October 21, 2016

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20006

Re: Docket No. CFPB-2016-0039
Amendments Relating to Disclosure of Records and Information, 81 Fed. Reg. 58,310 (proposed Aug. 24, 2016) ("Proposed Rule")

Dear Ms. Jackson:

This letter is presented by the Section of Business Law (the "Section") of the American Bar Association ("ABA") on behalf of its Committees on Consumer Financial Services and Banking Law in response to the Proposed Rule. Please note that the comments expressed in this letter represent the views of the Section only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore should not be construed as representing the policy of the ABA. We appreciate the opportunity to provide these comments to the Consumer Financial Protection Bureau (the "Bureau").

Although there are a number of important issues in the Proposed Rule that are worthy of public comment, we are writing about one particular issue that is foundational: the First Amendment concerns raised by the Proposed Rule.[1] Specifically, the Proposed Rule's prohibition on private persons in possession of "confidential investigative information" from disclosing such information without obtaining the prior approval of a Bureau official is inconsistent with the First Amendment. We urge the Bureau to revise its rules to make clear that no such prohibition applies. Below we provide background regarding well-established First Amendment principles and how they have been applied to other agencies. We then explain why the Proposed Rule cannot be reconciled with these principles and why we urge the Bureau to change its proposal.

[1] We understand that the ABA is separately filing a comment regarding the Proposed Rule's potential impact on privileged information provided to the Bureau in the course of the Bureau's supervisory or regulatory processes.

I. Prior Restraints and Content-Based Restrictions on Speech Are Presumptively Unconstitutional and Only Permitted in Narrow Circumstances.

There are two First Amendment principles relevant to the Proposed Rule: the prohibitions on "prior restraints" and "content-based restrictions." First, a "prior restraint" exists if a speaker must "ask a governmental agency for prior permission to speak." *Citizens United v. FEC*, 558 U.S. 310, 335 (2010). Such a prior restraint is "presumptively unconstitutional," because it is "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 558-59 (1976).

Courts require the following "procedural safeguards in order to avoid constituting an invalid prior restraint: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court." *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 321 (2002) (citing *Freedman* v. *Maryland*, 380 U.S. 51, 58-60 (1965)).

Second, "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed," and such content-based restrictions are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

Other federal agencies do not attempt to impose prior restraints and content-based restrictions on the subjects of their investigations or others who are in possession of investigatory information. For example, the Securities and Exchange Commission ("SEC") brings eight hundred enforcement actions each year, without claiming any such power. *See* Press Release: SEC Announces Enforcement Results For FY 2015, https://www.sec.gov/news/pressrelease/2015-245.html; *see also* 17 C.F.R. § 203.2 (regarding the SEC's internal treatment of investigative materials).

Congress has authorized the Federal Trade Commission ("FTC") to seek a prior restraint on recipients of its compulsory process from disclosing it to others—but subject to strict limitations that were doubtless intended to respect the above First Amendment principles. 15 U.S.C. § 57b-2a(c), (g). First, the FTC must obtain a judicial order, and it has no authority to impose a prior restraint before obtaining this judicial order. *Id.* Second, the FTC bears the burden of proving to the court that there is reason to believe that disclosure may cause one of five enumerated harms, such as "endangering the life or physical safety of an individual" or "seriously jeopardizing an investigation." *Id.* Third, the judicial order expires within 60 days and must be renewed every 30 days for a maximum of 9 months. *Id.* Fourth, this procedure is only available against third parties who receive compulsory process. Congress has specifically prohibited the FTC from using the procedure against persons who are "a subject of the

investigation or proceeding at the time such process is issued." *Id.* Finally, it is worth noting that we are unaware of any instances in which the FTC has used this procedure.

The FTC's authority and practice are particularly instructive as the Dodd-Frank Act provisions granting the Bureau investigative authority are modeled after the FTC Act (though are notably lacking a provision authorizing the Bureau to seek a judicial order imposing a prior restraint on third-party recipients of compulsory process). *Compare* 12 U.S.C. § 5562(c) (setting forth CFPB civil investigative demand authority) *with* 15 U.S.C. § 57b-1(c) (setting forth FTC civil investigative demand authority). Both statutes provide that information provided by recipients of civil investigative demands ("CIDs") *to* the relevant agency shall be treated confidentially *by* the agency, 12 U.S.C. § 5562(d); 15 U.S.C. § 57b-2(b), but neither prohibits a CID recipient from disclosing receipt of the CID, except pursuant to the judicial order procedures discussed above.

