



NEW YORK STATE
DEPARTMENT *of*
FINANCIAL SERVICES

Andrew M. Cuomo
Governor

Maria T. Vullo
Superintendent

April 12, 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:

I write as Superintendent of the New York State Department of Financial Services (NYDFS) in response to the Consumer Financial Protection Bureau (Bureau)'s Request for Information regarding Civil Investigative Demands and related processes (CIDs). As a state banking regulator that has partnered with the Bureau, NYDFS appreciates the opportunity to offer our thoughts on this crucial and core tool of the Bureau.

NYDFS supervises approximately 3,800 institutions with assets of approximately \$7 trillion, including state-chartered banks operating in New York; branches of foreign banks licensed in New York; U.S. and foreign insurance companies operating in New York; and licensed lenders, money transmitters, check cashers and other non-bank financial companies, some of which are also supervised by the Bureau. NYDFS has worked with the Bureau since its creation on supervisory matters, such as joint examinations, and is party to an information-sharing agreement with the Bureau to enhance our cooperative relationship. NYDFS has also taken joint enforcement action with the Bureau; we were co-plaintiffs in a suit against two companies and three of the companies' individual managers for deceiving consumers about the costs and risks of their pension advance loans.¹ Our federal-state partnership has shown the Bureau to be a leader in protecting financial markets and institutions and enforcing consumer financial laws.

I write to urge the Bureau to maintain its CID processes because they are an essential and important part of the Bureau's statutory mission of enforcing federal consumer financial laws.

¹ Press Release, CFPB, CFPB and New York Department of Financial Services Sue Pension Advance Companies for Deceiving Consumers About Loan Costs (Aug. 20, 2015), *available at* <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-new-york-department-of-financial-services-sue-pension-advance-companies-for-deceiving-consumers-about-loan-costs/>.

The Consumer Financial Protection Act (CFPA) grants the Bureau broad authority to investigate suspected violations of law. This reflects the important governmental interest in the swift and efficient investigation of possible unlawful activity. The Bureau's effectiveness in carrying out its congressionally-mandated duty of enforcing federal consumer financial laws requires this authority and the concomitant tools to conduct fulsome investigations of potential wrongdoing.

CIDs are a principal means by which the Bureau engages in investigating possible violations and determining whether enforcement is warranted, in order to protect consumers. Indeed, two of the Bureau's "primary functions," set forth in 12 U.S.C. § 5511(c), concern the Bureau's ability to investigate: first, regarding "collecting, investigating, and responding to consumer complaints," *id.* at § 5511(c)(2), and second, regarding the Bureau's ability to take appropriate enforcement action to address violations by covered persons of federal consumer financial law, *id.* at § 5511(c)(4). The Bureau is thus statutorily compelled to discover and procure evidence of compliance, or non-compliance, with federal consumer financial laws. The Bureau may wield this broad power through the issuance of CIDs, which enable it to investigate and collect relevant facts without requiring the commencement of any proceedings before information may be obtained. It is well-settled that an agency such as the Bureau should be given wide latitude to investigate via CIDs, a type of administrative subpoena, so that potential violations are quickly found and scrutinized. The faster an agency can get to the facts of any situation, the faster it can act to halt wrongdoing and determine whether enforcement should follow.

Importantly, while the Bureau is a relatively new agency, its CID processes are not—they come directly from the CID processes provided for in the Federal Trade Commission Act (FCTA), which were added to the FCTA in 1980. *Compare* 12 U.S.C. § 5562 *with* 15 U.S.C. § 57b-1. Both statutes set out similar processes: specifying who can initiate and conduct investigations;² requiring notification of the purpose of the CID;³ mandating that CID recipients meet and confer with the agency;⁴ providing processes for filing petitions for an order to modify or set aside CIDs, including the time to so file;⁵ establishing requirements and procedures for oral testimony and the rights of witnesses;⁶ and so forth. Just as the Bureau's CID processes replicate the FCTA's, the FCTA itself was based on the CID procedure utilized by the Department of Justice under the Antitrust Civil Process Act, 15 U.S.C. § 1311. Given these other laws and regulations, it is clear that the Bureau's CID processes arise out of and join a well-established tradition of administrative investigation, one repeatedly upheld by the courts⁷ and duplicated through legislation.

