April 26, 2018

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

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

Dear Ms. Jackson,

The Mortgage Bankers Association[1] appreciates the opportunity to comment on this Request for Information (RFI) from the Bureau of Consumer Financial Protection (CFPB). In addition to offering the comments below on the Bureau's Civil Investigative Demand (CID) process, MBA would like to reiterate our support for the reexamination of the Bureau's operations and practices after a half-decade in operation. MBA released *CFPB 2.0: Advancing Consumer Protection* in September 2017 to outline key considerations for the Bureau as it begins to think about the next five years.[2] In brief, MBA recommended that:

- CFPB end "regulation by enforcement" by issuing guidance to facilitate compliance rather than relying on fact-specific enforcement actions to announce new regulatory interpretations.
- CFPB communicate clearly when and how it plans to offer compliance guidance and acknowledged that it is bound by the guidance it releases.
- CFPB provide more due process protections in its enforcement actions to ensure fairness and consistency.

These larger, thematic concerns touch on all Bureau operations and therefore are a theme of many of the RFIs released to date. The information collected as part of the Bureau's RFI initiative can serve as a crucial starting point to determining how to best orient the CFPB to ensure it serves consumers and creates access to financial opportunity. MBA applauds the RFI initiative to the extent it serves as the beginning of this important conversation.

---

[1] The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership; and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies and others in the mortgage-lending field. For additional information, visit MBA's website: www.mba.org.

[2] Available here: https://www.mba.org/issues/cfpb-20-advancing-consumer-protection

The CID process is an appropriate place for the RFI initiative to begin. While the CID is an important tool for the Bureau to execute its mission, it can cause significant burden, confusion and damage if not used appropriately. At its core, CFPB enforcement is about fact-finding. CIDs that needlessly impede prompt and complete responses do not serve that mission. The suggestions below seek to highlight areas where improvements could create more efficient, fair and transparent investigations. The changes suggested would benefit both CID recipients and the CFPB. MBA offers the following specific comments on the CID process in that spirit:

Notification of purpose[3]

Each CID must state the "nature of the conduct" under investigation and the "provision of law" applicable to the allegedly problematic conduct.[4] Taken together, the specific conduct under investigation and the applicable provision of law constitute the CID's notification of purpose statement. The statement serves the critical purpose of providing fair notice to the subjects of the investigation and outlining its scope.

All too frequently, the specific conduct about which information is sought in past Bureau CIDs is described in broad terms. The same has been true for the description of the applicable provision of law, which can be as general as the Consumer Financial Protection Act's UDAAP prohibition and "any other Federal consumer financial protection law." A vague statement of purpose is by design. The Office of Enforcement's Policies and Procedures Manual suggests that statements of purpose should "describe the nature of the conduct and the potentially applicable law in very broad terms."[5] Unfortunately, a broad statement of purpose makes it difficult, if not impossible, for the CID recipient to determine the conduct that prompted the Bureau's investigation.[6] Vagueness also harms the CFPB by making the flow of information less efficient, which has the effect of delaying the resolution of the underlying matter.

Industry is not alone in identifying this issue. A recently published report prepared by the Office of Inspector General for the Board of Governors of the Federal Reserve System identified concerns with the CFPB's practice of crafting intentionally broad statements of purpose:

> "We believe that the guidance suggesting attorneys craft a statement of purpose "in very broad terms," without also reminding attorneys of the need for statements of purpose to be compliant with relevant case law on notifications of purpose, might increase the risk that the language in the CID's identical notification of purpose does not comply with that case law. As a result, a potentially noncompliant notification of purpose may limit the

---

[3] This section is responding to RFI questions 3, 4 and 5.
[4] 12 U.S.C. § 5562(c)(2).
[5] Policies and Procedures Manual, Office of Enforcement, Version 3.0 (May 2017), (https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201710_cfpb_enforcement-policies-and-procedures-memo_version-3.0.pdf).
[6] For instance, Bureau staff often use consumer complaints as the basis of an investigation. A CID based on such evidence should disclose the specific complaints, which are often public and provided to the regulated party, or the nature of the complaints to allow for a more focused response.

