

Potential Revamp Of CFPB Civil Investigative Demand Process

By **Jean Veta, Jason Grimes and Eitan Levisohn** (January 31, 2018, 1:09 PM EST)

On Jan. 24, 2018, the Consumer Financial Protection Bureau published a request for information (RFI) seeking comment on its civil investigative demand (CID) process.[1] In the RFI, the CFPB recognizes that “responding to a CID can impose burdens on the recipients” and expresses interest in how the CID process can be “updated, streamlined, or revised” to achieve the CFPB’s objectives “while minimizing burdens.”[2] This signals the bureau’s potential openness to revising its CID process, which has been regarded as difficult, expensive and time-consuming by many institutions. Indeed, given Acting Director Mick Mulvaney’s recent email to CFPB staff emphasizing that the bureau must work for covered entities as well as consumers, it is likely that the bureau will be receptive to comments by institutions expressing concerns with the current process and seeking improvements.



Jean Veta

The RFI seeks “feedback on all aspects” of the CID process, but specifically requests comment on 11 questions representing “a preliminary attempt by the Bureau to identify” elements of its CID process “on which it should immediately focus.”[3]



Jason Grimes

Early Investigative Stages

The first two questions focus on the processes for initiating investigations[4] and issuing CIDs,[5] including the delegation of authority for those tasks. Currently the assistant director of the Office of Enforcement and the deputy assistant directors of the Office of Enforcement have the nondelegable authority to initiate investigations. If the CFPB were to require more senior leaders (or even the director) to sign off on these early stage activities, this could have several significant effects. For example, if more senior leader signoff is required, bureau staff may be more circumspect in both initiating and defining the scope of investigations. Even if such a move does not change staff behavior, requiring signoff by more senior leaders is likely to slow down the process for commencing investigations.



Eitan Levisohn

Improving Understanding of Investigations

The RFI’s third question concerns whether improvements could be made to recipients’ understanding of investigations.[6] Currently, CIDs typically provide little information about the underlying investigation, instead relying on more general language from the standard federal

consumer protection statutes. Because of this, a recipient's ability to understand the nature and extent of the investigation often depends on the particular bureau staff's willingness to share that information. Instituting a more systematic approach could make the process more transparent and allow the bureau and the institution to move more expeditiously toward a resolution of the bureau's concerns.

Potential Burdens of Responding to a CID

The next set of questions addresses issues related to burdens a recipient may face in responding to a CID. The fourth question focuses on the nature and scope of CID requests.[7] This question addresses industry concerns about the volume and breadth of information requested by CIDs, and in particular the amount of electronically stored information requested. This question also perhaps arose because the bureau sometimes issues multiple CIDs in substantial investigations, which, in turn, can result in inefficiencies and additional burdens on recipients.

Similarly, the fifth question concerns the various time frames associated with the CID process, including deadlines for meet and confer sessions, the filing of petitions to modify or set aside a CID, and the return date of the CID.[8] Meet and confers generally must occur within 10 calendar days of receipt of the CID,[9] which gives limited time for recipients to identify all relevant issues and then reach agreement with bureau staff. Bureau staff in some cases are willing informally to extend the time to reach agreement on the scope of CID requests, provided the initial meet and confer is held within the required 10-day time frame. However, introducing more flexibility on timing into the bureau's rules is likely to benefit both CID recipients and the bureau, as it will allow both parties to explore reasonable approaches in a more systematic process.

Similarly, recipients are given only 20 calendar days from the CID date of service to file a petition to modify or set aside the CID.[10] Because the parties often are still involved in the meet and confer process during this 20-day window, this short time frame, as a practical matter, makes the filing of such a petition infeasible in many instances. On the other hand, this 20-day time period is defined by statute. Thus, it may be more difficult for the bureau to address this issue without a legislative fix.[11] Finally, CIDs are required to have a return date that "will provide a reasonable period of time within which" the recipient can respond.[12] In practice, recipients often find return dates to be aggressive, especially if the CID seeks a large amount of information or data.

Receipt and Handling of Information

The next two questions address specific issues regarding the bureau's receipt and handling of information from CID recipients. The sixth question concerns how the CFPB takes testimony from an entity, and specifically whether it should be made clear that the standards applicable to Federal Rule of Civil Procedure 30(b)(6) (which governs the deposition of an entity's representative) apply to the bureau.[13] The current CFPB rule for taking testimony from an entity is substantially similar to Federal Rule of Civil Procedure 30(b)(6). In practice, however, the process can be different. For example, it is not unusual to have multiple bureau lawyers and nonlawyers asking questions of witnesses in investigative hearings, which is certainly not typical in federal court depositions. While the bureau's approach can introduce some flexibility, it also can create confusion or make it more difficult for the witness to provide coherent answers. At the same time, consistent with its rules, the bureau has at times allowed more than one witness to testify on behalf of an entity during the same investigational hearing, which can benefit both the entity and the bureau by allowing the bureau to obtain answers in a more efficient fashion.

