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National Association of Federally-Insured Credit Unions

April 26, 2018

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
Washington, D.C. 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 National Association of Federally-Insured Credit Unions (NAFCU), the only national trade association focusing exclusively on federal issues affecting the nation's federally-insured credit unions, I am writing in regard to the Consumer Financial Protection Bureau's (CFPB) Request for Information on Civil Investigative Demands (CID) and associated processes.

General Comments

NAFCU and our members applaud the new CFPB leadership for undertaking a comprehensive review of the agency's operations. Under previous leadership, the Bureau adopted a counterproductive and adversarial posture toward the financial institutions it was charged with regulating. As a result, NAFCU welcomes the cultural transformation that has taken place within the Bureau, which values transparency, fairness and reasonable restraints on the agency's unprecedented executive authority. Credit unions did not cause the financial crisis, and NAFCU is optimistic that the CFPB will continue to identify opportunities to help the nation's member-owned cooperatives recover from years of over-regulation. The Bureau's current review and solicitation of industry feedback comes at just the right time and represents a much-needed change of approach. We look forward to working with the Bureau's leadership to ensure that governmental policies and procedures are transparent, efficient, and effective.

The *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act) authorizes the CFPB to investigate whether any person or entity is or has been engaged in conduct that may be a violation of federal consumer financial law. The Bureau currently has the authority to investigate credit unions with over \$10 billion in assets for such conduct. During the course of investigatory activities, the Bureau may issue CIDs to entities or persons in possession of information relevant to a violation of the laws the Bureau enforces. These demands compel the recipient to provide the Bureau with the requested information in one or more form, including written reports, documents, testimony and/or other mechanisms. The information provided will then be used as part of the Bureau's investigation.

NAFCU and our members strongly support the efforts of the Bureau to investigate and rein in bad actors in the financial marketplace. The protection of consumers is of the utmost importance and the core mission of credit unions is to provide their members with high-quality, fair, and affordable access to financial products and services.

However, when the federal government compels the production of information, as done in the CID process, that act carries substantial consequences and is considered one of the most invasive forms of government involvement in the public sphere. The receipt of a CID sets off a chain of events that could result in the expenditure of significant resources to ensure the financial institution totally and fully complies with the substance of the request. The burden of this process can be immense. As CFPB Acting Director Mick Mulvaney has emphasized, "bringing the full weight of the federal government down on the necks of the people we serve should be something we do only reluctantly." We agree with Acting Director Mulvaney's comments that the CFPB's power should be used only when necessary and after careful consideration. To that end, CIDs should be clear in their purpose and limited in their scope.

Specific Information on Purpose and Scope

As the Treasury Department recommended in its report titled "A Financial System that Creates Economic Opportunities: Banks and Credit Unions" (Treasury Report), which was issued pursuant to Executive Order 13772 on Core Principles for Regulating the United States Financial System, there are a number of reforms that should be adopted by the Bureau to reform the CID process. In particular, in past practice, the Bureau either ignored or failed to follow existing statutory protections. The Treasury Report highlighted that it was necessary for the Bureau to adopt guidance documents that would ensure compliance with federal law, which would include proper notice of a specific claim or claims related to the violation of specific consumer financial laws. Given the gravity and burden of CIDs, these demands should not be used as a means to request materials in an ambiguous manner in the hopes of gathering incriminating information.

The Bureau has opted to adopt procedures where only a broad statement of purpose is required to be given about the conduct under investigation and which consumer financial laws are alleged to have been violated. Under this procedure, financial institutions are confronted with vague boilerplate language on the scope of the investigation in the CID. This clearly contradicts the intent of the Dodd-Frank Act, which – in providing the Bureau the authority to issue CIDs – states that the Bureau must "state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." NAFCU recommends the Bureau amend its procedures to ensure any CID issued to a financial institution includes specific details of the acts and practice under investigation. In addition, any CID should also include a specific scope of the materials to be turned over to the Bureau and how those requested materials relate to these allegations and its investigation.

Appeals and Modifications of CIDs

In order to improve fairness of the CID process, the Bureau should establish procedures that allow for prompt clarifications or amendments to a CID. These procedures should be designed to protect the confidentiality of the institution that is seeking to petition the Director to set aside or modify a CID. Under current rules, confidentiality is not protected, and as a result, institutions are strongly discouraged from attempting to engage the Bureau in an honest dialogue for fear of reputational harm. As a result, CIDs that are overbroad, based on erroneous factual premises, or otherwise unlawful may go unchallenged.

The timing of the petition to the Director also presents challenges for institutions that seek to modify a CID. Under current rules, the timeframe is only twenty days, which gives an institution limited ability to mount an effective response. NAFCU asks that the CFPB adopt a more reasonable timeframe to ensure that institutions are able to gather the facts necessary and articulate a meaningful petition that addresses the legality of a CID. In addition, institutions should be permitted to file petitions at any point during an investigation, which would ensure a fair process that is responsive to the complexity of the CID and the inherently disruptive nature of investigational proceedings.

Bolster Meet-and-Confer Processes

As noted above, the CID process is an invasive and burdensome action on the part of the federal government. It should be used in a thoughtful and deliberate manner. In order to ensure that remains the case, the Bureau should adopt meet-and-confer policies that are designed to result in productive and mutually-beneficial discussions. This would include ensuring that decision-making personnel are present during any and all discussions of scope and the nature of the CID. There is little gained by back-and-forth discussions over several days or weeks as the process is started and halted in order to gain approval of supervising authorities. To avoid this belabored process, the Bureau should require decision-making staff to be present for any and all meet-and-confer discussions in order to expedite the process for coming to a result. In the alternative, the Bureau should enable non-supervisory staff present for the meet-and-confer discussion to have discretionary authority to approve requests for modification of a CID.

Conclusion

NAFCU appreciates the opportunity to provide comments on this request for information regarding the CFPB's CID processes. If you have any questions or concerns, please do not hesitate to contact me at amonterrubio@nafcu.org or (703) 842-2244.

Sincerely,



Alexander Monterrubio
Director of Regulatory Affairs