



April 26, 2018

Consumer Financial Protection Bureau  
1700 G Street, NW  
Washington, DC 20552

**Via: <http://www.regulations.gov>**

Re: Docket ID CFPB-2018-0001

**Comments to the Consumer Financial Protection Bureau's (CFPB) Request for Information Regarding Civil Investigative Demands**

The National Association of Consumer Advocates (NACA) is a nonprofit association whose members are private and public sector attorneys, legal services attorneys, law professors, and law students committed to representing consumers' interests. NACA is actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means. We respectfully submit these comments responding to the Consumer Financial Protection Bureau's (CFPB or bureau) Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes.

NACA is concerned that the CFPB has issued this and other public Requests for Information to begin an effort to revamp its internal processes and functions for the benefit of covered financial entities and to the detriment of consumers and the financial markets. We offer our comments below to reflect our full support of the bureau's current functions. Specifically, CFPB investigations and ensuing enforcement actions have had spectacular results, benefitting tens of millions of consumers across the country. The bureau must refrain from making any changes that would hamper its ability to fulfill its statutory mission to protect consumers in the financial marketplace, including its ability to initiate and carry out investigations of potential violations of consumer financial protection laws. The examination of civil investigative demands, i.e. administrative subpoenas, should not be used to "relax" standards for present and future investigations of financial industry misconduct.

**Background**

Just a decade ago the reckless behavior of big banks and predatory lenders and the lack of safeguards to hold them responsible for their actions caused the Great Recession, leaving millions of Americans without jobs, wiping out their savings, and causing devastating losses of homes. Consumer protection was neglected for far too long in the lead up to the financial crisis. In 2010, Congress created the CFPB, one of the core features of the Dodd-

Frank Act Wall Street Reform and Consumer Protect Act. The financial reform law gave the CFPB the massive responsibility to enforce the Consumer Financial Protection Act (Title X of the Dodd-Frank Act) and 18-plus additional consumer financial protection statutes. It also armed the CFPB with the tools it would need to fulfill its mission, including vigorous supervisory and enforcement authorities to investigate and act on potential violations of those laws.

The evidence shows that the CFPB has had tremendous success. Its work has led to the return of \$12 billion in relief to 27 million consumers who were harmed by wrongful corporate conduct. It has stopped harmful conduct, provided restitution and other remedies to harmed consumers, and facilitated improved business practices for financial entities it oversees.

With its investigative and enforcement authorities, the CFPB has taken legal actions against credit card companies for engaging in unfair, deceptive, and abusive practices related to marketing, billing, and enrollment for credit add-on products and services; banks for charging overdraft fees to consumers who had not agreed to overdraft services; payday lenders for pressuring borrowers into debt traps; for-profit colleges for exploiting students and pushing them into unaffordable loans; debt collectors for using illegal tactics to intimidate consumers into paying debts they may not owe; mortgage companies for wrongly foreclosing on consumers' homes.

### **CFPB's Statutory Authority is Consistent with its Past Approach to CIDs**

The Dodd-Frank Act makes clear that protecting consumers is the CFPB's top priority. For example, the CFPB is required to "enforce federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."<sup>1</sup> The CFPB must also ensure that "consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination."<sup>2</sup> One of its "primary functions" is to "supervise covered persons for compliance with federal consumer financial law, and tak(e) appropriate enforcement action to address violations of Federal consumer financial law."<sup>3</sup>

To pursue its statutory mission and objectives, the CFPB must actively seek out information to stay abreast of developments that could potentially harm consumers in the offering, selling, servicing, marketing, etc. of financial products and services. CIDs, i.e. administrative subpoenas, are important for covering "substantial information gaps" on potential violations of consumer financial protection laws to help the agency decide whether to initiate formal enforcement actions.<sup>4</sup> Therefore, this process must be efficient and substantive to enable the agency to carry out broad investigations as it is specifically authorized and tasked to do for the public's benefit. Adopting onerous requirements for

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<sup>1</sup> 12 U.S.C. § 5511(a).

<sup>2</sup> 12 U.S.C. § 5511(b).

<sup>3</sup> See, *Consumer Fin. Prot. Bureau v. Heartland Campus Sols., ESCI*, Civil Action No. 17-1502, 2018 U.S. Dist. LEXIS 31952 (W.D. Pa. Feb. 28, 2018) citing 12 U.S.C. § 5511 (c)(4).

<sup>4</sup> E.S. Kisluk, "Fishing" for Trouble?: On the Appropriate Limits of a Civil Investigative Demand Issues by the CFPB, 21 N.C. Banking Inst. 299 (2017).

civil investigative demands that would make investigations more difficult for CFPB staff to obtain information they need, or weakening or narrowing the process that would enable bad financial actors to evade and hinder investigations would betray the public interest.

### **Entities Have Appropriate Avenues, including Courts, to Question CIDs**

The CFPB thoughtfully structured the CID process through a public rulemaking and notice-and-comment period.<sup>5</sup> In addition, businesses have multiple avenues to seek relief or challenge the validity of civil investigative demands that they receive. The process includes opportunities for appeal of CID requests at the agency, and businesses also can turn to courts to seek to set aside or limit investigations.<sup>6</sup> CFPB investigations do not need additional hurdles that would prevent the agency from taking action in a timely manner to protect consumers from illegal and predatory financial conduct.