The seventh question concerns how the bureau handles inadvertently produced privileged information, and specifically whether it should make clear that the standards applicable to Federal Rule of Evidence 502 (which governs waiver of attorney-client privilege) also apply to documents inadvertently produced in response to a CFPB CID.[14] While the language of the CFPB rule governing this issue is substantially similar to Federal Rule of Evidence 502,[15] inclusion of this question may reflect a concern that the bureau's current practices for handling inadvertently produced privileged information differ from established standards.

Rights of Witnesses

The eighth question concerns the limitations in CFPB rules[16] on the role of a witness's counsel during an investigational hearing, specifically in light of the statutory[17] delineation of objections.[18] To the extent CFPB rules impose restrictions that go beyond the statute, it may be useful for the bureau to reexamine whether the rules are consistent with the statutory scheme. For example, CFPB rules only allow a witness' attorney to advise the witness in confidence "with respect to any question asked of the witness where it is claimed that a witness is privileged to refuse to answer the question,"[19] whereas the statute allows an attorney to "advise a person ... in confidence ... with respect to any question asked of such person." [20]

Meet and Confer

The ninth question concerns the meet and confer process, during which requests for modification of the CID, extensions of time and other issues may be discussed. The question also asks about the delegation of authority to approve such requests.[21] The CFPB rules, as written, appear fairly inflexible, in that they provide for a single meet and confer that must occur within 10 days of receipt of the CID, during which CFPB staff and the recipient must "discuss and attempt to resolve all issues regarding compliance" with the CID.[22] In practice, bureau staff often are willing to work with the recipient beyond this 10-day deadline to resolve issues, as long as the first meet and confer occurs within the 10-day time frame. It may be useful for the CFPB's rules to reflect this more flexible practice.

Responding to the CID

The 10th question concerns the requirements for responding to CIDs, such as any certification requirements and the CFPB's document submission standards.[23] When a recipient responds to a CID, the CFPB requires that some individual with knowledge certify that (a) the recipient has conducted a diligent inquiry of persons who likely have possession of relevant documents and information and a diligent search of locations and files that likely contain responsive documents; and (b) that all responsive materials identified by such searches have been turned over.[24] However, this standard certification is not always well-suited to responses by larger institutions, as it may be difficult, for example, for a single individual personally to have inquired of all individuals and locations likely to have responsive documents. It could be useful for the bureau to institute more flexible certification standards that reflect the organization of the recipient, rather than a one-size-fits-all approach. Similarly, the document submission standards may be unduly expensive for smaller institutions or for CIDs involving more limited requests.

Petitions to Modify or Set Aside a CID

The final question concerns petitions to modify or set aside a CID, and in particular two CFPB rules regarding the process that have been criticized as unfair.[25] The first issue is that CFPB rules allow

bureau investigators to provide a response to the petition to the director without serving such response on the petitioner.[26] Such a practice deprives the petitioner of knowing how the investigators are characterizing the petition, let alone responding to the investigators' arguments. The second issue addresses the fact that, while CFPB investigations are not public, petitions to modify or set aside a CID are designated as public documents under the CFPB's rules.[27] Thus, to challenge the issuance or scope of a CID, a recipient must accept that the bureau will indirectly reveal that the recipient has received a CID by making public the petition to modify or set aside the CID. This practice unfairly forces the recipient to choose between maintaining confidentiality or challenging the CID.

Consistency With Other Regulators

The bureau specifically asks commenters to provide "information concerning alignment with the processes of other agencies with similar authorities." [28] The federal financial institution prudential regulators rarely — at least in the first instance — issue CIDs or other formal processes (such as subpoenas) to the institutions they supervise, even in the context of formal enforcement investigations. Rather, these prudential regulators more often seek information through more informal processes and resort to formal process only if informal processes prove ineffective. This approach allows more flexibility and cooperation between the regulator and the target institution, which often can benefit both parties. While such an approach may not be feasible for the CFPB because it does not have supervisory oversight over all institutions within its enforcement jurisdiction, such an approach is worth considering, at least for those institutions that are subject to CFPB examination.

Conclusion

The CFPB's RFI may provide the platform for a constructive discussion between the bureau and the institutions within its jurisdiction to modify the bureau's CID process. Notably, most of the topics raised by the bureau would not require legislative changes, but rather could be accomplished by bureau rule changes or even informal changes to bureau policies. As such, there is a substantial possibility that the bureau can change its processes for opening investigations and issuing CIDs so as to benefit both the bureau and CID recipients.

