

Client Alert

February 1, 2018

With CID Request, CFPB Follows Through on Plan to Review Functions

By Donald C. Lampe, Steven M. Kaufmann, and Amanda J. Mollo

On January 26, 2018, the Consumer Financial Protection Bureau (CFPB or “Bureau”) published a Request for Information (RFI) in the *Federal Register* regarding the Bureau’s Civil Investigative Demand (CID) processes. According to the Bureau’s related press release, the RFI is the first part of Acting Director Mick Mulvaney’s “call for evidence” about the Bureau’s functions, about which we previously reported. As presaged in the Bureau’s press release, the RFI is designed to “ensure the Bureau is fulfilling its proper and appropriate functions to best protect consumers” and to facilitate updating, streamlining, and revising agency processes “to better achieve the Bureau’s statutory and regulatory objectives.” The comment period extends until March 27, 2018.¹

This initial RFI tackles perhaps the most controversial of the CFPB’s functions: enforcement. As is the case for a number of federal agencies with enforcement authority, the CFPB commonly uses the CID process to initiate enforcement proceedings. The CID process has been the principal, but not the only, means for the CFPB to conduct wide-ranging discovery into the activities of target companies. In fact, over the years, the Bureau’s Enforcement Division has issued dozens of CIDs to industry parties. Now is the time for participants in the consumer financial services markets to consider submitting thoughtful, yet practical, observations on the workings of the CFPB CID process to date. This Alert identifies potential points of interest for financial institutions and other financial services companies, and offers a number of practical takeaways.

BACKGROUND

Congress empowered the CFPB to engage in investigations under Section 1052 of the Dodd-Frank Act (12 U.S.C. § 5562). Section 1052(c), using language borrowed from other federal statutes, expressly authorizes the agency to issue written CIDs whenever the Bureau has reason to believe that any person (not limited to “covered persons” covered by Dodd-Frank Title X) may have custody, possession, or control of documents or other information “relevant to a violation.” The CFPB, in turn, issued its procedural rules for investigations, including procedures related to CIDs, codified at 12 C.F.R. Part 1080 (“Rules”).² The promulgation of these Rules created a measure of controversy, for example, as to the extremely short deadlines for CID recipients to respond and to the delegation of authority.

The Bureau also has come under criticism for certain common practices related to CIDs. As could be expected, CID recipients have found demands for documentary materials and testimony to be overly broad. The mechanism for recourse, filing a petition for an order modifying or setting aside a demand, has proven practically useless, as the former Director only once decided to modify a CID.³ Of the 33 petitions that resulted in publicly available orders issued by the former Director, no other relief was provided.⁴

¹ 83 Fed. Reg. 3,686 (Jan. 26, 2018).

² 77 Fed. Reg. 39,101 (June 29, 2012).

³ *In Re Synchrony Financial*, 2017-MISC-Synchrony Financial-0001, Decision and Order on Petition by Synchrony Financial to Modify or Set Aside Civil Investigative Demand, Sept. 7, 2017, https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201709_cfpb_synchrony-financial_decision-and-order-on-petition.pdf.

⁴ See CFPB, Petitions to modify or set aside, <https://www.consumerfinance.gov/policy-compliance/enforcement/petitions/>.

Client Alert

Moreover, the Bureau has been chastised by courts for exceeding its authority to issue CIDs in the first instance.⁵ For example, after the CFPB issued a broad-ranging CID to the Accrediting Council for Independent Colleges and Schools (ACICS), ACICS filed suit in the Federal District Court in Washington, D.C. to challenge the CID. The court held that the CFPB did not have the authority to issue a CID regarding “the process for accrediting for-profit schools,” calling the Bureau’s stated justification for the CID “a bridge too far!”⁶

REVISING THE CID PROCESS?