> recipient's ability to understand the basis for requests and thereby heighten the risk that the CID may face a legal challenge from the recipient."[7]

The IG report identifies two significant problems with the Bureau's policy of issuing statements of purpose that "describe the nature of the conduct and the potentially applicable law in very broad terms." First, an overly broad statement of purpose does not provide fair notice to the CID recipient. This raises serious due process concerns.[8] Second, in addition to failing to provide adequate notice, an overly broad statement "heighten[s] the risk that the CID may face a legal challenge from the recipient."[9] This is not a small problem. Litigation is expensive and time-consuming for both parties. In this way, an overly broad statement of purpose unfairly adds to the burden of the CID recipient and increases Bureau, and thus taxpayer, expenses.

Further, an overly broad statement of purpose results in an open-ended investigation with no meaningful limitations. While the CFPB's investigative authority is broad, it is not unlimited. A very important limit is the statute's notice requirement.[10] A broadly written statement of purposes effectively removes this limit. By doing so, it invites a fishing investigation contrary to the statutory design and basic notions of due process.

Finally, a broadly written notification of purpose significantly diminishes the recipient's ability to effectively participate in the meet and confer. The meet and confer meeting is the first opportunity for a recipient of a CID to discuss and challenge its scope with the CFPB. A notification of purpose that fails to communicate the specific basis for the CID's requests does not provide sufficient information for the recipient to challenge the scope of those requests. How would the recipient know what to challenge during the meet and confer, without first knowing the grounds for the CID?

There are significant consequences to preventing a meaningful meet and confer. The CID recipient misses out on an important opportunity to challenge the CID while maintaining confidentiality. Absent unusual circumstances, petitions to set aside or modify a CID are made public. Additionally, issues or defenses not raised during the meet and confer are considered waived for purposes of future petitions to modify or set aside. Thus, the recipient may also lose the ability to raise potentially meritorious arguments during a future petition to set aside or modify the CID.

The answer to these concerns is simple. CIDs should, at a minimum, include notification of purpose statements that clearly describe the specific conduct under investigation, including the

---

[7] Evaluation Report 2017-SR-C-015, Office of Inspector General, Board of Governors of the Federal Reserve System (September 20, 2017), pg. 8, (https://oig.federalreserve.gov/reports/cfpb-civil-investigative-demands-sep2017.pdf).

[8] While the IG report identifies this issue, it "did not seek to assess the adequacy of the notifications of purpose for the sampled CIDs."

[9] Id. at 8, footnote 13.

[10] "Each civil investigative demand *shall state the nature of the conduct* constituting the alleged violation which is under investigation *and the provision of law* applicable to such violation." (emphasis added) See 12 U.S.C. § 5562(c)(2).

relevant time period, and the exact statutory provisions of law alleged to have been violated. One model for the Bureau to consider adopting is the Federal Trade Commission's regulatory requirements, which state that CID recipients "shall be advised of the purpose and scope of the investigation."[11]

Initiating an Investigation[12]

The broad notification of purpose statement is reflective of the low threshold for opening an enforcement investigation. Once issued, the CID initiates an invasive, time-consuming and costly process. The bar should be raised in recognition of the costs and reputational risks of CFPB investigations, as well as in light of the Bureau's supervisory authority to examine covered institutions for compliance with CFPB rules.[13]

The CFPB's authority to issue a CID is not unlimited. Before the CFPB can issue a CID, the Bureau must have "reason to believe" that the subject has information relevant to a violation of federal consumer protection law.[14] In this way, the "reason to believe' requirement is a statutory limit on the Bureau's CID authority.

In the past, the CFPB has demonstrated a disregard for this statutorily defined limit. In responding to challenges to CIDs, the Bureau frequently states that it "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."[15] This position is clearly contrary to the Dodd-Frank Act's "reason to believe" requirement, a standard which limits the Bureau. The Bureau's use of a CID "just because it wants assurance" ignores this limit and is no limit at all. Based on the Bureau's aggressive interpretation, any investigation is justifiable because it would, at the very least, provide assurance that there wasn't a violation. Taken a step further, why would the Dodd-Frank Act establish a method to challenge a CID, such as can be done through a petition to set aside, if any investigation is justifiable?

