ELECTRONIC TRANSACTIONS ASSOCIATION
1620 L Street NW, Suite 1020
Washington, DC 20036
202.828.2635
electran.org

March 27, 2017

VIA ELECTRONIC SUBMISSION

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C., 20552

Re: Comments on Notice and Request for Information Regarding the Bureau's Civil Investigative Demand (CID) Processes, Docket No. CFPB-2018-0001

The Electronic Transactions Association ("ETA") submits these comments in response to the Consumer Financial Protection Bureau ("CFPB") Request for Information ("RFI") Regarding the Bureau's Civil Investigative Demand ("CID") Processes.

ETA is the leading trade association for the payments industry, representing over 500 companies that offer electronic transaction processing products and services. ETA's members include financial institutions, mobile payment service providers, mobile wallet providers and non-bank online lenders that make commercial loans, primarily to small businesses, either directly or in partnership with other lenders. ETA member companies are creating innovative offerings in financial services, revolutionizing the way commerce is conducted with safe, convenient and rewarding payment solutions and lending alternatives.

The ability to assert the power of the federal government to demand information, documents, and testimony is one of the most powerful tools of investigation and enforcement available to the CFPB. It is also one of the most burdensome to industry participants, as responding to a single CID can require hundreds of hours and hundreds of thousands of dollars—often without any clear indication of the exact nature of the potential violations being investigated. This burden is particularly challenging for ETA's members, which provide payment processing and related services for businesses of all sizes and industries, and often receive third-party CIDs from the Bureau and other law enforcement agencies that seek information about their customers or business partners. As such, ETA provides the following comments to assist the Bureau as it reviews and revises its investigative and CID policies, guidance, and regulations.

GENERAL COMMENTS

ETA and its members support the Bureau's efforts to fight fraud and protect consumers, and understand the Bureau's need for investigative tools to further is consumer protection mission. The Bureau, however, must weigh the costs and benefits of deploying its investigative tools against the significant burden that CIDs can impose on recipients, particularly those that are not the subjects of investigations. ETA applauds the Bureau's efforts to seek public input regarding the exercise of its authority to issue CIDs and the agency's willingness to enhance the transparency and fairness

of the investigative process. The CFPB should keep the following general comments in mind when reviewing its policies and procedures for issuing and managing CIDs.

- All investigated parties are entitled to a presumption that they have not violated a federal law or regulation until proven otherwise. Therefore, the CID process should not be used for generalized fishing expeditions, or to educate Bureau Staff about a certain industry or business practice, because doing so places a considerable burden on presumably law-abiding companies merely to help Bureau Staff conduct general industry research.

- In addition, all elements of an investigation should be kept strictly confidential by the CFPB, unless and until the investigation progresses to litigation or results in a consent order. This includes any dispute regarding the scope or nature of the CID, addressed in an administrative petition to modify or quash.

- In recognition of the power and burden of the CID process, it should be the policy of the CFPB to require investigators to use CIDs sparingly. When the Bureau issues a CID, that CID should be proportionally tailored to the matter being investigated and transparent about the identity of that matter.

- CIDs issued by the Bureau should include an adequate Notification of Purpose that provides sufficient notice about the specific, particularized conduct at issue that could give rise to or be relevant to a potential violation of a specifically identified consumer financial law. Indeed, relevant case law mandates such notice.[1] The Consumer Financial Protection Act ("CFPA") requires that any Notification of Purpose state "the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation,"[2] and this requirement is reiterated in the Bureau's rules.[3] This requirement has, for much of the Bureau's existence, been subject to internal staff guidance that Notification of Purpose be crafted "in very broad terms" to enable sweeping investigations.[4]

[1] *See, e.g.*, 12 U.S.C. § 5562; *CFPB v. Accrediting Coun. for Indep. Colleges & Schs.*, 854 F.3d 683 (D.C. Cir. 2017).
[2] 12 U.S.C. § 5562(c)(2).
[3] 12 C.F.R. § 1080.5.
[4] OIG, Evaluation Report, 2017-SR-C-015 (Sept. 27, 2017), *available at* https://oig.federalreserve.gov/reports/cfpb-civil-investigative-demands-sep2017.pdf.

COMMENTS IN RESPONSE TO RFI QUESTIONS

ETA respectfully provides the following responses to the Bureau's questions seeking input on all aspects of its CID process, including:

1. 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.