According to the RFI, the Bureau is interested in “better understanding how its processes related to CIDs may be updated, streamlined, or revised” in order to “achieve meaningful burden reduction or other improvement to the CID processes” without sacrificing effectiveness. The agency expressed its interest in commenters making concrete suggestions for modifications to the CID process while identifying aspects of the CID process that should not be altered. To guide commenters, the CFPB set forth a list of preliminary questions. This list includes questions that appear to be aligned with concerns expressed about the Rules and about Bureau actions in its enforcement cases, including:

- How the CFPB initiates investigations and the issuance of CIDs;
- Issues related to delegation of authority;
- How the CFPB can improve CID recipients’ understanding of investigations;
- The nature and scope of requests;
- The time frames associated with the steps of the CID process;
- Issues related to taking testimony from an entity and rights afforded to witnesses;
- Procedures related to privileged information; and
- Requirements for responding to CIDs and the processes concerning petitions to modify or set aside CIDs.

The RFI is clear about the “non-exhaustive” nature of its list of questions, noting that the list “is not intended to restrict the issues that may be addressed.”

WHAT DOES IT MEAN?

The RFI is brief, but specific passages in the document align with Acting Director Mulvaney’s known priorities for assessing the activities and functions of the agency,⁷ including:

- *Burden reduction.* The RFI specifically requests public comment on “how best to achieve meaningful burden reduction.” The RFI speaks of “minimizing burdens, consistent with applicable law.”
- *Cost-benefit analysis.* The RFI seeks from commenters, including entities that have received one or more CIDs and members of the bar who represent respondents, “useful information and perspectives on the

⁵ See, e.g., *CFPB v. Accrediting Council for Indep. Colls. and Schs.*, 183 F.Supp.3d 79 (D.D.C. 2016).

⁶ *Id.* at 83, 84.

⁷ Mick Mulvaney, Op-Ed., *The CFPB Has Pushed Its Last Envelope*, Wall St. J., Jan. 23, 2018, <https://www.wsj.com/articles/the-cfpb-has-pushed-its-last-envelope-1516743561?mod=searchresults&page=1&pos=2>.

Client Alert

benefits and burdens” of the Bureau’s CID process. The RFI also requests supporting data such as cost information. In addition, the RFI asks for information on costs and benefits relating to petitions to modify or set aside Bureau CIDs.

- *Due process.* The RFI is laden with opportunities to comment on due process considerations arising from the CID process under the rules and under common agency process, particularly as to timelines.
- *Critical assessment of the Bureau’s previous conduct.* In part, the RFI initiates an inward look into actual, on-the-ground activities of the Bureau’s Enforcement Division prior to the former Director’s resignation. The RFI specifically requests, with respect to potential updates or modifications to CID processes, information “in as much detail as possible.” Importantly, the RFI also specifically requests information regarding the alignment of the CFPB CID process with processes of other agencies with similar authorities.

PRACTICAL CONSIDERATIONS

There are several practical takeaways from this initial RFI, for consideration by industry-side commenters and other observers.

- It may not be advisable for specific targets of CIDs to set forth in comments detailed descriptions of their specific cases and experiences with the Bureau. Moreover, given years of controversy surrounding CFPB enforcement and the keen interest of media, consumer and community advocates, and certain high-profile members of Congress, it may not be in the best interests of particular financial institutions to provide specific written comments on the RFI at all.
 - Along these lines, it seems likely that it will fall on industry trade groups and organizations to assemble, prepare and submit comments in response to the RFI, incorporating, *inter alia*, examples of agency conduct that are not associated with particular respondents. After all, the RFI seeks actual evidence (facts). Certainly, the RFI effectively cries out for commentary on important policy questions, such as the previous Director’s stated policy of “regulation by enforcement.”
- The fact that a CID is confidential unless a recipient challenges the CID is an issue ripe for comment because the removal of confidentiality as a practical matter may deter recipients from petitioning to limit overly broad requests.
- At least for this Acting Director, comments addressing burden reduction, cost-benefit analysis, and due process based on his “clean slate” approach to potential agency reform should be particularly important. For example, it appears Acting Director Mulvaney would welcome data on the time and expense committed to CID responses by industry respondents.
- Conceptually, it should be helpful to distinguish between needed changes to (i) CFPB enforcement policy, (ii) the agency’s enforcement processes and procedures, and (iii) the Rules. Changes to the Rules, of course, ordinarily would require notice-and-comment rulemaking under the Administrative Procedure Act, while other actions could be effectuated promptly by the CFPB Director without rulemaking.
- The topic of petitions to modify or set aside Bureau CIDs seems particularly salient for potential commenters. Fortunately for industry-side respondents, there is a relatively large record of the former

Client Alert

Director's consideration and consistent rejection of such petitions upon which to base comments. This is an area, however, as to which effective reform may need to be accomplished through amending the Rules.