Not only does initiating an investigation merely to provide assurance that there hasn't been a violation run afoul of the statute's "reason to believe" standard, but it is also contrary to the supervisory scheme established by the Dodd-Frank Act. The Bureau was granted clearly delineated supervisory authority over much of the consumer finance market, an authority that includes the ability to conduct examinations. A key purpose of a CFPB examination is to provide

---

[11] 16 CFR 2.6 ("Any person, partnership, or corporation under investigation compelled or requested to furnish information or documentary material *shall be advised of the purpose and scope of the investigation, the nature of the acts or practices under investigation, and the applicable provisions of law*.") (emphasis added).
[12] This section is responding to RFI Questions 3, 4, 5.
[13] MBA will discuss the appropriate roles of supervision and enforcement in response to those RFIs, as well as provide more detail on the appropriate threshold for bringing an investigation.
[14] 12 U.S.C. § 5562(c).
[15] PHH Corp., CFPB No. 2012-MSC-PHH Corp-0001, at 3 (Sept. 20, 2012) (decision and order on petition to modify or set aside civil investigative demand). The CFPB cites United States v Morton Salt Co., 338 U.S. 632 (1950), a case describing the Federal Trade Commission's civil investigative demand authority. The CFPB's reliance on Morton Salt Co. is misplaced. The Bureau, as a single director agency, is fundamentally different that the FTC, an agency lead by a bi-partisan commission.

assurance that consumer financial laws have not been violated by entities within the CFPB's jurisdiction. If an investigation can be conducted simply to provide the Bureau with assurance, what's the point of a separate examination authority?

To address these concerns, the Bureau should establish a standard that clearly articulates when the Bureau has sufficient "reason to believe" to issue a CID.[16] This standard should be described in Bureau policies and communicated to the public. CIDs should be reserved for situations where the Bureau is made aware of sufficient facts or circumstances to satisfy the "reason to believe" standard. CIDs should not be used merely to provide assurance that consumer financial law has not been violated. Absent unusual circumstances, the basis for the Bureau's "reason to believe" should be discernable from the information included in the CID. The reasonableness of the Bureau's "reason to believe" should be open to challenge during both the meet and confer and as part of a petition to set aside.

Attorney-Client Privilege[17]

The privilege status of materials submitted to the Bureau should be respected. The attorney-client privilege is a foundational legal principle that allows individuals and organizations to fully communicate with counsel in confidence. It encourages "full and frank communication between attorneys and their clients, and thereby promotes broader public interests in the observance of law and administration of justice."[18] It provides clients with the means to obtain legal guidance so as to better comply with the law, behavior the Bureau should encourage. Failure to adequately protect privileged materials erodes this important legal protection. As stated by the Supreme Court, "an uncertain privilege…is little better than no privilege at all."[19]

The Bureau should respect this privilege by adopting reasonable procedures to ensure privileged materials obtained through Bureau supervision activities are not disclosed to the Bureau's enforcement arm.[20] Relatedly, Federal Rule of Evidence 502, regarding inadvertent production of privileged material to the CFPB, should apply to CFPB investigations. Materials covered by the attorney-client privilege or work product doctrine should not form the basis for a CID. Nor should CFPB request privilege logs early in the CID process. Doing so risks forcing possibly premature decisions on the part of the recipient and potentially exposing material that should be covered by privilege in subsequent production.

---

[16] The Bureau could consider following the lead of the Justice Department which adheres to a "policy that no criminal indictment should issue, nor any civil suit be filed, unless the available evidence is sufficient to "obtain and sustain" a judgment in favor of the government." See The Wall Street Journal (March 5, 2018) (www.wsj.com/articles/a-civiletti-lesson-for-elizabeth-warren-1520292500).
[17] This section is responding to RFI question 7.
[18] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).
[19] Upjohn Co. at 393.
[20] While MBA plans on addressing the Bureau's enforcement and supervisory functions in future RFI comment letters, it should be noted that a CID should not be used when the information sought could be acquired through the Bureau's supervisory channels.

Finally, the Bureau should seek privilege waivers only in extremely limited circumstances. Seeking privilege waivers on a routine basis could undermine the necessary candor and thoroughness that the privilege incentivizes. It has the potential to chill important compliance work and related consultations, behavior that furthers the Bureau's overall mission. In its guidance to US Attorneys, the Department of Justice has recognized the importance of respecting privilege in its investigative work, writing "the attorney-client privilege and attorney work product protection are essential and long-recognized components of the American legal system… while a corporation remains free to convey non-factual or "core" attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so."[21] The CFPB should adopt this stance and prohibit its attorneys from requesting privilege waivers.