The Bureau should ensure that CIDs are only issued after more formalized and deliberate decision-making, because of the expense of investigations, and burdens associated with responding to a CID. Accordingly, ETA recommends that the Assistant Director of the Office of Enforcement establish and implement more effective policies for determining whether to initiate an investigation and that the Bureau Director then review and approve any Office of Enforcement decision to initiate an investigation. These policies should be made public to ensure consistent application and accountability.

2. 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.

The CFPB Director alone should have the authority to issue CIDs. This would ensure that every CID has the express approval of the Director, making it much more likely that the Bureau issues a CID only after greater consideration. Such an approval process also would resemble more closely the FTC's process for issuing CIDs, which is an authority that is vested solely with the Commission.[5]

CIDs should be recognized in the rules as a powerful assertion of governmental authority, and presumptively burdensome to recipients. A CID should not be used to gather evidence that is selectively considered and used to prove a pre-ordained case.

3. 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.

As a general matter, the Office of Enforcement should only issue CIDs to obtain information or materials that are relevant to a violation of consumer financial law and that are not available through other sources. CIDs should not be generalized fishing expeditions.[6] A CID's Notification of Purpose must give adequate notice to the parties receiving the CID and the requests for

[5] 15 U.S.C. § 57b-1(i).
[6] See CFPB Investigative Policies p. 68, which call for a broad Statement of Purpose to expand the Bureau's ability to "request a broad spectrum of information in any CIDs."

materials, information and/or testimony must be calibrated to seek information that is related to the stated purpose of the investigation.

Currently, it is unusual for a CID to provide more explanation than a brief recitation of the overarching federal consumer protection statute at issue, notwithstanding relevant case law mandating more notice. While CIDs are required by statute, to "state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation,"[7] these Notifications of Purpose tend to be broad, generic, and open-ended, rarely giving the recipient sufficient information or notice about the nature of the investigation. Some CIDs even have a catch-all notice provision that covers all potential violations of Federal consumer financial protection law. These types of broad, open-ended provisions should be prohibited. The Federal Reserve Office of the Inspector General recently concluded that internal CFPB guidance regarding CID Notifications of Purpose conflicted with statutory requirements under the Consumer Financial Protection Act (CFPA), and has the potential to encourage CFPB staff to draft overly-broad statements.[8] The Federal Reserve OIG concluded that "[a]s a result, a potentially noncompliant Notification of Purpose may limit the recipient's ability to understand the basis for requests."[9] The Federal Reserve OIG also pointed to a recent court decision as an example of such an overly-broad Notification of Purpose.[10]

Accordingly, heightened standards should be employed regarding the clarity and specificity of a CID's Notification of Purpose. These standards should ensure that Notifications of Purpose address both the CFPB's authority to demand the information covered by the CID, and the relevance to the potential violations of Federal consumer financial law being investigated. The Notification of Purpose should cite not only statutory or regulatory provisions, but descriptions of potentially violative conduct.

4. 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.

A CID should be calibrated to seek information that concerns conduct governed by the CFPA and enumerated consumer financial laws. As discussed above, a CID's Notification of Purpose should give adequate notice to the parties receiving the CID regarding the issues being investigated, and

[7] 12 U.S.C. § 5562(c)(2).
[8] OIG, Evaluation Report, 2017-SR-C-015 (Sept. 27, 2017), *available at* https://oig.federalreserve.gov/reports/cfpb-civil-investigative-demands-sep2017.pdf.
[9] *Id.* at 7.
[10] In April 2017, the D.C. Circuit Court of Appeals affirmed the district court's denial of the CFPB's petition to enforce a CID issued to the Accrediting Council for Independent Colleges and Schools and held that the CID failed to advise the recipient of the "nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." *CFPB v. Accrediting Coun. for Indep. Colleges & Schs.*, 854 F.3d 683 (D.C. Cir. 2017).

the requests for materials, information and/or testimony must be calibrated to seek information that is related to the stated purpose of the investigation.

The CFPB should expand on the definition of "possession, custody, or control of the person to whom the demand is directed" as used in 12 C.F.R. § 1080.6(a)(1)(ii). These terms are not defined in the regulation, and it is often difficult to determine what information falls within the scope of the terms, especially when third parties are involved. Expanded rules or guidance should address a payment processor's obligation (as a third party) to provide information when such information may belong to another financial institution (say a bank), or the information may belong to the processor but be located in someone else's custody. There is often a burden to obtaining information that is not stored with the processor, even if the processor technically has access to it. And in order for a processor to obtain requested information, it may be necessary to reveal the fact of the CID, which could compromise any confidentiality requirements in the CID's Instructions.

