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HPC
HOUSING POLICY COUNCIL

April 26, 2018

VIA EMAIL AND U.S. MAIL

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:

On behalf of the Housing Policy Council of the Financial Services Roundtable (HPC), we submit the following comments in response to the Consumer Financial Protection Bureau's (CFPB or Bureau) Request for Information (RFI) regarding Bureau Civil Investigative Demands (CIDs).[1] HPC represents many of the nation's major companies in housing finance, including mortgage originators, servicers, insurers, and mortgage data service providers. A number of our members have received CIDs from the Bureau in the past, and HPC welcomes the Bureau's initiative to consider meaningful reform of the CID process.

Our response presents issues experienced by HPC members that demonstrate shortcomings we see with the Bureau's current practices and offers recommendations that fulfill the Bureau's statutory mission while respecting the rights and obligations of financial institutions. We especially highlight in this letter norms of legal and enforcement practice found in statute, court rulings, and regulatory and enforcement procedures that are sorely missing in the Bureau's actual practices involving CIDs. Our letter complements another comment letter submitted jointly by the Financial Services Roundtable, the Consumer Bankers Association, and the Consumer Mortgage Coalition. HPC endorses the content of that letter, which provides a comprehensive

[1] Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes, 83 Fed. Reg. 3,686 (Jan. 26, 2018).

review and analysis of the full range of issues posed by the Bureau's request for input on CIDs.

Fundamentally, we recognize and support the Bureau's fact-finding responsibilities. However, we recommend that the Bureau modify certain CID practices that discourage candor and hamper the effective collection and synthesis of relevant data and information. We provide suggestions below for making the CID process more targeted and efficient, while preserving the Bureau's ability to obtain the information it requires to conduct investigations into potential violations of federal consumer protection laws. HPC's comments are as follows:

1. **The Authority to Issue CIDs Should be Limited.**

The first two questions posed in the RFI concern the authority to issue a CID. Currently, that authority is vested in the Director, Assistant Director, and the Deputy Assistant Directors of the Office of Enforcement. HPC believes that the authority to issue CIDs should reside solely with the Director and the Assistant Director of the Office of Enforcement. Based on the experience of our members, the decentralization of this function has created a level of inconsistency and ambiguity that presents a challenge to all parties involved. Allowing the various Deputy Assistant Directors within Enforcement to issue CIDs has resulted in CIDs that lack clarity and specificity and reflect an inconsistent approach to the investigative process.[2] We note that the FTC's authority to issue a subpoena or investigative demand is vested solely in the Commission and is not delegated. *See* 16 C.F.R. § 2.7 (2017) ("When the public interest warrants, the Commission may issue a resolution authorizing the use of compulsory process . . . [to] . . . issue a subpoena, or a civil investigative demand . . .."). Limiting the authority to issue CIDs will ensure that they are more tailored to the specific investigation.

2. **The Bureau Should Comply with Statutory Notice Requirements Regarding the Basis for Investigations, and Tailor CID Requests Accordingly.**

The third RFI topic concerns the Bureau's statutory requirement to notify a CID recipient of the Bureau's purpose for investigation. The fourth RFI topic asks whether the nature and scope of CID requests achieve the Bureau's statutory and regulatory objectives, while minimizing burdens. We think these issues go hand-in-hand.

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[2] *See* Office of the CFPB Inspector General Evaluation Report, *The CFPB Generally Complies with Requirements for Issuing Civil Investigative Demands but Can Improve Certain Guidance and Centralize Recordkeeping*, (Sept. 20, 2017), at 11, *available at* https://oig.federalreserve.gov/reports/cfpb-civil-investigative-demands-sep2017.pdf (describing how some Enforcement attorneys favor issuing a broad CID request initially and then narrowing during the meet and confer process while others issue more targeted CIDs at the outset) (hereinafter OIG Report).

The Consumer Financial Protection Act mandates that each CID issued by the Bureau "shall state: (1) 'the nature of the conduct' which is under investigation, and (2) the 'provision of law applicable to' the alleged misconduct" [12 U.S.C. § 5562(c)(2)]; *see also* 12 C.F.R. § 1080.5. This explicit statutory requirement is crucial to a recipient's ability to understand and respond to CIDs. However, in our experience, the Bureau has not provided meaningful notice to CID recipients, opting instead to make vague statements of the investigation's purpose by referencing statutes under which the agency has enforcement authority. At the same time, CID requests are often overly-broad, designed to collect as many documents as possible, rather than documents relevant to a particular suspected violation. This is inconsistent with production of the statutory requirement contained in Title X, Subtitle E (Enforcement Powers), which requires "documentary material or . . . information [] relevant to a violation." 12 U.S.C. § 5562(c)(1).