Petition to modify or set aside[22]

Dodd-Frank establishes a process whereby the recipient of a CID can petition to have the CID modified or set aside.[23] The statute provides a general outline of the procedural requirements for the petition process including service deadlines, a tolling provision, and a broad list of grounds for petitioning. As currently structured under Bureau rules, several aspects of the petition process are unfair.

Confidentiality

Despite the CID process being confidential, petitions to modify or set aside a CID are disclosed publicly.[24] While the Bureau will consider requests for confidential treatment, each prior request has been denied.[25] The threat of public disclosure associated with challenging a CID is unfair and coercive. It understandably dissuades recipients from challenging a CID even when possessing a valid justification for doing so. The consequences of disclosure, including profound reputational harm, are real and have been borne by those who have challenged CIDs in the past. The risk of harm is particularly concerning for companies involved in the mortgage capital markets given the market's likely reaction to news of a CFPB investigation. This harm cannot be undone even if the allegations of improper conduct are later determined to be baseless.

By making CID recipients decide between maintaining confidentiality and challenging a potentially improper CID, the Bureau's rules magnify an already stark imbalance of power between the regulator and the regulated. Such an imbalance is inconsistent with commonly accepted standards of procedural fairness. Much like a pending enforcement action is kept confidential, the existence of a CID should not be disclosed by the Bureau. All of the due process concerns that justify confidential treatment of pending enforcement actions also justify the CFPB

[21] United States Attorney's Manual, 9-28.710 - Attorney-Client and Work Product Protections.
[22] This section is responding to RFI questions 4, 5, 9, 10, 11.
[23] 12 U.S.C. § 5562(f).
[24] 12 C.F.R. § 1080.6(g).
[25] Evaluation Report 2017-SR-C-015, Office of Inspector General, Board of Governors of the Federal Reserve System (September 20, 2017).

maintaining CID confidentiality through the petition process. While maintaining confidentiality limits the precedential value of a pending petition to modify or set aside, this is an acceptable cost. Pending petitions should be confidential or under seal. Confidentiality can be removed, and precedent established, once a petition is granted, a consent order is issued, or a public action is initiated.

Petition filing deadline

At most, a CID recipient has twenty calendar days from the date of CID service to petition the Bureau to modify or set aside a CID.[26][27] The prerequisites for filing a petition, including the requirement that issues must first be raised "during the meet and confer process" and that the recipient has "meaningfully [engaged] in the meet and confer process," have the effect of further constricting an already condensed schedule.[28] Under Bureau regulations, the meet and confer must occur "within 10 calendar days after receipt of the demand or before the deadline for filing a petition to modify or set aside the demand, whichever is earlier."[29] In this way, CID recipients must identify all possible factual and legal bases for contesting the CID *within ten days* of receiving the CID. Given the potentially critical significance of the petition to modify or set-aside, both the ten day meet and confer deadline and the twenty day filing deadline provide a CID recipient with too little time. While a party may request an extension of time to file a petition, "requests for extensions of time are disfavored."[30] Even if an extension is approved, the recipient still must identify and develop all potential concerns before the meet and confer deadline.

The Bureau should adopt a more flexible petition filing and meet-and-confer timelines. There are several ways this can be accomplished. With regards to the twenty day petition filing deadline, the Bureau can adopt a more reasonable approach to requests for extensions of time. While the Dodd-Frank Act establishes the twenty day deadline, the Act allows for a "period exceeding 20 days after service…as may be prescribed in writing, subsequent to service, by any Bureau investigator named in the demand."[31] In crafting regulations to effectuate this statutory requirement, the Bureau adopted a more strict approach ("extensions of time are disfavored") and a heightened approval process whereby only the "Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement" are authorized to approve an extension request rather than "any Bureau investigator" as contemplated by the Act. The Bureau has never explained the justification nor authority for the decision to deviate from the statutory scheme and implement a more restrictive approach. The Bureau should take steps to

