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Via electronic submission

April 25, 2018

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

Re: Request for Information Regarding Civil Investigative Demands and Associated Processes, Docket No. CFPB-2018-0001

Dear Ms. Jackson:

The Independent Community Bankers of America (ICBA)¹ welcomes the opportunity to provide comment on the Consumer Financial Protection Bureau's (CFPB or Bureau) request for information (RFI) regarding Civil Investigative Demands (CIDs) and associated processes.

On January 17, 2018, Acting Director Mick Mulvaney announced the Bureau's call for evidence "to ensure the Bureau is fulfilling its proper and appropriate functions to best protect consumers."² ICBA appreciates this wholistic review. The call for evidence includes the publication of twelve RFIs, each designed to review and solicit feedback on the Bureau's policies and practices.

Background

The *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank) provides the CFPB with the authority to conduct investigations into suspected violations of consumer

¹ The Independent Community Bankers of America®, the nation's voice for nearly 5,700 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services. With nearly 52,000 locations nationwide, community banks employ 760,000 Americans, hold \$4.9 trillion in assets, \$3.9 trillion in deposits, and \$3.3 trillion in loans to consumers, small businesses, and the agricultural community. For more information, visit ICBA's website at www.icba.org.

² CFPB Press Release, "Acting Director Mulvaney Announces Call for Evidence Regarding Consumer Financial Protection Bureau Functions," Jan. 17, 2018, *available at* <https://www.consumerfinance.gov/about-us/newsroom/acting-director-mulvaney-announces-call-evidence-regarding-consumer-financial-protection-bureau-functions/>.

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financial protection laws and to obtain information to aid in those investigations by issuing CIDs.³ The Bureau uses CIDs as a tool to gather information from entities that are suspected of violating consumer financial laws, or from third-parties that might have information relevant to the Bureau's investigation. CIDs are official demands for documentary material, tangible things, reports, answers to written questions, or oral testimony, and if necessary, can be enforced in federal court.

Dodd-Frank also outlines the procedural requirements for issuing CIDs, and mandates that the CFPB promulgate rules and procedures that govern the process. The Bureau's regulations set forth the notice provisions, reply deadlines, petitions to appeal, and other procedural requirements. This RFI seeks comments on these procedural requirements.

ICBA Comments

Executive Summary

ICBA firmly supports a balanced regulatory system. However, there has been a growing host of concerns that warrant review. At the end of this commendable review effort, ICBA is optimistic that the Bureau will better understand these concerns and be more aware of how its processes and rulemaking and other activities impact community banks.

Widely acknowledged by Congress, heads of agencies, and other policymakers, community banks did not cause the financial crisis. Nonetheless, they are ensnared in a complex legal and regulatory framework that was created in response to the crisis. Although these rules were designed to curb the bad practices of Wall Street banks and other financial services stakeholders, thousands of community banks must comply with rules that in many instances were not designed for them. Any effort to reduce these unintended consequences is welcomed by ICBA and community banks.

In response to the RFI at hand, ICBA encourages the CFPB to address three areas: (1) limit the scope of CIDs; (2) utilize less adversarial investigative tools, especially for third-party CID recipients that are not suspected of wrong-doing; and (3) follow due process and broaden procedural safeguards against abuse, including the implementation of refined statements of purpose, reasonable approaches to 'meet and confer,' and non-retaliatory treatment in response to petitions to set aside.

ICBA's specific recommendations related to these areas are noted below.

³ 12 U.S.C. § 5562.



Limited Scope

- ICBA urges the CFPB to clearly set limits on the Bureau’s authority, and to narrow the scope and coverage of CIDs.

Less Adversarial Tools and Methods

- ICBA urges the Bureau to differentiate between instances when a community bank is suspected of wrongdoing and when it is merely believed to have information relevant to an investigation, i.e., when it is a third-party recipient. As such, the Bureau should first seek voluntary cooperation before issuing a CID to a third-party recipient.
- ICBA recommends that the Bureau amend its regulations to require the usage of already available resources and reports before issuing a CID in attempts to gather information.