Even in urgent matters of national security, strict protections of First Amendment rights are required. The Federal Bureau of Investigation ("FBI") sometimes issues a form of compulsory process known as a national security letter ("NSL"). *See generally John Doe, Inc. v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). A senior FBI official may impose a nondisclosure requirement on an NSL recipient by making a certification that: "there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person." *Id.* at 874. The Second Circuit has held that the relevant statute is unconstitutional to the extent that it requires the NSL recipient rather than the government to initiate judicial review, and it has imposed a variety of other constitutional limitations on the procedure. *Id.* at 876-885; *see also In re Nat'l Sec. Letter*, 930 F. Supp. 2d 1064 (N.D. Cal. 2013).

II. The Proposed Rule's Approach to Confidential Investigative Information Presents Severe First Amendment Problems

Under the Proposed Rule, a person lawfully in possession of confidential investigative information would only be permitted to disclose it to certain listed parties, such as certain employees, or "Another person, with the prior written approval of the Associate Director for Supervision, Enforcement, and Fair Lending." Proposed § 1070.42(b). Further, if the information were disclosed to a second person, the second person "shall not, without the prior written approval of the Associate Director for Supervision, Enforcement, and Fair Lending, utilize, make, or retain copies of, or disclose . . . confidential investigative information for any purpose, except as is necessary to provide advice or services" to the first person. Proposed § 1070.42(b)(3)(i).

"Confidential investigative information" would be defined as including "Any other documents, materials, or records prepared by, on behalf of, received by, or for the use by the CFPB or any other [Federal, State, or foreign governmental authority, or an entity exercising governmental authority] in the conduct of enforcement activities, and any information derived

from such materials." Proposed §§ 1070.2(a), (i). The section-by-section analysis of the Proposed Rule makes clear that the term is intended to include CIDs themselves. 81 Fed. Reg. at 58,316.

In other words, subjects of investigations and other CID recipients would be prohibited from communicating information on a wide array of topics connected with any investigation by the Bureau, including the fact of the investigation's existence, its ostensible purpose, the nature of the Bureau's requests, or the party's response, without seeking the prior approval of a Bureau official.[2] Yet investigation subjects and other CID recipients may have a number of reasons that they wish to share such information with others. Oftentimes, CID recipients have contractual obligations or other business reasons to disclose the existence of an investigation to existing or prospective business partners. CID recipients may also wish to share the existence of an investigation for other reasons closer to core First Amendment concerns. For example, they may wish to share such information with a trade association to get guidance on how to respond to information requests or to assist the trade association in its lobbying efforts. Or a CID recipient might wish to share a CID with members of Congress or the press in an effort to bring oversight to the investigative process. Under the Proposed Rule, these activities would all be prohibited absent authorization from the Bureau.[3]

The proposal thus represents a "prior restraint" of speech for purposes of First Amendment analysis, because the speaker must ask the Associate Director for Supervision, Enforcement, and Fair Lending for permission to speak. *Citizens United*, 558 U.S. at 335. Additionally, it represents a "content-based restriction," because it applies to particular speech because of the topic discussed, namely the Bureau's enforcement activities. *Reed*, 135 S. Ct. at 2226. For these reasons, the proposal is presumptively unconstitutional.

Further, the proposal does not satisfy the minimum procedural safeguards that are necessary to save a prior restraint from invalidity. The restraint is not for a "specified brief period" before judicial review, *Thomas*, 534 U.S. at 321, but is permanent. And although it might be possible for a CID recipient to go to court to obtain judicial review of the restraint, First Amendment doctrine requires that the "censor must bear the burden of going to court to suppress the speech." *Id.*

Moreover, the proposal is not "narrowly tailored to serve compelling state interests," *Reed*, 135 S. Ct. at 2226, because it is overbroad. Even in the realm of national security, the government is expected to make an *individualized* determination that release of *specific* information presents "a danger to the national security of the United States" or another

[2] Curiously, the prohibition would also facially extend to information connected to any investigation by any other governmental authority, which is obviously a matter beyond the Bureau's authority.

