era for the CFPB:
Balancing Power and Reprioritizing Consumer Protections"

March 26, 2025

Chairman Barr, Ranking Member Foster, and members of the Subcommittee, thank you for the opportunity to appear before you. My name is Rebecca E. Kuehn, and I am a partner at the law firm Hudson Cook, LLP, where I chair the Credit Reporting, Privacy, and Data Security Practice Group. Earlier in my career, I worked at the Federal Trade Commission (FTC), where I was Assistant Director of the Division of Privacy and Identity Protection in the Bureau of Consumer Protection, which oversees issues related to consumer privacy, credit reporting, identity theft, and information security. There, I led the Fair Credit Reporting Act program, and I oversaw the Commission's enforcement, outreach, and rulemaking activities in that area. I also oversaw investigations and enforcement actions involving the application of Section 5 of the FTC Act, which sets forth the prohibition against unfair and deceptive acts and practices.

I have been privileged to work in the area of consumer financial services on all sides – on behalf of financial services clients, as in-house counsel for companies, and at the FTC. Today, I am appearing today in my own capacity, and not on behalf of my firm or any client of the firm.

The focus of this hearing is on the Consumer Financial Protection Bureau (CFPB), which was established in 2011 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act). The CFPB was established in response to the 2008 financial crisis to "regulate the offering and provision of consumer financial products or services under the

Federal consumer financial laws." 12 U.S.C. § 5491(a). It is a comparatively young agency by federal government standards, but its approach to consumer protection, particularly its use of enforcement actions to establish activities that the CFPB believes violate the law, has raised significant concerns about regulatory overreach and created uncertainty in the financial services market.

Before the Subcommittee are a number of legislative proposals designed to increase the transparency and accountability of the CFPB and to provide needed regulatory certainty. My testimony today will be focused on two areas that are in need of reform: the CFPB's exercise of its enforcement authority over alleged violations of the Dodd-Frank Act's prohibition against unfair, deceptive or abusive acts or practices, and the CFPB's use of its investigatory authority, in particular its use of the civil investigative demand (CID).

I. The Need for UDAAP Reform

The Dodd-Frank Act grants the CFPB the authority to take action "to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." 12 U.S.C. § 5531. Whereas deception and unfairness have a long history of case law and guidance to explain them, the concept of "abusive" does not. The Dodd-Frank Act defines "abusive" acts or practices as conduct that: "(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or (2) takes unreasonable advantage of (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; (B) the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or

service; or (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer." 12 U.S.C. § 5531(d). Essentially, the Dodd-Frank Act delineates not just one way that an act or practice can be abusive, but rather four, describing each in broad, undefined terms.

The contours of the Bureau's abusiveness authority—its limits and how it differs from unfairness and deception—remain unclear to this day. The Bureau has primarily used its enforcement authority to declare what it believes is abusive. The enforcement cases to date have not shown how abusiveness is different from unfairness or deception, and they have been inconsistent in applying different abusiveness prongs to similar facts and circumstances. The result is that enforcement can appear arbitrary and results-oriented or—as some have put it—as "regulation by enforcement."

Further, although the CFPB issued a policy statement in 2023 identifying certain acts and practices that the agency considers "abusive," the policy statement affords the CFPB substantial discretion to deem actual practices "abusive."[1] The statement provides some framework for analyzing whether particular practices could be categorized as abusive, but it is not specific enough to provide meaningful guidance to consumer financial services companies for their compliance programs. For example, the statement notes that taking "unreasonable advantage" of consumers is determined by the specific facts and circumstances, and that "even a relatively small advantage may be abusive if it is unreasonable." This vague analysis—coupled with the 2023 Policy Statement's observation that the CFPB believes that it is not necessary for the agency to find any consumer harm or analyze the relevant costs or benefits to consumers—introduces a further level of uncertainty in the financial service market about what acts or

[1] Statement of Policy Regarding Prohibition on Abusive Acts or Practices, 88 Fed. Reg. 21883 (April 12, 2023) (12 C.F.R. Ch. X).