The Bureau is statutorily required to make the CID's Notification of Purpose precise enough to "inform [the CID recipient] of the link between the relevant conduct and the alleged violation." *See CFPB v. Accrediting Council for Indep. Colls. & Schs.* (*ACICS*), 854 F.3d 683, 691 (D.C. Cir. 2017). In other words, HPC believes that specificity is not only critical, but also required.

Further, the data and documents requested should be narrowly defined and tailored to the investigation. Given the vast amount of information retained by financial institutions for each mortgage, in multiple systems, a request for extensive and potentially superfluous information may divert and consume resources unnecessarily. Financial services companies operate in a digital age and the operational and regulatory complexity of mortgage origination and servicing generates incredible volumes of data and communications for each mortgage, which may be spread over numerous systems and record repositories. To maintain competitiveness, companies are adopting new technologies to benefit consumers and to improve operations. The adoption of such technologies has resulted in an explosion of data, and an ever-expanding universe of electronically stored documents. For this reason, it is important for the Bureau to heed the well-established legal principle that administrative subpoenas, such as CIDs, cannot be drafted to be "unduly burdensome or unreasonably broad" [*ACICS*, 854 F.3d. at 689]. A single CID request may implicate years of stored data across numerous custodial sources. The costs associated with responding to such requests are significant.[3]

[3] In connection with a petition to quash, one CID recipient explained that the cost of just the production of emails and electronic records responsive to the Bureau's CID would cost over $5.25 Million. In re MGIC, No. 2012 – misc- MGIC, Declaration of Dan D. Stilwell, dated Dec. 7, 2012, at ¶ 7, available on the Bureau's website: https://files.consumerfinance.gov/f/201311_cfpb_mgic-investment_declaration.pdf. That is in addition to the "very significant legal and other fees to actually review the electronic and paper records requested by the CFPB for responsiveness and privilege." *Id.*

As technology advances and data storage and retrieval become more complicated, it is vital that the Bureau notify CID recipients of the specific purpose of the investigation, and take due care to ensure that requests are reasonably tailored to that purpose. The Bureau's Enforcement Manual states:

> Staff should consider the burden the CID will impose upon the recipient. A CID should be narrowly tailored to solicit the information necessary for the investigation. If Staff later determines that additional information is needed from the recipient, Staff may issue another CID or request that the CID recipient provide the information voluntarily.[4]

In practice, however, the Bureau's approach typically begins with broad and vague requests, which Enforcement attorneys may or may not subsequently agree to limit or modify. Instead, the Bureau should implement the explicit guidance from the Policy manual, starting with a narrow request and expanding it only if necessary. For example, if an investigation is initiated based on a specific consumer complaint, the Bureau should identify that complaint to the CID recipient. Such an approach would be consistent with the Federal Rules of Civil Procedure, which state that a "party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena" [Fed. R. Civ. P. 45]. Careful drafting of requests will get the information the Bureau needs in a more timely fashion. Companies will also be able to provide more accurate information, without engaging in a costly and unnecessary review of hundreds of thousands of documents.

Similarly, the Bureau typically requests tolling agreements at the very outset of the investigation, long before any decision has been made, or could be made, regarding the likelihood of an enforcement action. While a proposed tolling agreement is preferable to a lawsuit, in other enforcement contexts such agreements are usually sought *after* sufficient fact-finding *and* when an enforcement action appears inevitable, and the parties need more time to reach a consensual resolution.

While not all CIDs are directed at companies that are themselves the targets of enforcement, many are. Companies that are subject to Bureau enforcement are owed due process and must be afforded the opportunity to defend themselves. Years-long, open-ended investigations that conflict with statutorily-mandated Notification of Purpose do not give companies adequate notice of wrong doing. Additionally, to the extent a company is suspected of regulatory violations (whether or not there is ultimately an enforcement action), a vague Notification of Purpose deprives the company of the ability to take prompt corrective action. Thus, failure to provide a clear and compliant Notification of Purpose may subject consumers to preventable risk, while allowing

[4] CFPB Policies and Procedures Manual, Office of Enforcement, Version 3.0 (May 5, 2017).

charges against financial services companies to expand over the course of the investigation.

Frankly, meaningful notices of the conduct would also contribute to more tailored CID requests, which would partially address the problem of overly-burdensome CIDs.

3. Bureau Rules Setting Strict Deadlines in Connection with CIDs Are Oppressive and Run Afoul of Professional Conduct Standards.