[3] The Proposed Rule does authorize disclosure "as required by law." Proposed Rule § 1070.41(a)(1). Such authorization, however, only serves to eliminate the catch-22 that would otherwise exist if a recipient of confidential information were both legally required and legally prohibited from disclosing the information. It does nothing to aid the person who, though not legally required to do so, wishes to speak about the information at issue.

enumerated harm. *Mukasey*, 549 F.3d at 874. By contrast, the Proposed Rule assumes the Bureau has a compelling interest in keeping virtually every scrap of information connected to any investigation secret, far beyond the needs of the SEC, the FTC, and even the FBI.

Further, the Bureau's own existing practices would render a claim that the Bureau has a compelling interest implausible. The section-by-section analysis of the Proposed Rule could be read to imply that a prohibition on disclosure already exists and the function of the proposal is simply to "lend clarity." 81 Fed. Reg. at 58,316. But in fact the Bureau's enforcement activities to date have not relied upon such a prohibition. Notably, Bureau CIDs, which contain extensive instructions, do not contain any instruction that the CID must be kept confidential. Indeed, the Bureau has told many recipients of CIDs that that their cooperation in keeping the CID confidential is voluntary:

> This CID relates to an official, nonpublic, law enforcement investigation being conducted by the Bureau. *We ask your voluntary cooperation in not disclosing the existence of this CID* outside your organization, except to legal counsel, until you have been notified that the investigation has been completed. Premature disclosure could impede the Bureau's investigation and interfere with its enforcement of the law.

CID published in *CFPB v. Stricklin*, No. 1:14-cv-00578 (D. Md. Feb. 27, 2014), ECF No. 1-3 (emphasis added).[4]

Moreover, the Bureau routinely publishes petitions to modify or set aside its CIDs on its website, on the grounds that they "are part of the public records of the Bureau unless the Bureau determines otherwise for good cause shown." 12 C.F.R. § 1080.6(g).

To be sure, the Bureau is fully entitled to restrict its own speech regarding investigations. And there are important reasons for the Bureau to so, including the fact that subjects of investigations often have a strong interest in maintaining the confidentiality of investigations, lest they be tarred by the mere existence of an investigation without any finding of wrongdoing. But if a subject of an investigation chooses to speak about the investigation, the Bureau may not restrain such speech without appropriate procedural safeguards and a compelling interest.

III. The Final Rule Should Confirm that a CID Recipient is Not Prohibited from Disclosing Confidential Investigative Information.

The Bureau's current rule is ambiguous with respect to whether CID recipients are free to disclose their receipt of a CID. On the one hand, the rule provides that no person in possession of confidential information may disclose it, suggesting such disclosure is prohibited. 12 C.F.R. § 1070.41(a). On the other hand, the current rule appears focused on preventing the Bureau itself

[4] It is our understanding that this language is part of the general instructions contained in CIDs sent to third parties (*i.e.*, to recipients who are not themselves the subject of the investigation).

from disclosing confidential investigative information, and the practices described above support such a narrower reading. Indeed, the current rule contains no exception for a CID recipient disclosing the CID to its own counsel, further suggesting that the current rule's prohibition does not extend to CID recipients. Moreover, a court confronted by this ambiguity would have to choose the reading that does not restrict the speech of CID recipients, in order to "avoid a serious constitutional question." *Dent v. Holder*, 627 F.3d 365, 374 (9th Cir. 2010); *see also Chowdhury v. Ashcroft*, 241 F.3d 848, 853 (7th Cir. 2001). The current ambiguity, however, raises unnecessary legal questions for CID recipients and should be clarified.

We urge the Bureau to state in the final rule that the subject of an investigation or other CID recipient is not prohibited from disclosing confidential investigative information. As explained above, the prohibition described in the Proposed Rule is not constitutionally tenable. Moreover, there are no revisions that the Bureau could make to the prohibition that would rescue its constitutionality. In particular, the Bureau lacks authority to confer jurisdiction on a federal court to entertain a suit initiated by the Bureau, in which the court would order a CID recipient not to disclose information. Congress knows how to authorize such suits by statute, as it has done in the case of the FTC, but has not done so in the case of the Bureau.

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The Proposed Rule presumes that subjects of investigations are not at liberty to speak about those investigations and requires them to obtain special approval from a government official. Our legal system, however, presumes that ordinary citizens are free to discuss government activities and presumes that government efforts to restrain such speech are unconstitutional.

We appreciate the opportunity to comment on the Proposed Rule and we hope that these comments are helpful to the Bureau.

Sincerely,

William D. Johnston
Chair, ABA Business Law Section