practices the CFPB may consider to be "abusive." Rather than provide regulatory certainty, the 2023 Policy Statement increases the confusion.[2]

It has been suggested that the definition of "abusive" cannot be defined in the abstract and will have to be determined based on the facts and circumstances in a matter.[3] The problem with that approach is that it will take many years—likely, decades—to develop the contours of the Bureau's abusiveness authority through court cases. Unlike a formal rulemaking process, allowing for notice and comment, which can elicit comments from industry addressing questions and concerns about a new rule—and providing the agency the opportunity to explain or address those concerns—rulemaking by enforcement has real due process and fairness implications. The CFPB could declare an existing practice "abusive" and penalize financial services companies retroactively, without giving companies a chance to adjust their policies. Given the substantial penalty authority afforded CFPB for UDAAP violations, a financial services company can face significant consequences if the CFPB decides, for the first time, that certain acts and practices are "abusive." This type of "gotcha" approach to enforcement of UDAAP has been roundly criticized.

The FTC's UDAP enforcement approach provides a path forward. The FTC generally cannot seek civil penalties for a standalone UDAP violation under section 5 of the FTC Act. Rather, the FTC may only obtain civil penalties where a company violates a rule issued by the

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[2] Although the CFPB invited comments on the Policy Statement, the Bureau announced the immediate applicability of the statement the date it was published. Further, although there have been a number of substantive comments filed that raised significant issues with the Policy Statement, see https://www.regulations.gov/document/CFPB-2023-0018-0001/comment, the CFPB has not modified its Policy Statement or otherwise addressed the comments it received.

[3] *How Will the CFPB Function Under Richard Cordray: Hearing Before the Subcomm. on TARP, Fin. Servs. & Bailouts of Pub. & Private Programs,* 112th Cong. 112-107, at 69 (2012).

FTC rule defining an act or practice as unfair or deceptive,[4] or the company violates a previous FTC order.[5]

In order to provide regulatory certainty to the market, but still provide the CFPB with the flexibility and ability to address new or rising threats to consumers, two changes should be implemented. First, the CFPB should be required to set forth more clearly the standard for finding an act or practice "abusive," preferably through a notice and comment rulemaking. Further, the CFPB should only be permitted to seek monetary relief where either it has defined a practice as an unfair, deceptive, or abusive act or practice through formal rulemaking or where a company has violated a prior order of the CFPB. H.R. 6789 would revise the Bureau's practices to provide for rulemaking and appropriately restrict the CFPB's ability to obtain monetary relief to those circumstances where the company has been fairly put on notice of the conduct. These revisions would provide more regulatory certainty while allowing the CFPB the ability to address new or emerging issues.

[4] Under section 18 of the FTC Act, 15 U.S.C. § 57a, the FTC is authorized to prescribe "rules which **define with specificity** acts or practices which are unfair or deceptive acts or practices in or affecting commerce." Anyone who violates the rule "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule" is liable for civil penalties. 15 U.S.C. § 45(m)(1)(A).

[5] This authority to seek civil penalties historically followed an order entered into by the company at issue. In recent years, the FTC has sought to leverage what it refers to as "Penalty Offense Authority" under section 5(m)(1)(B) of the FTC Act, to obtain civil penalties from parties engaging in conduct with actual knowledge that the conduct has previously been found to be unfair or deceptive via a prior administrative order by the Commission. It has done this by sending Notice of Penalty Offenses to thousands of companies in relevant industries. https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-takes-action-stop-dk-automation-kevin-david-hulse-pitching-phony-amazon-crypto-moneymaking. As -Commissioner Wilson observed, however, this practice may not be effective where the Notices do not identify clear-cut violations of the FTC Act. *See* Dissenting Statement of Commissioner Christine S. Wilson on *Notice of Penalty Offenses Concerning Substantiation of Product Claims* (March 31, 2023), available at https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner_wilson_dissenting_statement_substantiation_npo_3.31.23_final.pdf.