The fifth topic concerns the timeframes associated with each step of the Bureau's CID process, including the specific timeframes for meeting and conferring and petitioning to modify or set aside a CID. The current deadlines are unreasonably short. The Bureau's stated opposition to time extensions places both the responding party and Enforcement counsel in an adversarial, rather than cooperative, posture and conflicts with the standards for professional conduct.

A. The Meet and Confer

Bureau Rules provide that the recipient of a CID "shall" meet and confer with a Bureau investigator 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 [12 C.F.R. § 1080.6(c)]. Setting such a narrow window for parties to attempt to resolve all issues regarding compliance with a CID is unrealistic and unproductive, not to mention arbitrary. Such a short timeframe acts to discourage candid, meaningful discussions at the investigation's earliest stage. This is especially so if the CID contains a vague Notification of Purpose coupled with overbroad requests, as discussed above. Bureau investigators, in some instances, have been willing to informally defer portions of meet and confer discussions, so long as an initial meet and confer is held within the 10-day window. Offering broader discretion to Bureau investigators to grant reasonable extensions or increase the time period to meet and confer would produce more fruitful discussions among the parties and would benefit both the Bureau and the investigated party alike, by introducing common grounds that otherwise could not be fleshed out on short notice.

B. The Petition to Modify or Set Aside a CID

The Bureau's Rules relating to investigations give investigated parties only 20 calendar days after service to file any petition to modify or set aside a CID. *See* 12 U.S.C. § 1080.6(e). The Rules provide that, while the Assistant Director and Deputy Assistant Directors of the Office of Enforcement are authorized to grant extensions of time to file such petitions, such extensions are "disfavored." *Id.* § 1080.6(e)(2). But the Bureau's rules are inconsistent with the law, which expressly permits—and does not disfavor—

extensions of time to be granted by "any Bureau investigator named in the demand" [12 U.S.C. § 5562(f)(1)]. As a practical matter, such a narrow timeframe often requires responding parties to decide whether to file such a petition without having exhausted the meet and confer process. Moreover, the rule as written treats the investigation process as a zero-sum game, in which parties must decide almost immediately whether they are able to comply with the terms of a CID, or should petition to modify or set aside the CID, often without determining whether they are able to negotiate reasonable limitations on the CID. The Bureau should revise its rules to permit reasonable extensions of time by Bureau investigators, as expressly permitted under the statute, or it should increase the time period for responding.

The Office of Enforcement's Policies and Procedures Manual provides internal guidance to staff for reducing the potential burden of complying with a CID. Among other things, the Manual states that staff should (1) narrowly tailor a CID to solicit the information necessary for the investigation and (2) be amenable to working with the recipient to narrow an issued CID so that it is consistent with the needs of the investigation. Under the current framework, the meet and confer must take place by Day 10 after receipt of the CID (and it may take that long for the recipient to review and determine what concerns it has with the CID as drafted), and the petition to set aside the CID must be filed by Day 20. In other words, the opportunity to "narrow" the CID with Bureau staff will realistically take place between Days 10 and 20, while the CID recipient is also simultaneously preparing the Motion to Set Aside. The Bureau's regulations also require that a Motion to Set Aside include "factual and legal objections to the civil investigative demand, including all appropriate arguments, affidavits, and other supporting documentation" [12 C.F.R. § 1080.6(e)]. Yet the Bureau generally does not grant requests for extensions of the deadline to submit a petition to modify or set aside the CID, even if the meet and confer is in process and even if the Bureau has not made a determination as to what modifications it is willing to make to the CID.

The schedule required under this framework is unrealistic. It does not provide CID recipients a meaningful chance to work cooperatively with the Bureau to find common ground. Instead, responding companies and their attorneys are expected to drop everything to immediately respond to the CID. In the end, forcing companies to engage in fire drills through artificially-imposed deadlines does not advance the Bureau's statutory objectives. The Bureau should adopt a more reasonable framework for CID deadlines and extensions, to enable meaningful negotiation during the meet and confer process before a petition must be submitted.

