

## CFPB In Focus: Navigating Investigational Hearings



*Law360, New York (April 23, 2014, 1:31 PM ET)* -- The Consumer Financial Protection Bureau has been actively engaged in investigations of banks and nonbanks since it was established nearly three years ago. To further its mission “to ensure that consumer financial markets actually work for people,” the bureau has stated that it will use “strong and vigilant enforcement” to “root out unfair, deceptive, or abusive acts or practices in connection with consumer financial products or services.” The recent proliferation of public enforcement actions demonstrates that the CFPB is putting words into action.

Like many government agencies before it, the CFPB has relied heavily on the use of Civil Investigative Demands (“CIDs”) in its investigations to carry out its mission. Although the final rules relating to investigations, including those related to CIDs, were drawn from investigative procedures used by other government entities, most heavily the Federal Trade Commission, the CFPB’s execution of these rules can be quite different in a number of important ways.

The process for investigative hearings, which are noticed through CIDs and used to take oral testimony during the bureau’s investigations, is another instance in which the CFPB’s rule of the road diverges from those of many other government agencies. Thus, enforcement lawyers and the institutions they represent are working within a new rubric in many ways. This article provides an overview of the CFPB’s rules relating to investigational hearings and practical tips for preparing and defending such hearings.

### Overview of the Rules

Section 1080.7 of the final rules provides that investigational hearings may be conducted pursuant to CIDs “for the giving of oral testimony in the course of any Bureau investigation, including inquiries initiated for the purpose of determining whether or not a respondent is complying with an order of the Bureau.” Given that investigational hearings typically are noticed by CIDs, many of the rules discussed in our previous article on the subject, CFPB Investigations in Focus: Navigating CIDs, also will apply here.

The final rules further provide that CIDs for oral testimony “shall prescribe a date, time, and place at which oral testimony shall be commenced, and identify a Bureau investigator who shall conduct the investigation and the custodian to whom the transcript of such investigation shall be submitted.” 12 C.F.R. § 1080.6(a)(4). The bureau may request testimony from a corporate representative on behalf of an entity, but also may notice the testimony of individuals. If the CID for oral testimony is issued to an entity, the CID must describe “with reasonable particularity” the matters for examination. *Id.*

While the CFPB would argue that it adheres to this requirement, the matters for examination provided often are so broad and ambiguous that it may be difficult to decipher the actual topic for examination, which may lead to difficulty in designating the appropriate person to testify. If the entity designates more than one person to testify, it must tell the bureau the matters on which each designee will testify. *Id.* If the CID for oral testimony is noticed to a particular individual, you may only receive the general notice of the purpose of the investigation with no information on the specific matters or topics for examination.

Investigational hearings must be conducted under oath or affirmation and stenographically reported. *Id.* § 1080.7(b). The final rules require the bureau investigators to exclude from the hearing all persons except: (i) the person being examined; (ii) his or her counsel; (iii) the officer before whom the testimony is to be taken; (iv) any investigator or representative of an agency with which the Bureau is engaged in a joint investigation; and (v) any individual transcribing or recording the testimony. *Id.* § 1080.7(c).

The inclusion of investigators or representatives of an agency engaged in a joint investigation with the bureau is a departure from the FTC’s rules which do not explicitly include such people, and in fact, require consent of the person being examined before allowing others to be present. This is consistent, however, with the CFPB’s public announcements of collaboration and coordination among other banking regulators and state attorneys general. And, even if a representative from the other agency is not present during the hearing, the transcript from the examination likely will be shared with that other agency.

While the final rules permit a witness’s counsel to be present during the investigational hearing, they do not permit attorneys to make objections other than those made “for the purpose of protecting a constitutional or other legal right of privilege, including the privilege against self-incrimination.” *Id.* § 1080.9(b)(2). This, too, is a significant departure from the FTC’s rules which allow attorneys to make any objections as long as they are stated concisely in a non-argumentative and non-suggestive manner.

Counsel be warned; if the bureau investigator finds that counsel for a witness has engaged in “disorderly, dilatory, obstructionist, or contumacious conduct,” or contemptuous language in the course of the hearing, the investigator may refer the matter to the bureau for action. *Id.* § 1080.9(b)(5). Action could include suspending or disbarring the attorney from further practice before the bureau. *Id.* While the FTC has a similar rule, it rarely acts on it. Only time will tell whether the CFPB will follow suit with the FTC.

Following completion of the examination of the witness, counsel for the witness may request that the

bureau investigator conducting the hearing permit the witness to clarify his or her answers. Id. § 1080.9(b)(5). While both the CFPB's rules and the FTC's rules provide that it is within the sole discretion of the investigator to grant or deny such a request, the CFPB's rules do not contain the added language contained in the FTC's rules that such requests ordinarily would be granted except for good cause stated and explained on the record.