II. The Need to Reform Civil Investigative Demand Practices

One of the primary investigative tools used by the CFPB is the Civil Investigative Demand ("CID"), which may be used to compel companies to produce documents, answer questions, and even provide oral testimony to the CFPB before any formal enforcement proceedings commence. Section 12 C.F.R. § 1080.6 permits the Director, the Assistant Director of the Office of Enforcement, and the Deputy Assistant Directors of the Office of Enforcement to issue CIDs to both targets of investigatory action as well as persons with potential knowledge or evidence of the same. In the experience of my firm and its clients, CIDs impose enormous costs on CID recipients and typically result in business disruptions that last many months, often years. The demands required to respond to CIDs divert company personnel and involve substantial e-discovery costs, well over $1 million and very often exceed $250,000, not including the cost of attorney's fees. Just one recent investigation I worked on involved over the production of over 30 gigabytes of data, hundreds of pages of written CID responses, and multiple days of testimony involving numerous witnesses. These demands are served with minimal time permitted to respond, and the amount of time permitted for extensions has shortened greatly in recent years. That is a substantial burden, particularly for small and mid-sized companies.

The authority to impose such costs and burdens should be more closely held and limited to the CFPB's senior leadership, specifically to the Director or Associate Director level. Subsection 5562(c) of Dodd-Frank explains that the Bureau may issue a CID when it "has reason to believe" that the CID target may be in possession, custody or control of material, tangible things or information "relevant to a violation…."[6] Where there is no reason to believe a violation has occurred or is occurring, no CID should issue. The Notification of Purpose

[6] 12 U.S.C. § 5562(c)(1).

requirement is even more explicit, providing that the CID "shall state the nature of the conduct constituting the alleged violation under investigation and the provision of law applicable to such violation."[7]

But, in my experience, the Bureau has not limited the use of CIDs as described above. The Bureau has imposed vast costs and enormous business disruption upon CID targets for other purposes, including:

i. Gathering information about a particular market segment of the financial services industry;

ii. Gathering information about a particular target's policies and procedures;

iii. Conducting top-to-bottom reviews of a CID target's business because the target operates in a business that is disfavored by the Bureau (e.g., small dollar lending) and, in effect, requiring the target to prove it has not violated a myriad of consumer financial laws; and

iv. Using broadly worded CIDs to follow-up on examinations that were already overly-broad and unduly burdensome.

The Bureau's own Policies and Procedures Manual takes the position that:

> The Bureau is authorized to investigate merely on suspicion that any person has violated any provision of federal consumer financial law, or to seek assurance that a violation has not occurred.[8]

In other words, the Bureau believes, as a matter of policy and procedure, that the Office of Enforcement may impose the enormous burden of a CID on a business to make the CID target prove a negative, that a violation has not occurred, or to alleviate a "mere suspicion" of a violation held by the Bureau.

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[7] 12 U.S.C. § 5562(c)(2).

[8] CFPB Enforcement Policies and Procedures Manual, Version 3.2, February 2021, available at. https://www.consumerfinance.gov/foia-requests/foia-electronic-reading-room/enforcement-policies-and-procedures-manual-version-3-2/, at 37.

The Bureau has often used the "prove a negative" approach to support very broad investigations concerning compliance with a multitude of consumer financial laws in the belief that if the Bureau can turn the company "inside-out," some violation will be found. Said more clearly, the Bureau's procedures encourage the issuance of CIDs that permit Bureau investigators to probe into aspects of the business that have nothing to do with the "mere suspicion" that may have originally led to the CID. There is not even a passing concern noted to the recipient's due process rights only to be investigated where something more than mere suspicion exists. If that unwarranted probing leads to some practice that can then be declared "unfair" or "abusive," the investigators can relate that unfairness or abusiveness finding back to the CID's "very broad" Notification of Purpose whose "direction and scope" was always intended to be uncertain. In my experience, it is historically extremely rare for the CFPB to close an investigation with no finding, and quite common for the investigation to evolve beyond the initial stated purpose. Again, the Bureau's policy is inconsistent with Dodd-Frank's Notification of Purpose requirement that the CID "state the nature of the conduct constituting the alleged violation" and identify "the provision of law" appliable to such violation.[9]