[26] 12 U.S.C. § 5562(f)(1); 12 C.F.R. § 1080.6(e).
[27] The recipient may have less than twenty days if the return date on the CID is less than twenty days after service. (12 C.F.R. § 1080.6(g)).
[28] The Bureau will not consider a petition to modify or set aside unless the "recipient has meaningfully engaged in the meet and confer process." (12 C.F.R. § 1080.6(c)(3)). The Bureau "will consider only issues raised during the meet and confer process." (Id.).
[29] 12 C.F.R. § 1080.6(c).
[30] 12 C.F.R. § 1080.6 (e)(2).
[31] 12 U.S.C. § 5562(f)(1).

conform to the statutory scheme by eliminating the requirement that "requests for extensions of time are disfavored." Requests for extensions of time should be liberally approved.[32]

Similarly, the Bureau should amend the regulation in a manner that provides greater flexibility to the ten day "meet and confer" requirement. While an opportunity to meet and confer with Bureau investigators early in the process is desirable, the need to communicate all potential defenses or responses to a CID petition or have those waived makes the current ten day deadline particularly unreasonable. It also acts to discouraged candid, meaningful communication at the investigation's earliest stage.

Here too, a more flexible approach is needed. A CID recipient should be able to provide the Bureau with notice of an intent to file a petition during the meet and confer. Once notified of the recipient's intent to file a petition, the Bureau should extend the meet and confer process so as to provide the CID recipient/future-petitioner with adequate time to identify and develop all potential legal and factual bases to challenge the CID. Adopting these changes will go far in bringing more fairness to the petition filing process.

Petition responses

Under Bureau rules, investigators may provide the Director with a statement setting forth their factual and legal response to a CID recipient-petitioner's petition to modify or set aside a CID without providing the response to the petitioner.[33] Without access to the response, a petitioner is unable to review the Bureau investigator's arguments and, if appropriate, respond to them. This violates basic standards of fairness and due process. Responses to CID petitions to modify or set aside should be provided to the petitioner.

Petition reviews

CID petitions are reviewed by the CFPB Director.[34] It is unlikely that the Director would rule against Bureau enforcement staff and side with the petitioner. A review of published CID petitions shows that the Director has, in fact, very rarely found for CID petitioners. Of the 33 petitions found on the CFPB website, none were set aside and only three were partially modified. This is perhaps not surprising given the role the Director often plays in determining the propriety of opening an investigation.

As the success rate on CID petitions suggests, the current review process lacks adequate independence. It is merely a procedural formality. Reviews of CID petitions should be conducted by a neutral arbiter, such as an independent administrative law judge, rather than the CFPB Director.

---

[32] It is conceivable that more narrowly tailored CIDs would not require the response times currently needed to reply to broad CIDs. Despite this, extensions are in the best interest of the Bureau in all cases by ensuring more complete responses and lessening the burden on CID recipients.
[33] 12 C.F.R. § 1080.6(e)(3).
[34] Id.

Standard of review

The Bureau should provide additional guidance on the standard of review used to assess petitions to modify or set aside a CID. Currently, the Bureau uses a standard whereby a petition is denied if "(1) the investigation is for a lawfully authorized purpose; (2) the information requested is relevant to the investigation; and (3) procedural requirements are followed."[35] The threshold required under this standard is so low as to be functionally no threshold at all. Previous decisions show that very few facts are relevant to the Director's assessment. For example, the question of whether the CID recipient was even subject to the federal consumer protection laws cited in the notification of purpose was deemed irrelevant.[36] Ignoring arguments based on the Bureau's enforcement jurisdiction would seem to render the first consideration ("investigation is for a lawfully authorized purpose") meaningless. The Bureau's use of broad notification of purpose statements makes the second consideration (relevance to the investigation) similarly meaningless. The final consideration (satisfying procedural requirements) is easily satisfied given the minimal procedural requirements the Bureau must follow.

If the three elements are satisfied, the CID may still be set aside if the CID causes an 'undue burden' to the recipient. We are unaware of any instances of a CID recipient succeeding on a petition to set aside based on undue burden. Moreover, it is unclear what constitutes an 'undue burden'.

The CFPB should add clarity and fairness to the petition process by providing guidance on the petition standard of review. The petition review should consider threshold jurisdictional issues. Should a petitioner raise a valid question as to jurisdiction or some other preliminary matter, CID production should be limited to answering these initial questions. Further production should only be permitted, if at all, once threshold issues have been satisfactorily resolved.

