



Civil Investigative Demands: What You Should Know

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Background on CFPB Investigations

CFPB Investigative Authority

- 12 U.S.C. § 5562
- Authority to issue subpoenas and demands seeking:
 - testimony,
 - documents,
 - tangible things, and
 - responses under oath to interrogatories and data requests.
- Failures to obey can be enforced in federal court

Sources of CFPB Investigations

- Supervisory / examination processes
- Consumer complaints
- Tips from reporters, newspaper articles, consumer advocacy groups, and whistleblowers
- Referrals from other agencies
- Discovery during investigation of another subject, such as affiliates or service providers

Responding to a Civil Investigative Demand (CID)

Initial Considerations for Response

- Retaining Counsel
 - Once a CID is received, if the recipient does not already have counsel experienced in responding to CIDs from the CFPB, experienced counsel should be retained as soon as possible.
- Litigation Hold
 - In addition to retaining qualified counsel, the recipient must institute a litigation hold to preserve documents and information to respond to the CID. It is important that the hold covers the full responsive period set-out in the CID as well ensuring all relevant individuals that may have responsive documents and information receive the litigation hold.
- Reviewing the CID with Counsel
 - After retaining counsel, meeting with counsel to discuss the CID, any difficulties in responding to the CID, or questions concerning the CFPB's requests is important in advance of the meet and confer meeting with the CFPB.

Meet and Confer & Motions to Set Aside

- **Meet and Confer**
 - Upon CID receipt, recipients have 10 days in which to have a meet and confer with CFPB staff to discuss the CID and compliance with the requests outlined in the CID.
 - This is the recipient's opportunity to request modifications to the CID, whether those be to the scope of the CID, individual requests, or additional time to respond to the CID.
- **Motion to Set Aside**
 - If a company believes it has a legal basis to do so, it must file a petition to modify or set aside the CID within 20 calendar days after the CID is served and after the company has met and conferred with the CFPB. Generally, such a petition is publicly filed and therefore discloses the existence of the Bureau's investigation to the public. These petitions rarely succeed but may still be prudent to defend against a later claim that the company has waived objections to the CID by failing to exhaust administrative remedies.

Evaluating Requests for Response

- Document Requests
 - CIDs will typically request documents related to topics identified in the notification of purpose in the CID.
 - Documents can include a wide array of documents such as policies and procedures, internal documents, e-mails, chat service messages, and many more. Typically requests for documents can be very board.
- Interrogatories
 - Typically, interrogatories will ask the company questions about company policies and procedures, questions concerning corporate structure, and request general information about the company, associated third-parties, and may ask for descriptions of various items related to the CID.

Evaluating Requests for Response Continued

- **Written Reports/Data Requests**
 - The CFPB may also request additional written reports and data requests in a CID.
 - For lenders, this may be information concerning loans originated, serviced, or collected depending on the nature of the CID.
 - Requests for written reports or data are typically very involved and may require compiling data for many years prior. This may require unarchiving legacy data sources or pulling information from a CRM system.
- **Depositions/Interview Requests**
 - The CFPB may also request to depose certain individuals or ask the Company to provide a witness to be deposed on certain topics. Ensuring that any individual being deposed is ready to answer the CFPB's questions is essential and working with outside counsel to prepare is a necessary component of any deposition or interview preparation.

Preparing Responses

- **Timing**
 - During the meet and confer, if modifications to the CID are needed for additional time to respond to the CID, the recipient and the CFPB will come to agreement on when each response is due.
- **Preparation**
 - To prepare responses to the CFPB it is important that you and counsel communicate frequently, both about the transfer of documents and information, as well as any difficulties with preparing responsive information to provide to the CFPB.
- **Response**
 - Each response to the CID, if there are multiple responses, will typically consist of the documents and information being provided in response to the CID and an accompanying letter providing information to the CFPB concerning the documents in the response and any other information the recipient wants to include.
 - The production letter is typically a good place to include some advocacy where possible.

Certification

- The CFPB requires that recipients certify to the response to the CID that all information provided to the CID is true and complete.
- Typically, this is executed at the end of all productions, i.e., once all the documents, information, and other requested items are provided to the CFPB an entity will execute the certification and provide it to the CFPB.
- That said, in recent experiences, the CFPB has asked clients to execute a certification for every production, so this may be a topic that should be discussed during the meet and confer to fully understand the CFPB's expectations.

CFPB Enforcement Process

Concluding an Investigation

- When CFPB has concluded fact gathering, it will evaluate whether it will result in a public enforcement action
- The CFPB may close an investigation without further action
 - No violation
 - Statute of limitations has expired
 - CFPB policy not served by enforcement
 - Factors in Responsible Business Conduct policy are implicated
 - Self-monitoring
 - Self-reporting
 - Remediation
 - Cooperation

Notice and Opportunity to Respond and Advise (NORA)

- CFPB may seek company's input prior to making its decision to proceed to an enforcement action
 - The NORA process provides the company with notice of alleged violations and the opportunity for the company to provide a written statement why the CFPB should not bring an enforcement action
 - Generally staff will call to explain that it is prepared to request settle-or-sue authority
 - A letter starting the NORA process follows
 - 14-days to respond (should notify CFPB within 7 days that you intend to respond)
 - Written response (40-page limit) of "law or policy" why CFPB should not bring an enforcement action
 - Factual assertions in NORA response must be made under oath