In practice, the Bureau's Notifications of Purpose rarely provide the sort of specificity contemplated by the statute and regulation. The notifications often do not even identify all of the laws that that are under investigation, instead using a generic reference to "any other federal consumer financial law." When a particular law is identified, the notifications do not identify the specific statutory or regulatory section or subsection that is the purported subject of the investigation. Rather, the entirety of a particular consumer financial law may be identified, leaving the CID target to guess at which section or subsection the Bureau believes may have

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[9] *Id*.

been violated. The following is just one example of such a Notification of Purpose from an actual CID:

> The purpose of this investigation is to determine whether lenders or other unnamed persons have engaged or are engaging in unlawful acts or practices in connection with the marketing, offering, servicing, or collection of … loans, in violation of Sections 1031 and 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5536, the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et seq., the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 et seq., the Truth in Lending Act, 15 U.S.C. §§ 1601 et seq., or any other federal consumer financial law. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

Taking just the reference to the Fair Credit Reporting Act (FCRA) in the above Notification of Purpose as an example, the FCRA includes: 30 sections, nearly 150 subsections and more than 34,000 words that govern: users of consumer reports; furnishers of information to consumer reporting agencies; and the consumer reporting agencies themselves. The Notification of Purpose does not identify the nature of the conduct constituting the alleged FCRA violation, nor does it identify which provision of the FCRA, or any of the other consumer financial laws, is applicable to the suspected violation giving rise to the investigation.

As counsel for numerous CID targets, the attorneys in my firm have routinely asked Bureau investigators for more information about: (i) why the CID was issued; or (ii) what specific violations are suspected that may have triggered the CID's issuance. Universally, the response has been that the Bureau's policy is not to share such information with CID targets. Effectively, the Bureau has turned the Notification of Purpose requirement on its head. The CID target is not informed of the "nature of the conduct constituting the alleged violation" or "the provisions of law" applicable to the alleged violations.

It is clear, however, that actually complying with the Notification of Purpose requirement would not limit the Bureau's ability to investigate other areas when warranted. If, during any

investigation, the Bureau should learn about other practices that support a "reason to believe" a different violation has occurred, the Bureau can simply issue a new and subsequent CID identifying the new conduct constituting the suspected violation along with the identification of the particular provision of law applicable to such violation.

The costs and burdens of CIDs also are exacerbated by unreasonably tight timelines. CID production timeframes typically are as follows:

- Ten calendar days (after receipt of the CID) for the CID recipient and Bureau investigators to meet and confer to "discuss and attempt to resolve all issues regarding compliance with the [CID];[10]
- Twenty calendar days (after service of the CID) for the CID recipient to file a petition to modify or set aside the CID concerning those issues that can't be resolved with Bureau investigators;[11] and
- Thirty calendar days, typically, to respond to the entire CID.[12]

In considering the impact of these deadlines on the CID recipients, it is important to recognize that for many companies, the compliance and/or legal departments who manage the internal aspects of the CID response process consist of just a few employees. Given the short CID timeframes, managing the company's internal response process becomes a full-time job for these employees, meaning that they are not available to continue their actual job functions. Over the course of the weeks and months that follow the receipt of a CID, the personal stresses experienced by some of these employees in responding to the CID become literally unbearable. My firm's clients' employees have quit their jobs because of the stresses imposed by having to respond to the CID while also performing their ordinary job functions.

[10] 12 C.F.R. § 1080.6(c).
[11] 12 C.F.R. § 1080.6(e).
[12] Virtually every CID we have reviewed imposes a thirty-day response deadline.