C. Professional Civility and Extensions of Time

It is a matter of common courtesy among attorneys to agree to reasonable extensions of time. *See, e.g.*, Standard No. 10, D.C. Bar Voluntary Standards of Civility in

Professional Conduct ("We will agree to reasonable requests for extensions of time and for waiver of procedural formalities provided our clients' interests will not be adversely affected."). A number of Federal courts have explicitly adopted cooperation principles concerning discovery and scheduling matters. *See, e.g.*, Local Rule 26.4, S.D.N.Y. and E.D.N.Y ("Counsel are expected to cooperate with each other, consistent with the interests of their clients, in all phases of the discovery process and to be courteous in their dealings with each other, including in matters relating to scheduling and timing of various discovery procedures."). A number of other jurisdictions require civility among counsel, and Bureau attorneys are subject to those mandatory civility requirements when enforcing CIDs in those jurisdictions.[5]

The Bureau's policy disfavoring extensions, and in particular extensions of time to submit petitions to modify or set aside a CID, and the Bureau's processes that often take the ability to grant even a short extension out of the hands of line-level Enforcement attorneys, are in tension with these professional standards. The Bureau should consider the long-term reputational consequences of refusing to provide reasonable extensions when requested. As a matter of basic professionalism, reasonable extensions should be granted quickly as a matter of course when they would not meaningfully impede a particular investigation, and line-level Enforcement attorneys should have the authority to grant reasonable extensions without supervisor approval in most investigations, consistent with their professional obligations.

[5] *See* David A. Grenardo, *Enforcing Civility: Holding Attorneys to a Higher Standard of Conduct*, American Bar Association 39th National Conference on Professional Responsibility, *available at* https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/39th_conf_session14_enforcing_civility_holding_attorneys_to_a_higher_standard_of_conduct.authcheckdam.pdf.

4. Investigational Interviews Should Be Conducted Like Depositions and the Bureau Should Grant Investigated Parties Better Access to Counsel.

RFI topics six and eight relate to taking testimony and the rights of individuals in investigational interviews. As a general matter, the Bureau's investigational interview process should align as closely as possible with the rules governing depositions in the Federal Rules of Civil Procedure. This would help the Bureau to get a complete and accurate picture of a witness' knowledge, and would make it more likely that a witness' testimony could be used in a future enforcement action, which would promote efficiency. For example, Bureau rules currently state that whether clarifying questions may be asked after completion of the examination is "within the sole discretion of the Bureau investigator conducting the hearing" [12 C.F.R. § 1080.9(b)(4)]. This is in direct contrast to the rules in civil litigation [Fed. R. Civ. P. 30(c)(1)]. The purpose of the investigational interview should be make sure that the Bureau has the truth, which includes an accurate recounting of the witness' knowledge. The Bureau should not have anything to fear from permitting clarifying questions from the witness' or the company's attorney. Indeed, Bureau supervisors would benefit from seeing the whole picture before making enforcement decisions, rather than only the one-sided perspective that may be painted by the Enforcement attorneys making the recommendation.

Likewise, the Bureau's rules forbid counsel from making certain testimonial objections that are otherwise available to litigants in federal civil proceedings. *See* 12 C.F.R. § 1080.9(b)(2) ("Any objections made under the rules in this part shall be made only for the purpose of protecting a constitutional or other legal right or privilege."). As an initial matter, Dodd-Frank expressly allows for objections in investigational hearings and does not contain the limitation found in the Bureau's regulations. *See* 12 U.S.C.S. § 5562(d)(iii). At the same time, both Dodd-Frank and the Bureau's regulations allow witnesses to be accompanied by their attorney. It makes no sense for an attorney to be present to represent a client if they cannot protect their client's interests by noting legitimate objections on the record where appropriate.

5. The Inadvertent Production of Privileged Information and the Use of Privileged Information Generally.

HPC urges the Bureau to make clear that the provisions of Federal Rule of Evidence 502 should apply to documents inadvertently produced in connection with Bureau investigations.

In addition, to date, Bureau Enforcement attorneys have required financial institutions to transmit overly detailed privilege logs at the outset of the investigation, often accompanied by demands for assurances that there are no other privileged materials being withheld. These demands present difficulties for the CID recipient and for the

Bureau because they divert resources and create inefficiency at the beginning of the investigation as the recipient is trying to collect responsive material. Another practical problem is that CID recipients typically are not going to know the full universe of privileged materials until later in the course of gathering, reviewing, and producing documents, so early demands are inherently going to be incomplete and the demands for assurances that there are no additional documents being withheld are impossible to satisfy.