Due Process Safeguards

- ICBA recommends that the CFPB implement refined statements of purpose, reasonable approaches to ‘meet and confer,’ and non-retaliatory treatment in response to petitions to set aside.
- ICBA urges the Bureau to adopt standards discussed in recent case law to ensure that subjects receive proper notice of the specific actions suspected to be in violation of law.
- ICBA recommends procedural changes to the ‘meet and confer’ requirement.
- ICBA recommends that the Bureau strike language that “disfavors” petitions to set aside and end the chilling effect of making such petitions public.

Please see below for ICBA’s detailed comments regarding these recommendations.

CFPB Should Limit the Broad Scope of CIDs

Under Dodd-Frank, the CFPB and its Director have broad and unparalleled power, including the ability to administer, enforce and promulgate consumer financial protection rules, supervise and examine certain entities, and investigate consumer complaints. Although the Bureau is not authorized to supervise and examine community banks with assets of less than \$10 billion, current law nonetheless grants the Bureau broad authority over all of the nation’s community banks.

The CFPB can join routine prudential examinations of community banks if it deems appropriate, require reports from community banks, and recommend enforcement actions to the prudential regulator that must be addressed within 60 days.⁴ Perhaps the Bureau’s most wide-reaching power is its rulemaking authority. While the Bureau does not supervise most community banks, they nonetheless must comply with dozens of consumer financial protection rules promulgated by the CFPB.⁵ Relevant to the purpose of this RFI, the CFPB also has the broad authority to issue a CID directly to a small community bank.⁶

⁴ 12 U.S.C. §§ 5516(c), (b), and (d).

⁵ 12 U.S.C. § 5512.

⁶ 12 U.S.C. § 5562.



While the Bureau was designed to supervise and examine those entities that caused the crisis, the implementing statute and regulation for CIDs are written so broadly that the CFPB is currently empowered to subject a community bank to an investigation and issue a CID, regardless of whether the bank is even suspected of wrongdoing. Merely having information that the Bureau believes is relevant is enough to subject a community bank to a CID, which could include the production of documents, tangible things, written reports, answers to questions, and oral testimony.⁷

Although ICBA is unaware of any community banks that have received a CID or is a third-party recipient, the fact remains that the Bureau presently has this authority which is a cause for concern.

As discussed in a recent Treasury report, the Bureau has attempted to extend its jurisdiction beyond the intent of the Dodd-Frank Act. The report states, “[t]he CFPB has, for example, inappropriately attempted to extend its reach to entities including college accreditors and auto dealers and it has taken these actions outside the discipline and transparency of notice-and-comment rulemaking.”⁸

Given recent public remarks delivered by current Bureau leadership, ICBA is not concerned that the current iteration of the Bureau will similarly push the limits of its authority. However, it is reasonable to assume that without a change to the existing regulatory structure, future Bureau leadership could attempt to once again exceed its statutory authority. Because this potential for abuse remains, ICBA urges the CFPB to take this opportunity to clearly set limits on the Bureau’s authority, and to narrow the scope and coverage of CIDs. This would curb any future attempts toward expanding power beyond statutory intent.

Less Adversarial Investigative Tools and Methods Should be Utilized

ICBA urges the Bureau to differentiate between instances when a community bank is suspected of wrongdoing and when it is merely believed to have information relevant to an investigation, i.e., when it is a third-party recipient. Simply being a third-party recipient of a CID requires a community bank to adhere to a strict set of procedures that are not intended for smaller financial services providers and could create significant compliance costs. As such, ICBA recommends that the Bureau first seek voluntary cooperation before issuing a CID to a third-party recipient that *might* have relevant information.

According to the Bureau’s internal document, “Policies and Procedures Manual,” the CFPB may send a voluntary request for information in lieu of a CID, depending on the circumstances. ICBA recommends this be the primary method for entities that are not subjects of the investigation. Voluntary requests for information would relieve much of the burden associated with the receipt of a CID, especially when considering the legal costs associated with its compliance.

⁷ 12 U.S.C. § 5562(c).

⁸ See “A Financial System that Creates Economic Opportunities: Banks and Credit Unions,” U.S. Department of the Treasury, June 2017, *available at* <https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf>.



Further, avenues other than CIDs exist by which the Bureau can obtain information. This includes leveraging the prudential regulators that *do* have direct supervisory authority over community banks with assets of less than \$10 billion.