Benefits of NORA

- CFPB may be persuaded not to bring an enforcement action
- May be persuaded to narrow scope of an enforcement action
- Certain claims may be eliminated or reduced in terms of severity
- May establish a framework for settlement discussions
- Requesting an in-person presentation may be advantageous in addition to the written NORA
 - Can assess staff reaction in real time
 - CFPB can ask questions that allows company to specifically address key concerns
 - Puts a human “face” to the company

NORA Risks

- Information in NORA response is treated as an admission
- Can guide CFPB to how to fix weaknesses in their case
- Can result in company revealing defenses that the CFPB can better work around

Escalation in Addition to NORA

- A company may request a meeting with more senior CFPB leadership (Assistant Director or Associate Director)
 - There is no “right” to such a meeting
 - Do not want to be perceived as a dilatory exercise that will undermine the staff’s decision to implement policy uniformly
 - Matters involving unique issues, implicating important policy considerations, or involve complex legal or factual issues may be best suited to a meeting
 - For supervised entities, possibility of addressing matter through supervision
 - Unlikely to get more than one meeting

Following the NORA

- If the staff decides to pursue an enforcement action, it will request from the Director authority to “settle or sue”
- Once this authority had been obtained, it is very difficult to persuade the CFPB not to initiate a public enforcement action
- NORA process is important if goal is to prevent any public action

Settlement

- Most CFPB matters settle before suit is filed
- A typical settlement contains three items:
 - Redress of consumer harm
 - Know how many consumers harmed
 - Know extent of injury
 - Know relevant statute of limitations period
 - A civil monetary penalty
 - Tier 1 – up to \$5000 per violation
 - Tier 2 – up to \$25,000 per reckless violation
 - Tier 3 – up to \$1,000,000 per knowing violation
 - All subject to mitigating factors such as company financial resources, good faith, and violation history
- Conduct provisions

Conduct Provisions

- Types of conduct provision
 - Forgiving consumer debt
 - Prohibiting collection of consumer debt
 - Installing a monitor
 - Hiring consultants
 - Correcting documents
 - Changing call scripts
 - Submission to supervision
- Typical period is 5 years but CFPB recently has shown desire for longer terms
- Court likely to limit order to “stop the unlawful practice” and “comply with law”

Structural Relief for “Repeat Offenders”

- Director Chopra has expressed his policy to pursue the full extent of the CFPB’s authority to place “limits on the activities or functions” of so-called “repeat offenders”
- Types of “repeat offenders”
 - Companies that violate a formal court or agency order
 - Can include violations of orders from other regulators
 - Companies that commit violations across different business lines
- CFPB creating new units to identify and punish repeat offenses

Types of Structural Relief

- Capping size or growth of company
- Limiting or banning specific business lines or practices
- Requiring divestiture of certain business lines
- Limiting leverage or requiring company to raise capital
- Revoking government-granted privileges such as licenses and registrations
 - Requires CFP collaboration with state regulators
- Disqualification of individuals involved in repeat violations
- Clawbacks, forfeitures, and changes to compensation of executives involved in repeat violations

If Settlement Not Reached

- CFPB has litigation authority to file suit in federal district court
 - The CFPB has some flexibility to select a venue
 - Most often, suit is filed in the district where the company has its principal place of business
- CFPB is also authorized to proceed through administrative tribunal
 - This is not frequently used but the CFPB has sent some signals that it may consider it more frequently in the future
 - ALJ makes a recommendation for decision by the Director
 - Process driven by tight timelines and more limited discovery
 - Recent updates to administrative rules
 - Allowing depositions
 - Allowing bifurcation

Enforcement: Hot Topics

Joint Enforcement - Federal

- Recent joint CFPB and DOJ cases to address redlining
- Alignment between enforcement priorities of CFPB and FTC:
 - Junk fees
 - Algorithmic bias
 - Servicemember protections

Joint Enforcement - States

CFPB Bolsters Enforcement Efforts by States

Interpretive Rule Seeks to Clarify Scope of States' Ability to Enforce Federal Consumer Financial Protection Laws

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Washington, D.C. - Today, the Consumer Financial Protection Bureau (CFPB) issued an interpretive rule that describes states' authorities to pursue lawbreaking companies and individuals that violate the provisions of federal consumer financial protection law. Because of the crucial role states play in protecting consumers, the Consumer Financial Protection Act grants their consumer protection enforcers the authority to protect their citizens and otherwise pursue lawbreakers.

"In the years leading up to the financial crisis, federal regulators undermined states seeking to protect families and businesses from abuses in the mortgage market," said CFPB Director Rohit Chopra. "Our action today demonstrates our commitment to promoting state enforcement, not suffocating it."

Joint Enforcement - States

State Partners and CFPB Sue Prehired For Illegal Student Lending Practices

The states and CFPB are seeking to void the income share loans, obtain redress for affected consumers, and obtain a penalty which would be deposited into the CFPB's victims relief fund. Today's action is part of the renewed focus the CFPB has placed on partnering with state regulators and bringing forth joint actions, including issuing an interpretive rule in 2022 designed to reinforce and expand state enforcement efforts.

Avoiding Enforcement Actions

- Pay attention to the CFPB's guidance:
 - CFPB Supervisory Highlights
 - Regulation by Speeches and Blogs
 - CFPB Circulars
- Compliance Reviews