



# Consumer Finance Enforcement Activity

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## Agenda

- 2:00 p.m. - 2:05 p.m. Introduction
- 2:05 p.m. - 2:15 p.m. Current trends in enforcement actions by the CFPB under new leadership
- 2:15 p.m. - 2:25 p.m. Recent changes in the CFPB's practice of issuing CIDs containing broadly worded Notification of Purpose statements, and the practical effect of challenging those CIDs
- 2:25 p.m. - 2:40 p.m. Recent state consumer financial protection enforcement activity
- 2:40 p.m. - 2:55 p.m. Your company receives a CID – now what?
- 2:55 p.m. - 3:05 p.m. Mechanics of responding to a CID
- 3:05 p.m. - 3:15 p.m. What's next?
- 3:15 p.m. - 3:30 p.m. Questions?



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# Current trends in enforcement actions by the CFPB under new leadership

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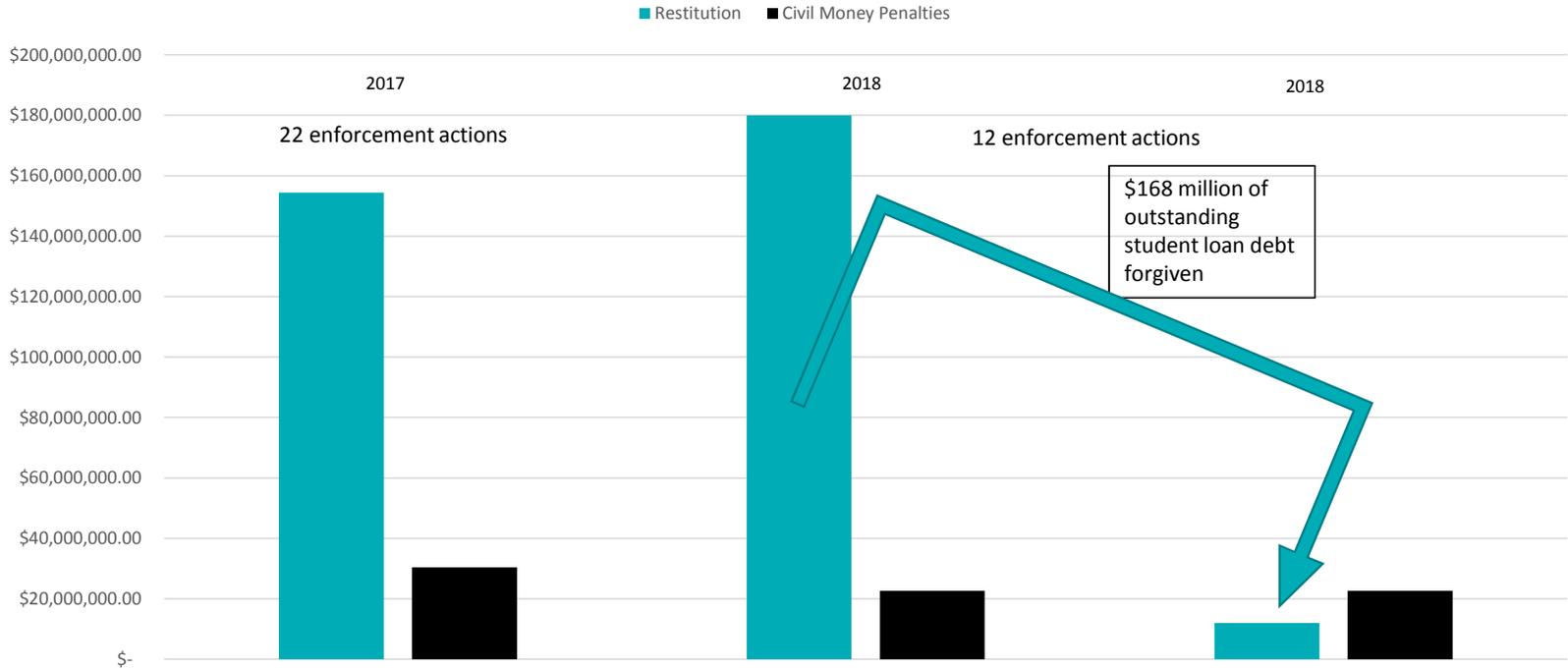