6. The CID Document Submission Standards Are Costly and Unjustified.

RFI topic ten concerns Bureau requirements for responding to CIDs, including document submissions standards. The Bureau's Enforcement Manual states that all recipients should comply with the Bureau's "Document Submission Standards." The Submission Standards, in turn, state that the "standards must be followed for *all documents* you submit in response to the CID" (emphasis added). The Submission Standards contain costly specifications that must be applied to all electronically stored information (ESI) submitted to the Bureau. Notably, document productions to the Bureau actually must include *two* separate sets of data—the original underlying native files, and separate TIF images, TXT files, and accompanying load files that must be created specifically for the response the CID. The Bureau's boilerplate ESI specifications all but require a CID recipient to hire a third-party eDiscovery vendor to respond to a CID. At the outset, the Federal Rules of Civil Procedure make clear that in responding to a document request or subpoena, a "party need not produce the same electronically stored information in more than one form" [Fed. R. Civ. P. 26(b)(2)(E)(iii); Fed. R. Civ. P. 45(E)(1)(c)]. The Bureau's document standards should align with this legal practice. Requiring a CID recipient to produce data in two separate forms is costly and wasteful, not to mention burdensome.

The Bureau should take a more flexible approach and address the form of ESI submission during the meet and confer process, rather than the boilerplate form of submission from the get-go. The ESI Submission Standards also require data to be produced on CD, DVD, or USB Thumb Drive. These options, however, do not provide for secured electronic delivery through cloud based services or File Transfer Protocols. The Bureau should allow CID Responses to be submitted via secured file-sharing methods, which is faster and more cost effective.

In addition, the Bureau also demands that CID recipients submit certifications along with document productions and interrogatory responses. These certifications are problematic in that they require the person certifying to assert broadly that there is no other responsive information. Such broad certifications expose individuals to unnecessary risk, because it is simply impossible for anyone to have reviewed every record or spoken with everyone with potentially responsive information. We would urge the

Bureau to revise its certifications to adopt language similar to the certifications allowable under the Federal Rules of Civil Procedure which contain qualifying language regarding the knowledge of the person submitting the certification and the ability to rely reasonably on the statements and responses of others at the institution. The Bureau could certainly follow up if it had any questions regarding such certifications to ensure that it understands any such qualifications.

7. Orders on Petitions to Modify Or Set Aside CIDs Should Be Redacted or Kept Confidential

The last RFI topic concerns the Bureau's practice involving petitions to modify or set aside CIDs, including whether the petitions and the Director's orders should be made public, as is the current practice. As the September 2017 OIG report found, the Bureau knows that the obvious effect of this practice is to dissuade companies from challenging CIDs. The CID process should be fair and not penalize companies for exercising their rights. The mere fact an investigation exists does not mean something illegal has occurred, and companies should not be subjected to reputational harm simply for challenging an overbroad or burdensome CID (or preserving the company's right to do so while it works with the Bureau to try to narrow the requests).

The OIG Report further states that the Bureau "cite[s] government transparency as a reason for publishing petitions and orders in response to petitions." The Bureau's website has a similar statement. *See* https://www.consumerfinance.gov/policy-compliance/enforcement/petitions/ ("As part of our ongoing commitment to transparency, we will post petitions to set aside civil investigative demands and the corresponding orders."). The Bureau's invocation of "government transparency" does not comport with the Bureau's own regulations, which state that its investigations are non-public [12 C.F.R. § 1080.14(b)]. The Bureau forces a CID recipient challenging Bureau authority to make the matter public by placing the petition on its docket. If the Bureau must publish the petition, it should simply redact the name of the CID recipient prior to placing the petition or the Director's order on the public docket. Redacting petitioners' identity gives the public the same level of insight into the Bureau's decision-making processes and reasoning, while preventing the reputational harm associated with publicizing the investigation. In fact, the Bureau should simply adopt the approach taken by prudential banking regulators who maintain confidentiality when publicizing, for example, determinations on supervisory appeals.

In addition, the short timeframe for filing a petition to quash, typically 20 days after receipt of the CID, discourages meaningful, candid and good faith discussions regarding the scope of the CID. Typically, the CID recipient will not have responded substantively to the CID before the deadline for filing a motion to quash. However, because the filing of a motion to quash must be done to preserve the CID recipient's objections, and it is

the only way to stop the clock on a CID response, CID recipients are often compelled to file such a motion. The filing of a petition to quash is time-consuming and an unnecessary diversion of the recipient's resources during a period of time when the recipient should be focusing on responding substantively to the CID.

* * *

HPC appreciates the opportunity to respond to the RFI regarding CIDs and it appreciates the Bureau's consideration of these comments. We believe that while the CID process is an important tool that the Bureau must have at its disposal, for the reasons explained above, the CID process needs to be modified to ensure that it will be used fairly and under appropriate circumstances. If you would like to discuss this further, please contact our Senior Vice President for Mortgage Policy, Meg Burns, at 202-589-1926 or Meg.Burns@FSRoundtable.org.

Yours truly,

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