Entities have sued in federal court to dispute CID notices and breadth of investigations. Notably, a number of courts have examined and mostly have concluded that the CFPB's exercise of its statutory authority to investigate, including its notices to entities of investigations and its requests for information, has been carried out within the scope of the statute.<sup>7</sup>

For example, courts have ordered entities to comply with CFPB CIDs seeking:

- (1) Information as part of an investigation to determine whether consumer reporting agencies, persons using consumer reports, or other persons may be violating federal consumer financial protection laws, including the Fair Credit Reporting Act.<sup>8</sup>
- (2) Information to determine whether debt relief providers, lead generators, or other unnamed persons are engaging in unlawful acts or practices in the advertising, marketing, or sale of debt relief services or products, in violation of the Consumer Financial Protection Act and the Telemarketing Sales Rule.<sup>9</sup>
- (3) Information to determine whether student-loan servicers or others, in connection with servicing of student loans, including processing payments, charging fees, transferring loans, maintaining accounts, and credit reporting, engaged in unfair, deceptive or abusive acts or practices.<sup>10</sup>
- (4) Information to determine whether small-dollar online lenders or others engaged or are engaging in unlawful acts or practices relating to the advertising, marketing, provision, or collection of small-dollar loan products, in violation of the Dodd-Frank Act, the Truth in Lending Act, the Electronic Funds Transfer Act, and the Gramm-Leach-Bliley Act.<sup>11</sup>

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<sup>5</sup> See, Christopher Peterson, *Symposium Article: Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, at 12 (June 2016). Rules Relating to Investigations, 12 C.F.R. pt. 1080.

<sup>6</sup> Rules Relating to Investigations, 12 C.F.R. pt. 1080.

<sup>7</sup> See, e.g. *Consumer Fin. Prot. Bureau v. Heartland Campus Sols., ESCI*, Civil Action No. 17-1502, 2018 U.S. Dist. LEXIS 31952 (W.D. Pa. Feb. 28, 2018); *Consumer Fin. Prot. Bureau v. Seila Law, LLC*, No. 8:17-cv-01081-JLS-JEM, 2017 U.S. Dist. LEXIS 217692 (C.D. Cal. Aug. 25, 2017); *Consumer Fin. Prot. Bureau v. Source for Pub. Data, L.P.*, No. 3:17-mc-16-G-BN, 2017 U.S. Dist. LEXIS 86856 (N.D. Tex. June 6, 2017); *Consumer Fin. Prot. Bureau v. Great Plains Lending, LLC*, 846 F.3d 1049 (9th Cir. June 6, 2016).

<sup>8</sup> *Consumer Fin. Prot. Bureau v. Source for Pub. Data, L.P.*, No. 3:17-mc-16-G-BN, 2017 U.S. Dist. LEXIS 86856 (N.D. Tex. June 6, 2017).

<sup>9</sup> *Consumer Fin. Prot. Bureau v. Seila Law, LLC*, No. 8:17-cv-01081-JLS-JEM, 2017 U.S. Dist. LEXIS 217692 (C.D. Cal. Aug. 25, 2017).

<sup>10</sup> *Consumer Fin. Prot. Bureau v. Heartland Campus Sols., ESCI*, Civil Action No. 17-1502, 2018 U.S. Dist. LEXIS 31952 (W.D. Pa. Feb. 28, 2018).

<sup>11</sup> *Consumer Fin. Prot. Bureau v. Great Plains Lending, LLC*, 846 F.3d 1049 (9th Cir. 2017).

These and other investigations are critical to protect American consumers, the public interest, and the health of the financial market. The current CID process, which is within the statutory scope for its investigations, necessarily gives the CFPB sufficient flexibility and authority to enforce multiple consumer financial protection laws, such as those mentioned above.

Financial institutions responding to CIDs have complained that the CID process constitutes an “undue burden,” on their businesses. In reality, the inconveniences that CIDs may pose to financial institutions likely do not meet the definition of “undue burden.” Courts have reasoned that an “undue burden” related to responses to administrative subpoenas is met when businesses “supply evidence establishing that compliance “threatens to unduly disrupt or seriously hinder normal operations of a business.”<sup>12</sup> It is a high and necessary standard to meet to ensure that the CFPB can issue valid requests for information and require substantive and timely responses from corporate entities.

### **CFPB Should Enforce Substantive Law and Disregard Political Industry Pressure**

Finally, Congress, through the Dodd-Frank Act, recognized that an independent CFPB also needed broad authority to investigate potential wrongdoing by entities in a sophisticated industry that has vast resources and wields tremendous political influence. Bad actors in the financial industry have been successful in their political efforts to loosen safeguards and shield themselves from liability for their wrongdoing. CFPB’s ability to initiate investigations and to issue investigative demands in adherence of the law must be free from political considerations. CFPB should focus on its mandate to comply with the Dodd-Frank Act, protect consumers in the finance markets, and enforce the consumer protection laws under its jurisdiction.

Sincerely,

Christine Hines  
Legislative Director

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<sup>12</sup> See, e.g., *Consumer Fin. Prot. Bureau v. Future Income Payments, LLC*, 252 F. Supp. 3d 961, 970 (C.D. Cal. 2017).