## **Enforcement: still one of many tools, but will not be used to make rules on a case-by-case basis**

- Still seen as an essential tool to ensure justice is served in the public interest and hold bad actors to account while sending a message of deterrence
- More emphasis on prevention through rule-writing and education should mean less enforcement
- When enforcement action is undertaken, it must be purposeful to foster compliance and to help prevent consumer harm and right wrongs
  - Utilize robust resources in the most effective manner to focus on the right cases to reinforce clear rules of the road and prevent harm by holding bad actors to account
  - Send a clear message through public action to the marketplace to deter unlawful behavior and support a level playing field – while reaching a just outcome for harmed consumers
  - Deliberate use through months or years of investigation to find violations, develop evidence, build a case, and reach a resolution (closure, settlement, or litigation)
  - Careful and purposeful investigations to ensure fair and thorough evaluation of the facts and law

# Overall Trends and Observations

CFPB Restitution and CMP 6 Month Comparison



## Recent Enforcement Actions

- Large Bank: EFTA violations related to failure to stop preauthorized payments upon request and to initiate and complete error resolution procedures. Reopening of deposit accounts without authorization or adequate notice.
  - \$12 million restitution and \$3.5 CMP
- Non-Bank Jewelry Company: Opening credit card accounts without consent, enrolling in ancillary product without consent, misrepresenting the financing terms, and violated TILA
  - \$10 million CMP and \$1 million CMP to NY State
- Individual: Misrepresentations to veterans regarding assignment of pension payments, which are non-assignable under federal law.
  - \$1 CMP and banned from working between veterans and third parties purporting to sell future right to an income stream from the veteran's pension
- Non-Bank Small-Dollar Lender and Individuals: Misrepresentation on terms of loans and validity of loans resulted in only injunctive relief.
- Non-Bank Small-Dollar Lender:
  - Various operational failures (unauthorized charges, overpayment, collections, ads for unavailable services; TILA and GLBA regulatory violations (privacy notice and APR)
    - \$100,000 CMP

## Recent Enforcement Actions

- Non-Bank Small-Dollar Lender: Debiting bank accounts without authorization (authorized to debit certain accounts, but not all accounts).
  - \$3.2 million CMP
- Non-Bank Student Loan Servicer: Failure to timely adjust loan balances for deferment, forbearance, or Income-based repayment (self-disclosed to the Bureau and remediation).
  - \$3.9 million CMP
- Non-Bank Mortgage Servicer: Issues included transfer of loans (loss mitigation, incomplete or inaccurate escrow information that impacted disbursement), vendor oversight, ARM adjustment, document management.
  - \$200,000 CMP and \$36,500 restitution
- Non-Bank Mortgage Company: HMDA violations (inaccurate data).
  - CMP of \$1.75 million
- Non-Bank Company (bank service provider): Actively involved in the creation and implementation of unlawful loan program.
  - Discharge of all outstanding debt on loans estimated at \$168 million
- Filed Suits:
  - Credit repair company
  - Debt Collection law firm



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# Recent changes in the CFPB's practice of issuing CIDs

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## Notification of Purpose – CFPA Requirements

- The CFPA requires that every CID “shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to each violation.” 12 U.S.C. § 5562(a)
- The CFPA’s implementing regulation provides that:

“Any person compelled to furnish documentary material, tangible things, written reports or answers to questions, oral testimony, or any combination of such material, answers, or testimony to the Bureau shall be advised of the nature of the conduct constituting the alleged violation that is under investigation and the provisions of law applicable to such violation.” 12 C.F.R. § 1080.5