D. Jean Veta is a partner, Jason Grimes is an associate and Eitan Levisohn is special counsel at Covington & Burling LLP in Washington, D.C.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Bureau of Consumer Financial Protection, Request for Information Regarding Bureau Civil Investigative Demands and Associated Process (hereinafter "CID RFI"), available at http://files.consumerfinance.gov/f/documents/cfpb_rfi_civil-investigative-demands_012018.pdf.

[2] *Id.* at 3.

[3] *Id.* at 4.

[4] Question 1 seeks feedback on "The Bureau's processes for initiating investigations, including 12 CFR 1080.4's delegation of authority to initiate investigations to the Assistant Director of the Office of

Enforcement and the Deputy Assistant Directors of the Office of Enforcement.” Id. at 5.

[5] Question 2 seeks feedback on “The Bureau’s processes for the issuance of CIDs, including the non-delegable authority of the Director, Assistant Director of the Office of Enforcement, and the Deputy Assistant Directors of the Office of Enforcement to issue CIDs.” Id.

[6] Question 3 seeks feedback on “Specific steps that the Bureau could take to improve CID recipients’ understanding of investigations, whether through the notification of purpose included in each CID or through other avenues, including facilitating a better understanding of the specific types of information sought by the CID.” Id.

[7] Question 4 seeks feedback on “The nature and scope of requests included in Bureau CIDs, including whether topics, questions, or requests for written reports effectively achieve the Bureau’s statutory and regulatory objectives, while minimizing burdens, consistent with applicable law, and the extent to which the meet and confer process helps achieve these objectives.” Id.

[8] Question 5 seeks feedback on “The timeframes associated with each step of the Bureau’s CID process, including return dates, and the specific timeframes for meeting and conferring, and petitioning to modify or set aside a CID.” Id.

[9] 12 C.F.R. § 1080.6(c).

[10] 12 C.F.R. § 1080.6(e).

[11] 12 U.S.C. § 5562(f)(1).

[12] 12 C.F.R. § 1080.6(a)(i).

[13] Question 6 seeks feedback on “The Bureau’s taking of testimony from an entity, including whether 12 CFR 1080.6(a)(4)(ii), and/or the Bureau’s processes should be modified to make expressly clear that the standards applicable to Federal Rule of Civil Procedure 30(b)(6) also apply to the Bureau’s taking of testimony from an entity.” CID RFI at 5.

[14] Question 7 seeks feedback on “The Bureau’s processes for handling the inadvertent production of privileged information, including whether 12 CFR 1080.8(c) and/or the Bureau’s processes should be modified in order to make expressly clear that the standards applicable to Federal Rule of Evidence 502 also apply to documents inadvertently produced in response to a CID.” Id. at 5-6.

[15] 12 C.F.R. § 1080.8(c)(1)

[16] 12 C.F.R. § 1080.9(b).

[17] 12 U.S.C. 5562(c)(13)(D)(iii).

[18] Question 8 seeks feedback on “The rights afforded to witnesses by 12 CFR 1080.9, including limitations on the role of counsel described in 12 CFR 1080.9(b) in light of the statutory delineation of objections set forth in 12 U.S.C. 5562(c)(13)(D)(iii).” CID RFI at 6.

[19] 12 C.F.R. § 1080.9(b).

[20] 12 U.S.C. 5562(c)(13)(D)(ii).

[21] Question 9 seeks feedback on “The Bureau’s processes concerning meeting and conferring with recipients of CIDs, including, for example, negotiations regarding modifications and the delegation of authority to the Assistant Director of the Office of Enforcement and Deputy Assistant Directors of the Office of Enforcement to negotiate and approve the terms of satisfactory compliance with civil investigative demands and extending the time for compliance.” CID RFI at 6.

[22] 12 C.F.R. 1080.6(c) (emphasis added).

[23] Question 10 seeks feedback on “The Bureau’s requirements for responding to CIDs, including certification requirements, and the Bureau’s CID document submission standards.” CID RFI at 6.

[24] 12 C.F.R. § 1080.6(a)(1)(ii).

[25] Question 11 seeks feedback on “The Bureau’s processes concerning CID recipients’ petitions to modify or set aside Bureau CIDs, including: (a) Whether it is appropriate for Bureau investigators to provide the Director with a statement setting out a response to the petition without serving that response on the petitioner; (b) Whether petitions and the Director’s orders should be made public, consistent with applicable laws; and (c) The costs and benefits of the petition to modify or set aside process, vis-à-vis direct adjudication in Federal court, in light of the statutory requirement for the petition process and the fact that CIDs are not self-enforcing.” CID RFI at 6.

[26] 12 C.F.R. § 1080.6(e)(3).

[27] 12 C.F.R. § 1080.6(g).

[28] CID RFI at 4.