The initial thirty-day return date for the typical CID presents a significant concern. This is because it establishes the mandatory response date for the entire CID unless the deadline is otherwise modified. A modification is only approved if, during the meet and confer process, the CID recipient can convince Bureau investigators to recommend such a modification to the Deputy Enforcement Director. All of this must be done before the twenty calendar day deadline for the filing of a petition to modify or set aside the CID. What this means for the CID recipient is that, within ten days, it must:

- Review its business records to determine whether responsive information and documents even exist;
- Determine how long it will take to collect, review and produce the responsive information; and
- Confer with its counsel to discuss the CID recipient's ability to respond to the CID and to identify the resources and time needed to respond so its counsel can negotiate the possible modification of the CID with Bureau investigators.

Most troubling of all for the CID recipient is that the following must all occur simultaneously during the initial thirty-day response period following receipt of the CID: (i) complete the meet and confer process; (ii) identify those issues where an agreement can't be reached with Bureau investigators and, within twenty days, file a petition to modify or set aside the CID as to those issues; and (iii) identify, collect, screen and process all of the information and documents needed to respond to the CID. Further, because the recipient cannot know what CID requests will be modified or how they will be modified until the modification letter is actually received, the recipient must proceed as though it will fully respond within the initial thirty-day deadline or prepare an unnecessary petition to modify the CID in the event that the modification letter provides insufficient relief.

When my firm has raised concerns with Bureau investigators regarding what seems to be a default thirty-day return date, the concerns have often been met with the response that thirty-days is the Bureau's standard response time which will not be modified except upon a showing of good cause. The result is that the CID recipient and its counsel spend the precious initial days following receipt of the CID developing their "good cause" information for each CID request item where additional time is needed. The time required to develop and make this showing can amount to days of company and attorney time during which the thirty-day response clock is running.

The twenty calendar day deadline for filing a petition to modify is established by statute.[13] The point of the meet and confer process, which, by rule, must occur within ten calendar days of the CID's receipt, is to allow the CID recipient and Bureau investigators the opportunity to "discuss and attempt to resolve all issues regarding compliance with the [CID]."[14] Except for the most limited of CIDs, "all issues" cannot be identified, much less "resolved," in the ten days for a meet and confer or the twenty days before a petition to modify or set aside the CID must be filed.

H.R. 10036 seeks to address these concerns by incorporating a process through which the CID recipient, through counsel, may seek and obtain clarifications regarding the scope or breadth of the demand, and the deadlines for filing a petition to set aside the CID as well as the return date of the CID would be suspended pending that process.

The Dodd-Frank Act permits a CID target to file a petition to modify or set aside a CID.[15] The statute authorizing such filing says nothing about: (i) the Bureau making the petition public;

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[13] 12 U.S.C. § 5562(f)(1).
[14] 12 C.F.R. § 1080.6(c) (emphasis added).
[15] 12 U.S.C. § 5562(f).

or (ii) withholding the Bureau investigator's response to the petition from the CID target.[16] Nonetheless, the Bureau's implementing regulations generally require the public disclosure of such petitions.[17]

By making the petitions public, the Bureau effectively makes the otherwise confidential existence of the investigation itself public before there is any actual finding of a law violation. The effect is to deter CID targets from exercising their right to file a petition, even when the CID requests are unreasonable, to avoid the significant business disruption that could flow from such a public disclosure, including: (i) a drop in share prices for publicly traded companies; (ii) the loss of access to credit facilities needed to run the business; and (iii) negative publicity leading to a loss of market share. All of this, effectively, compels agreement to unreasonable CID requests because the CID target wants to avoid the harms that would flow from the public disclosure of the existence of the investigation.

H.R. 10036 would require the CFPB to treat petitions as confidential and clarify that the grounds to set aside a CID include whether the demand was unduly burdensome, disproportionately expensive, and outside the scope of the inquiry, or it was unreasonably cumulative, or that it could be obtained from some other source that is more convenient, less burdensome, or less expensive. These revisions would allow a recipient to raise legitimate concerns with the scope and burden of a CID, without fearing disclosure of what would otherwise be a confidential investigation.

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[16] *Id.*

[17] 12 C.F.R. § 1080.6(g).

Thank you again for the opportunity to testify before you today. I am happy to answer any questions.