In addition, the Bureau should provide guidance on how it will assess whether a CID causes undue burden to the recipient. The assessment should consider the costs likely to be incurred by a CID recipient, such as time, staff resources, legal expenses and reputational harm. Once determined, these costs should be weighed against the consumer harm associated with the alleged violation that is the stated focus of the CID.

Meet & confer[37]

CFPB rules require a CID recipient to attend a meet and confer with a Bureau investigator.[38] During this meeting, the recipient must make available "personnel with the knowledge necessary to resolve any issues relevant to compliance with the demand."[39] Satisfying this requirement can

[35] PHH Corp., CFPB No. 2012-MSC-PHH Corp-0001, at 5 (September 20, 2012) .
[36] "[A]n entity's fact-based arguments about whether it is subject to or has complied with substantive provisions of the CFPA" is not a defense to the enforcement of a CID. In re Accrediting Council for Indep. Colleges and Schools, 2015-MISC-ACICS-0001, at 2 (Oct. 8, 2015).
[37] This section is responding to RFI question 5, 9.
[38] 12 C.F.R. § 1080.6(c).
[39] 12 C.F.R. § 1080.6(c)(1).

be very difficult. It often requires the participation of technical staff and senior-level decision makers. The Bureau is not subject to a similar requirement. A CID recipient who attends a meet and confer is unlikely to meet with a Bureau decision maker. As a result, commitments are generally one-sided.

This imbalance is unfair and contrary to the spirit of the meet and confer meeting. It can often result in unnecessary delays as Bureau staff wait for an authoritative response from Bureau leadership. The Bureau should make available personnel with the knowledge and, importantly, authority to resolve any issues relevant to CID terms. In situations where this is not possible, the Bureau should respond to the CID recipient's meet and confer requests within a reasonable amount of time. The deadline for production should be extended by the time it takes the Bureau to respond to requests made during the meet and confer.

CID information requests[40]

The breadth of CID information requests makes producing responsive material very challenging. The challenge may be heightened by the fact that the CID could represent the recipient's first notice that it is the subject of or associated with an investigation. Often, the request requires production of an exhaustive list of documentary material, tangible things, written reports and answers to interrogatories. To respond, a CID recipient must first conduct a thorough review of policies, procedures, processes, operations, and record-keeping systems to identify responsive materials and determine what to produce. Once complete, items subject to privilege must be identified and logged. Finally, the recipient must prepare necessary copies and create any requested reports. This is often an expensive, arduous and time-consuming process.

Production process

To minimize this burden, the Bureau should propose a realistic production schedule at the onset of the CID production process. As part of establishing a realistic production schedule, the Bureau should allow for triaged production in response to requests for large amounts of material. Triaged production would allow recipients to produce less burdensome items first. These items could be used to answer threshold questions, such as jurisdictional issues, or to clear-up straightforward uncertainties. Under a triaged production process, subsequent productions could dive deeper.

Material requested

The range of materials requested in a CID can be excessively broad. The materials requested may have no obvious relationship to the alleged violation of federal consumer protection law being investigated. There should be a clear nexus between the information requested and the violation alleged.

[40] This section is responding to RFI questions 4,5,10.

CID requests can cover an unnecessarily long period of time. The Bureau may request records covering a period that exceeds any relevant statutory record retention requirement or statute of limitations. The Bureau should tailor information requests to the statute of limitations of the "specific provision of law" mentioned in the CID notification of purpose. The Bureau should also recognize the applicable record retention requirements and limit information requests accordingly.

The CFPB frequently requests materials that include personally identifiable information (PII). Requests for materials containing PII put consumer privacy at risk. In light of recent information security issues at the Bureau, requests for material with PII should be limited to situations where the request is absolutely necessary.

Given the time and resources needed to respond to CID requests, the Bureau should ensure production requests are not duplicative or unnecessarily broad. For example, a duplicative production request can happen when the Bureau issues multiple CIDs. In addition to ensuring production requests are not duplicative, the Bureau should not request materials it does not intend, or have the ability, to review. Broad, "give me everything" requests, which may include extensive document file metadata, should be rare. These types of sweeping requests should only be issued after first clearing a higher internal threshold. Nor should the Bureau use a CID as an educational tool to better understand a particular line of business, product or industry. Finally, as with all aspects of the CID process, information requests should be proportional to the consumer harm alleged. An overlapping or unnecessarily broad production request represents an unjustifiable burden on the CID recipient and an unnecessary risk to consumer PII.