Bank prudential regulators have the authority, access, capability and experience to handle investigations or information gathering from community banks without the need to issue CIDs. Prudential regulators already possess examination and supervision authority which gives them broad ability to collect information and evidence to determine whether there is a violation of consumer protection laws and regulations, or other information that could be relevant to a suspected violation.

If the Bureau believes that a community bank has information about a subject under investigation, then there should be cooperation between the Bureau and the prudential regulator, with the prudential taking the lead role in interaction. The Dodd-Frank Act already requires the Bureau to fully use reports that have already been provided to a federal or state agency before requiring reports directly from a community bank with assets of less than \$10 billion.⁹ However, despite this statutory requirement, the Bureau's CID regulations make no mention of cooperation with prudential regulations, nor any indication that Bureau staff must use reports already provided to a federal or state agency. In a situation where the Bureau suspects a community bank of wrongdoing, or where it merely believes that the bank has information relevant to the investigation of a third-party's potential wrongdoing, the Bureau should first seek to utilize information already made available to a federal or state agency to reduce duplicative burden. As such, ICBA recommends that the Bureau amend its regulations to require the usage of already available resources and reports before issuing a CID in attempts to gather information.

The Bureau Should Enhance Substantive Due Process Safeguards

As Acting Director Mulvaney has made clear, much can be done to guarantee due process while still vigorously enforcing consumer financial law.¹⁰ ICBA welcomes this commitment, especially in light of the previous administration's practice of issuing a CID to gain assurances that the recipient was not violating consumer financial protection law.¹¹

The need to take on the burden, expense and inconvenience of defending a CID action merely to assuage the Bureau's doubts is at odds with the tenets of substantive due process. ICBA urges the Bureau to use this review as an opportunity to further increase due process protections and ensure subjects of an investigation receive the benefit of existing statutory protections. At minimum, this should include the implementation of: (1) refined statements of purpose, (2) reasonable approaches to 'meet and confer,' and (3) non-retaliatory treatment in response to petitions to set aside.

⁹ 12 U.S.C. § 5516(b).

¹⁰ CFPB Press Release, *supra* note 2.

¹¹ See PHH Corp., CFPB No. 2012-MSC-PHH Corp-0001, Sept. 20, 2012, at 4, citing *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950), where the court found that an agency's investigative power is similar to a Grand Jury, which "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not," available at https://files.consumerfinance.gov/f/201209_cfpb_setaside_phhcorp_0001.pdf.



1. Refined statements of purpose

Current law requires the CFPB to state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.¹² According to the most recent publicly-available internal guidance, the Bureau recommends that these statements of purpose describe the nature of the conduct and the potentially applicable law in “very broad terms.” A recent investigation by the Office of the Inspector General (OIG) found that this practice was encouraged to allow for an investigation to develop over time.¹³

The OIG suggested that the Bureau rescind this practice and urge enforcement attorneys to revise opening memoranda or revisit statement of purpose if the investigation evolves. Similarly, the OIG found that Bureau attorneys were not making their statements of purpose compliant with relevant case law. According to the OIG report, the Bureau has apparently remedied these deficiencies. However, ICBA recommends that CFPB incorporate and codify these remedies into section 1080.6. The CFPB should also adopt standards discussed in recent case law to ensure that subjects receive proper notice of the specific actions suspected to be in violation of law.¹⁴

2. The Bureau’s Approach to ‘Meet and Confer’

Current Bureau rules mandate that the CID recipient meet and confer with the Bureau’s litigation team within 10 days of the agency serving the CID. With such short timelines, the response to demands result in a “fire drill,” constricting the time by which a respondent can receive the demand letter, deliberate with its Board, and eventually respond. Because the 10-day requirement to meet and confer is not statutorily mandated, ICBA recommends that the Bureau revise the requirement. Given recent changes by the Federal Trade Commission (FTC), ICBA advocates for a response time of 30 days.

Beyond strict timing requirements, the Bureau will not even consider petitions to set aside or modify a CID (discussed further below) until the recipient has meaningfully engaged in a meet and confer session with Bureau staff. In fact, the CFPB interprets requests for delays as waiving administrative right to request CID modification. While a meet and confer is certainly important, the CFPB should recognize that there are less formal, and therefore less burdensome, tactics that it can use to gather information, especially from third-parties.