At the same time as the CID processes give the Bureau the means and methods to investigate violations of federal consumer financial laws, they also provide recipients of investigative

² 12 C.F.R. §§ 1080.4, 1080.6; 16 C.F.R. §§ 2.1, 2.5

³ 12 U.S.C. § 5562(c)(2); 12 C.F.R. § 1080.5; 15 U.S.C. § 57b-1(c)(2); 16 C.F.R. § 2.6.

⁴ 12 C.F.R. § 1080.6(c); 16 C.F.R. § 2.7(k).

⁵ 12 U.S.C. § 5562(f)(1); 12 C.F.R. § 1080.6(e); 15 U.S.C. § 57b-1(f)(1); 16 C.F.R. § 2.10.


⁶ 12 C.F.R. §§ 1080.6(a)(4), 1080.9; 16 C.F.R. §§ 2.7(b)(4), 2.9.

⁷ *United States v. Morton Salt*, 338 U.S. 632 (1950); *United States v. Powell*, 379 U.S. 48 (1964); *FTC v. Texaco, Inc.*, 555 F.2d 862 (1977); *United States v. Markwood*, 48 F.3d 969 (6th Cir. 1995); *CFPB v. Source for Public Data, LP*, No. 17-16, 2017 WL 2443135 (N.D.T.X. June 6, 2017).

demands opportunities and procedures to clarify, modify, and challenge such demands. The requirement that CID recipients meet and confer with the Bureau soon after receiving a demand enables early discussion and clarification of any issues. 12 C.F.R. § 1080.6(c). Further, the Bureau must give notice to CID recipients of the nature of the conduct constituting the alleged violation under investigation and the provision of law applicable to such violation. 12 U.S.C. § 5562(c)(2); 12 C.F.R. § 1080.5. While the Bureau defines the scope of its own jurisdiction when issuing CIDs, *CFPB v. Harbour Portfolio Advisors, LLC*, No. 16-14183, 2017 WL 631914, at *2 (E.D. Mich. Feb. 15, 2017) (quoting *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001)), this provision gives the CID recipient fair notice about the conduct and alleged violation that prompted the demand. Recipients may also petition to modify or set aside CIDs, first to the Bureau itself and then to a federal court. 12 U.S.C. § 5562(f)(1). Courts consider whether a CID's subject matter is outside of the agency's jurisdiction, whether the demands are too indefinite, or whether the requests are unduly burdensome. See *CFPB v. Heartland Campus Solutions, ESCI*, No. 17-1502, 2018 WL 1089806, at *4 (W.D. Pa. Feb. 28, 2018); *United States v. Markwood*, 48 F.3d 969, 979 (1995) (reviewing cases). These processes, taken together, show that CID recipients are afforded multiple opportunities to challenge improper requests. At the same time, the CID is a crucial governmental investigatory tool that allows the Bureau, like other governmental authorities, to obtain information essential to its mission.

In short, the Bureau's CID processes enable the Bureau to efficiently carry out its statutory duty to investigate possible violations of federal consumer financial law, are consistent with the known and accepted processes for CIDs by other agencies, and offer CID recipients fair and reasonable ways to challenge any improper requests. Any alterations to these processes may weaken, slow, or unnecessarily complicate the Bureau's important and leading role in investigating and enforcing federal consumer financial laws and protecting consumers in the financial marketplace.

Sincerely,

A handwritten signature in dark ink, appearing to read "Maria T. Vullo", written in a cursive style.

Maria T. Vullo

Superintendent

New York State Department of Financial Services