Written Reports

CIDs may include requests for very specific written reports displaying information which is not in a readily reportable format (e.g. information from emails or other correspondence). Many financial institutions use systems which retain information in database format and are thus capable of producing a variety of routine written reports (e.g. payment activity reports, lien tracking reports, etc.). Routine reports display data that's maintained in a readily reportable format. Complying with a request for these reports is generally not overly burdensome provided the request includes reasonable parameters and timeframes.

The relative ease in which routine reports can be created contrasts sharply with the difficulty of creating custom reports which involves gathering data that's not maintained in a readily reportable format. Once collected, the data must be entered into a database or spreadsheet which must then be used to produce a report. Often times this is a manual process that's both time-consuming and labor-intensive.

In the context of litigation – which is analogous to enforcement – a party can request almost any document but cannot require the opposing party to distill those same documents into specific written reports. It's unduly burdensome and provides no new information. The requesting party can simply request the source documents and create their own reports.

Similarly, the Bureau should not require CID recipients to create custom reports to display information which is not in a readily reportable format. The burden of creating this type of custom report cannot be justified as no new information is provided. Therefore, requests for written reports should be limited to existing reports, or customized reports built from existing databases.

Document certification[41]

Bureau rules require that documentary material submitted in response to a CID be certified by someone with "knowledge of the facts and circumstances relating to such production, to the effect that all of the tangible things required by the demand … have been submitted to the custodian."[42] This standard is unrealistic for larger businesses where it is unlikely that a single person would have the knowledge necessary to make such a broad certification. The CFPB should adopt a more flexible standard that reflects contemporary business realities and allows for usual qualifiers regarding the certifier's knowledge and possible reliance on statements made by others.

Witness testimony[43]

Under the Dodd-Frank Act, an attorney may confidentially advise a witness on ***any*** question asked of the witness.[44] The Bureau permits an attorney to advise a witness in confidence only on questions "where it is claimed that a witness is privileged to refuse to answer the question."[45] The CFPB's rules are unjustifiably more restrictive than what was set forth in the governing statute. It is unclear why a more restrictive rule is necessary. The Bureau should adopt a rule to allow confidential attorney advisement regardless of the type of question asked.

Investigation conclusion[46]

Even a short CFPB investigation is burdensome. Understandably, subjects of an investigation deserve to know whether an investigation remains ongoing, has concluded, or will proceed to enforcement. While some investigation subjects are notified of status changes, others are not provided with this information. Absent this notice, a recipient is left to speculate as to the status of an otherwise open-ended investigation. This is unfair, particularly for those recipients that are publicly traded or involved in the mortgage capital markets, because third parties (e.g. clients, investors or creditors) often require evidence from the Bureau that an investigation has closed. For these reasons, CFPB investigation subjects should receive prompt written notification when the Bureau decides to end an investigation.

Conclusion

---

[41] This section is responding to RFI question 10.
[42] 12 C.F.R. § 1080.6(a)(1)(ii).
[43] This section is responding to RFI question 8.
[44] 12 U.S.C. 5562(c)(13)(D)(ii).
[45] 12 C.F.R. § 1080.9(b).
[46] The section is responding to RFI question 3,5.

The CID process is an important and powerful tool for the Bureau to further their investigations. Receipt of a CID can cause lasting reputational harm to the recipient and frequently requires significant resources to respond. For these reasons, the Bureau's CIDs should be targeted and limited, with a clearly defined process to challenge them if necessary. Such a process will allow the Bureau to investigate specific allegations to their satisfaction without requiring CID recipients to answer broad and vague requests for information under very tight timelines.

MBA appreciates the opportunity to contribute to the discussion on this important matter and applauds the Bureau's willingness to consider the above recommendations on how to improve the CID process. Please contact Justin Wiseman, Associate Vice President and Managing Regulatory Counsel, at (202) 557-2854 or jwiseman@mba.org with any questions about this comment.

Thank you for your consideration of these views.

Sincerely,

David H. Stevens
President and Chief Executive Officer
Mortgage Bankers Association