For routine third-party CIDs, Bureau regulations do allow for a waiver of the meet and confer requirement.¹⁵ ICBA appreciates this concession as it will mitigate the cost and burden of providing the Bureau with information. However, rather than making certain waivers an exception dependent on Bureau approval, ICBA recommends meet and confers not be required, at all, for third-party recipients. Unless the respondent requests the meeting, there should be no

¹² 12 U.S.C. § 5562 (c)(2).

¹³ Consumer Financial Protection Bureau, Office of Inspector General, “Evaluation Report: 2017-SR-C-015,” Sept. 20, 2017, at 8, *available at* <https://oig.federalreserve.gov/reports/cfpb-civil-investigative-demands-sep2017.pdf>.

¹⁴ *See*, Consumer Financial Protection Bureau v. Accrediting Council for Independent Colleges and Schools, 854 F.3d 683 (D.C. Cir., 2017), affirming the D.C. District Court’s denial of the CFPB’s petition to enforce a CID issued to the Accrediting Council for Independent Colleges and Schools (ACICS) due to the finding that the CID did not adequately notify ACICS of the “nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.”

¹⁵ 12 C.F.R. § 1080.6(c).



mandatory meet and confer for third-party recipients. This would also mean that a respondent would not have to wait until a meet and confer to file a petition to set aside the CID.

3. Non-retaliatory treatment in response to petitions to set aside

Following the meet and confer, the CID recipient may submit a written request for a modification of the CID terms or request an extension for time to respond. Relatedly, the recipient may file a petition to modify or set aside a CID. Generally, the petition must be made within 20 days after receipt of the CID, but the Bureau can extend that deadline. However, current regulations and internal policy explain that such extensions are disfavored.¹⁶ ICBA recommends that the Bureau strike the language that “disfavors” extensions of time, and instead instructs Bureau staff to consider each request on their merits.

Aside from requesting an extension of time, a petitioner may also request that its petition is treated confidentially. Unfortunately, section 1080.6(g) of Bureau rules states that the Bureau will default toward making petitions publicly available unless the Bureau determines that good cause has been shown, otherwise. ICBA urges the Bureau to revise this practice since it inherently discourages resistance or questioning, regardless of how reasonable.

If a recipient would like to challenge a CID, it must weigh the reputation risk that it would face, given the Bureau’s standard practice of making such actions public. Presumably, there are recipients that decline to challenge a CID given this reputation risk, despite the fact that they might have a legitimate challenge. This practice is disconcerting and could give the appearance of retribution for merely questioning the Bureau.

According to the OIG report, the Bureau modeled the publication of petitions on the investigative procedures of the FTC. In 2012, the FTC solicited comments on amending its rules to end its practice of publishing petitions. It ultimately decided to keep its practice of publishing petitions under the theory that they would “guide future petitioners and provide predictability to the determination process.”¹⁷ While ICBA understands that the publication of petitions can help inform future petitioners, we are less convinced of the utility of publishing names and other identifying information. Insights can still be gleaned from redacted publications.

The primary reason that community banks do not appeal a decision by a regulator is due to fear of retaliation. This non-mandated practice of publishing petitions makes the Bureau’s process the poster-child that legitimizes those fears. If the Bureau must make petitions publicly available to provide predictability for future petitioners, ICBA urges the Bureau to at least redact identifying information.

Conclusion

Overall, ICBA applauds the Bureau’s effort to solicit information on ways to improve the CID process and reduce unwarranted regulatory burden. Under Acting Director Mulvaney’s leadership, this review process will lay the groundwork for a more measured and tailored

¹⁶ 12 C.F.R. § 1080(6)(e)(2).

¹⁷ 77 Fed. Reg. 59294 (Sept. 27, 2012), at 59300.



approach toward promulgating and enforcing consumer protection rules for subsequent CFPB administrations.

Should you have any questions or would like to discuss anything further, please do not hesitate to contact me at Michael.Emancipator@icba.org or at 202-659-8111.

Sincerely,

/s/

Michael Emancipator
Assistant Vice President and Regulatory Counsel

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