The final rules provide that "any person compelled ... to testify in an investigational hearing, shall be entitled to retain a copy or, on payment of lawfully prescribed costs, request a copy of ... the transcript of his or her testimony. The bureau, however, may for good cause deny such a request and limit the witness to inspection of the official transcript of the testimony." Id. § 1080.9(a). Upon completion of the transcription of the witness's testimony, the witness shall be offered an opportunity to read the transcript and shall have 30 days thereafter to identify any changes and sign. Id. Thus far, in our experience, the CFPB has taken the position that this section of the rule only allows a witness to request a copy of his or her transcript rather than being entitled to one and that the bureau may deny such a request.

## **Rules of the Road**

There are a number of practical takeaways from our experiences of preparing for and defending a CFPB investigational hearing. We discuss a few below.

### ***This is Not a Deposition***

While there are some similarities between investigational hearings and depositions in private civil cases, it is important for counsel and the witness to remember that these are not civil depositions. There are different rules that apply with respect to (i) objections; (ii) the role of witness counsel; and (iii) counsel's right to examine his or her own witness. For example, it is not uncommon for the bureau to use multiple questioners at the same time. In addition, there is no time limit on investigational hearings. They can, and in our experience, have lasted more than seven hours. And, the same witness can be noticed for multiple days of testimony.

### ***Seek Clarification on the Topics***

The topics identified in the request for testimony can be broad and ambiguous. This may occur because the CFPB may not have the same level of knowledge of the issues or entity as the witness. Or, the bureau may want to leave itself with some room to change the focus of its investigation. Thus, working with the bureau investigator taking the testimony to gain clarity on the topics to be covered is essential. This could allow you to streamline your witness preparation and make the hearing itself more efficient. Likewise, it will help to avoid mutual frustration on the part of the CFPB and the witness by reducing the potential for the CFPB to begin inquiring about topics for which the witness did not have the opportunity to prepare. Any clarity or agreements on what will be covered (or not covered) in the hearing should be documented.

### ***Prepare the Witness on Process and Substance***

As with any type of hearing or deposition, it is imperative to thoroughly prepare the witness. The witness must be prepared to cover the topics as they have been described (and perhaps clarified) by the CFPB. It also is important to explain the process and ground rules to the witness so that he or she can be as comfortable as possible. This may be the first time the witness is providing testimony and, in any event, likely will be the first time the witness is testifying at a CFPB investigational hearing.

If the witness has testified in private civil cases, it will be important to explain the differences between a civil deposition and an investigational hearing as the witness may be expecting counsel to make objections that he or she cannot make. Indeed, because the lawyer may not be able to make any (or many) objections, the witness must be trained to be his or her own lawyer. For example, the witness needs to be trained not to speculate, to ask for clarification where necessary, to ask that compound questions be broken down into individual questions, and to ask for breaks when needed.

This is especially important because, as discussed above, in certain instances the questions asked by the bureau may not be clear to the witness, given the witness's likely superior knowledge of its business. Indeed, it is not uncommon for the CFPB to have an investigational hearing at the onset of an investigation, so it can learn about the industry and/or where the relevant documents or data are located.

### ***Try to Establish Ground Rules***

It is important to reach an agreement with the bureau attorney on the ground rules that will apply to the investigational hearing. As a technical matter, counsel's ability to object is severely curtailed. However, it is rarely advantageous to either side to have an incomprehensible record. Therefore, coming to an agreement with the bureau attorney prior to the hearing that some objections will be made on the record in certain situations — such as out of scope, exceedingly poor form of the question, or mischaracterization of the witness's testimony — may make sense. In a similar vein, although the bureau could deny counsel's request to ask questions at the hearing, the CFPB often permits cross-examination.

### ***Take Very Good Notes***

While the witness is provided an opportunity to review and correct a copy of the transcript of his testimony, he is only permitted to order a copy of that transcript upon prior approval of the CFPB. That means that the witness may not get a copy of the transcript in the near term, or in some instances, at all. This practice makes good note-taking imperative on the part of counsel, as your notes may be the only record that you have of what was said during testimony. Relatedly, the CFPB may give many exhibits during the testimony, and it typically and promptly, takes back those exhibits when the hearing is over. Accordingly, jotting down bates numbers (if the documents were produced by an individual or corporate defendant) and descriptions of documents can be very important.

## Conclusion

Preparing for, providing testimony and defending witnesses in CFPB investigational hearings can be a challenging experience that proves very different from a deposition. While the final rules relating to such hearings are similar to those used by other prudential regulators, there are significant departures that lead to new rules of the road. Drive carefully!

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