- Timing of the Bureau's receipt and review of comments on the RFI, and in particular any action to reform the agency's CID process, may be affected by the Acting Director's tenure at the agency. That is, under the Vacancies Act, the Acting Director is to serve a maximum of 210 days from the date of his appointment.⁸ This works out to around mid-to-late June, 2018 for Acting Director Mulvaney. It is not a foregone conclusion that a presidentially appointed and legislatively confirmed Director will follow in the Acting Director's footsteps. It appears, however, that a new Director will likely be cut from the same cloth as Acting Director (and former conservative Congressman) Mulvaney.

CONCLUSION

We will continue to monitor developments related to the CFPB, particularly those that affect potential reform of the agency. We expect to see more CFPB RFIs, as outlined by Acting Director Mulvaney, in the coming weeks. Stay tuned.

Contact:

Donald C. Lampe

(202) 887-1524

dlampe@mofo.com

Steven M. Kaufmann

(202) 887-8794

skaufmann@mofo.com

Amanda J. Mollo

(202) 778-1609

amollo@mofo.com

⁸ See 5 U.S.C. §§ 3346, 3349a.

Client Alert

Financial Services Team

California

Alexis A. Amezcua	(415) 268-6557
Elizabeth Balassone	(415) 268-7585
Roland E. Brandel	(415) 268-7093
Sarah N. Davis	(415) 268-7478
Henry M. Fields	(213) 892-5275
Joseph Gabai	(213) 892-5284
Angela E. Kleine	(415) 268-6214
Jim McCabe	(415) 268-7011
James R. McGuire	(415) 268-7013
Mark David McPherson	(212) 468-8263
Ben Patterson	(415) 268-6818
Sylvia Rivera	(213) 892-5734
William L. Stern	(415) 268-7637
Nancy R. Thomas	(213) 892-5561
Lauren Lynn Wroblewski	(415) 268-6458

New York

Robert J. Baehr	(212) 336-4339
James M. Bergin	(212) 468-8033
Meghan E. Dwyer	(212) 336-4067
David J. Fioccola	(212) 336-4069
Marc-Alain Galeazzi	(212) 336-4153
Adam J. Hunt	(212) 336-4341
Jessica Kaufman	(212) 336-4257
Mark P. Ladner	(212) 468-8035
Jiang Liu	(212) 468-8008
David H. Medlar	(212) 336-4302
Barbara R. Mendelson	(212) 468-8118
Michael B. Miller	(212) 468-8009
Judy Man Ni Mok	(212) 336-4073
Jeffrey K. Rosenberg	(212) 336-4130
Mark R. Sobin	(212) 336-4222
Joan P. Warrington	(212) 506-7307

Washington, D.C.

Marcie Brimer	(202) 887-6932	Donald C. Lampe	(202) 887-1524
Rick Fischer	(202) 887-1566	Jeremy R. Mandell	(202) 887-1505
Adam J. Fleisher	(202) 887-8781	Amanda J. Mollo	(202) 778-1609
Natalie A. Fleming Nolen	(202) 887-1551	Obrea O. Poindexter	(202) 887-8741
Calvin D. Funk	(202) 887-6930	Ryan J. Richardson	(202) 887-8761
Julian E. Hammar	(202) 887-1679	Sean Ruff	(202) 887-1530
Oliver I. Ireland	(202) 778-1614	Trevor R. Salter	(202) 887-1527
Crystal N. Kaldjob	(202) 887-1687	Nathan D. Taylor	(202) 778-1644
Steven M. Kaufmann	(202) 887-8794	Jennifer S. Talbert	(202) 887-1563

Client Alert

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 13 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.