## CFPB Has Historically Interpreted the Notification Requirement Broadly

- The CFPB has been known for broad, wide-ranging CIDs that test the boundaries of the CFPA’s requirements. However, recent court decisions have found such CIDs unenforceable:
  - **FIRST CASE:** *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs.*, 854 F.3d 683 (D.C. Cir. 2017): The D.C. Circuit Court unanimously upheld a decision by the District Court ruling that a CID issued by the Bureau was unenforceable because the CFPB “failed to provide ACICS with sufficient notice as to the nature of the conduct and the alleged violation under the investigation.”
  - **ALSO:** *Consumer Fin. Prot. Bureau v. Source for Pub. Data, L.P.*, 903 F.3d 456 (5th Cir. 2018): The Fifth Circuit held that a CID was unenforceable where the CFPB failed to advise the recipient of “the nature of the conduct constituting alleged violation which is under investigation and the provision of law applicable to such violation,” which prevented the Court from reviewing whether the information sought was “reasonably relevant to the inquiry.”
- Additionally, the CFPB’s Office of Inspector General’s 2017 Report advised that the Office of Enforcement should revise its policy of using “very broad terms” in notifications of purpose in order to comply with relevant case law.

## CFPB Announces Change in Policy

- On April 23, 2019, the CFPB announced changes to its policy in order to provide more information about the potentially wrongful conduct under investigation, explaining that, under the new policy:

“CIDs will provide more information about the potentially applicable provisions of law that may have been violated. CIDs will also typically specify the business activities subject to the Bureau’s authority. In investigations where determining the extent of the Bureau’s authority over the relevant activity is one of the significant purposes of the investigation, staff may specifically include that issue in the CID in the interests of further transparency.”

- The CFPB explained that the new policy resulted from recent court decisions, the 2017 Report, and comments that the Bureau received in response to the Requests for Information issued in 2018.



## Effect of the Policy Change

- What is the practical effect of this policy change on recipients of CIDs (whether the subject of investigation or third parties)?
  - May be easier to identify what conduct is under investigation and potential liabilities.
  - May be less burdensome to respond.
  - May narrow the scope of response.
  - May provide additional opportunities to object to specific requests that fall outside the stated purpose of the investigation.



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## **Recent state consumer financial protection enforcement activity**

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## Recent state consumer financial protection enforcement activity and priorities

- June 14, 2019: 43 State Attorneys General announced a \$168 million settlement, obtaining debt-relief for 19,000 student borrowers who took out loans to attend a for-profit college that subsequently failed.
- June 11, 2019: Attorneys from Illinois, Pennsylvania, and Massachusetts testified at House Financial Services Committee (Subcommittee on Oversight and Investigations) on “An Examination of State Efforts to Oversee the \$1.5 Trillion Student Loan Servicing Market.” They criticized servicers’ failure to provide accurate information about income based repayment plans, debt relief companies, and “forbearance steering” by school consultants to manage default rates.
- May 24, 2019: 52 State and Territorial Attorneys General letter to the U.S. Department of Education, asking the Department to automatically forgive the student loans of permanently disabled veterans (rather than require veterans to affirmatively seek a loan discharge).
- May 16, 2019: 25 State Attorneys General submitted comments to the CFPB opposing repeal of ability to pay rule for short-term/small-dollar loans.

## Recent state consumer financial protection enforcement activity and priorities

- April 25, 2019: California Attorney General Becerra announced \$150 million bank RMBS settlement, dating back to 2003-2007 time period.
- April 20, 2019: Maryland Attorney General Frosh touted state General Assembly's passage of bill prohibiting student loan servicers from "mislead[ing] borrowers" and "misrepresenting information or omitting material information about a student loan."
- April 9, 2019: Massachusetts Attorney General Healey announced \$2 million settlement with mortgage servicer regarding loan modification practices (expressing disapproval of use of interest only modifications).
- April 5, 2019: Attorneys General of Delaware and Massachusetts announced \$6 million settlement with "subprime" auto lender, providing monetary relief to borrowers and deletion of trade lines on credit reports.
- April 4, 2019: 21 State Attorneys General called on Department of Education to reverse limitations on the Department's "routine disclosure" of student loan servicing information, noting that state attorneys general "are in a unique position to ensure that the servicers are conducting their businesses in compliance with consumer protection laws."

## Recent state consumer financial protection enforcement activity and priorities

- March 29, 2019: Massachusetts Attorney General Healey announced \$2 million settlement with mortgage servicer regarding loan modification practices (allegations included improper insurance payments and administration, improper fees, and failure to timely respond to borrower disputes).
- February 12, 2019: 21 State Attorneys General petitioned CFPB not to expand use of no-action letters and “regulatory sandbox” because it would “permit the CFPB to exempt ... companies and even entire industries from certain consumer protection laws and regulations.”
- January 4, 2019: New York Attorney General James announced \$9 million settlement with federal student loan servicer (allegations included “steering” borrowers away from income-based repayment plans and “deceiving” borrowers about public service loan forgiveness program); joint settlement with N.Y. Department of Financial Services.
- January 3, 2019: For-profit education company agreed to forgive \$493 million in student loan debt, affecting 179,000 students, in settlement with 49 State Attorneys General.



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## **Your company receives a CID – now what?**

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## Litigation Hold and Assessment of Materials

- Work with counsel to identify possible custodians and sources of information.
- Issue a broad litigation hold.
- Flag automatic record retention or deletion practices, including templates or other documents that may be written over or otherwise not retained.
- ESI considerations – What are the volume and type of information implicated by the request?
  - Emails
  - Databases
  - Audio or other recordings



## Reviewing Individual Requests

- With counsel, carefully review the requests and definitions
  - Which requests or definitions need clarification?
  - Are there terms that are not defined, or are defined differently than you use them internally?
  - Which requests are very burdensome?
  - Are there requests that are not applicable to your company, or for which you have no information?



## Privilege and Confidentiality

- Privilege
  - Consider custodians who are likely to have privileged or confidential information
  - Assist counsel in identifying materials that may be privileged.
- Confidentiality agreements
  - Consider whether to attempt to negotiate a confidentiality agreement.
- Third-party concerns
  - Does the CID call for production of a third party's information?
  - Do you have an obligation to notify any third parties of the investigation?



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# Mechanics of responding to a CID

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# Challenging the CID

## Petition to Set Aside or Quash

- The CID will often be overly broad or vague.
  - This is most evident in the notification of purpose.
  - The demands may also be subject to attack.
    - The notification of purpose cannot conflict with the demands.
  - A CID that exceeds the jurisdiction of the issuing agency must be set aside.
- The mechanism for challenging the CID is a petition to set aside or quash.
  - Meet and confer with the CFPB before filing the petition.
    - Opportunity to gather more information about the CFPB's intent.
  - The petition should:
    - Emphasize that the agency's authority is limited to its authorizing statute.
    - Challenge whether the CID's scope exceeds the CFPB's jurisdiction.
      - Is your company subject to the CFPB's regulatory authority?
      - Does the CID demand information that is outside the CFPB's purview?
- The petition should include as an exhibit a copy of the CID.
  - You can also include declarations and other documents.
- The petition and any attachments are filed through email with the Office of the Executive Secretary.



## Challenging the CID Request for Confidentiality

- Request confidentiality.
  - If you don't request confidentiality, the petition will be public.
  - There are three main arguments in favor of confidential treatment:
    - Investigations are usually not public.
    - The target of an investigation has a substantial privacy interest in keeping the existence of the investigation private.
    - The public will not benefit from the release of information so early in the investigation.
  - Confidential treatment is not guaranteed.
    - You can and should request that the agency give you advance notice before publishing the materials.
    - You should also submit redacted versions of documents and request that if the materials are published, the redacted versions are used.

# Responding to the CID

## Review and Produce

- Review documents before you produce them to the CFPB.
  - No need to produce more than the CID demands.
  - Review for:
    - Subject matter/issue—“Responsiveness”
    - Privilege
    - Confidentiality
      - Protective order
      - Redactions
- Typically the documents will be uploaded to a file-sharing site hosted by the agency.
  - The CID includes instructions on electronic discovery requirements.
- Communicate with the agency regarding timelines.
- Send a transmittal letter to the agency explaining the contents of the production.
- Document all productions internally.
- Back up the productions.



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**What's next?**

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**Questions?**

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