5. 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.

The Bureau should update the rules of process to give the CID recipient more time for responding to CIDs, scheduling a meet and confer, and for moving to modify or quash a CID. This additional time will allow for a more productive exchange between the Bureau and CID recipient regarding the types of information and materials that the CID seeks. In particular, the Bureau should no longer reflexively and almost invariably deny any request for an extension, (as it currently does[11]), but rather, the agency should address on a good faith, case-by-case basis each request for more time. The Bureau should generally grant reasonable requests for extensions of time, barring a particularly exigent need on behalf of Bureau investigators.

In particular, the timing requirement for an initial meet and confer[12] should be relaxed to provide CID recipients time to fully review and digest a CID. This could be accomplished simply by amending 12 C.F.R. § 1080.6(c) to remove the specific timing requirement (10 days), and require only that a meet and confer is required prior to filing a motion to limit or quash a CID (unless such requirement is waived by the Bureau investigator).

Additionally, some timing requirements, such as the 20 days in which a CID recipient must move to limit or quash a CID, are set by statute.[13] Accordingly, the CFPB, through rules and guidance, should direct its Staff to work with recipients to determine whether the issues with the CID may be addressed through more informal processes, such as negotiations during a meet and confer, and potentially eliminating any need to file a motion to modify or quash.

[11] *See id.* §§ 1080.6(d), 1080.6(e)(2).
[12] *Id.* § 1080.6(c).
[13] 12 U.S.C. § 5562(f)(1).

The indefinite nature of the Bureau's CID process is also a timing issue. Even after a recipient has responded to a CID, the CFPB often provides no assurance that the information and materials requested have been received, and, importantly, that the Bureau will not be coming back with further questions under the CID.

6. 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.

The Bureau should refer to and rely on the discovery rules put forward in the Federal Rules of Civil Procedure, including Rule 30(b)(6) which should govern the Bureau's taking of testimony from an entity. To this end, the Bureau should amend its Rules governing investigations to reflect reliance on the established standards in the Federal Rules of Civil Procedure.

7. 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.

The Bureau's Rules should make it expressly clear that the standards applicable to the Federal Rules of Evidence, including Rule 502 should apply to the inadvertent production of privileged information, and that the Rules of Evidence be used, where possible, in order to clarify the correct interpretive precedent for the Bureau's investigative rules. The Office of Enforcement has often taken the position that the investigational and adjudicative rules are not bound by the Federal Rules of Evidence. With no existing CFPB precedent, this is typically grounds for Enforcement Counsel to assert its own interpretation, creating a highly uneven playing field for CID recipients and other subjects of Bureau investigations.

8. 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).

CFPB rules should not limit the role of counsel further than that which is prescribed in the CFPA. The statute allows an attorney to "advise a person . . . in confidence . . . with respect to any question asked of such person," with no limitation on the timing of such advice.[14] However, current Bureau rules limit this ability to instances in which privilege has been invoked, and prohibit advice being given if a question is pending.[15] Further, the Bureau's current rules prohibit counsel from objecting on non-privilege grounds during the taking of testimony at Investigational Hearings. This means that witnesses are often not afforded complete representation at Investigational Hearings, even if

[14] 12 U.S.C. § 5562(c)(13)(D)(ii).
[15] 12 C.F.R. § 1080.9(b).

those witnesses retain counsel. It also means that the taking of testimony does not accord with the Federal Rules of Evidence and Civil Procedure.

9. 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.

The meet and confer process can be invaluable in allowing the parties to get to the practical core of what the Bureau is seeking in a particular CID. The meet and confer process is also all but mandatory, as "the Bureau will not consider petitions to set aside or modify a civil investigative demand unless the recipient has meaningfully engaged in the meet and confer process described in this subsection and will consider only issues raised during the meet and confer process."[16] This process necessarily entails the need for flexibility, as both sides presumably learn additional facts throughout the process and must provide considered responses. However, current CFPB rules are not flexible, and provide that parties must "discuss and attempt to resolve all issues regarding compliance" with the CID in a single meet and confer session.[17] We encourage the CFPB to develop permissive meet and confer rules that provide appropriate flexibility to Bureau personnel and CID recipients.

10. The Bureau's requirements for responding to CIDs, including certification requirements, and the Bureau's CID document submission standards.

The Bureau's current certification requirements are impractical and ignore the realities of how companies receiving CIDs endeavor to locate responsive documents and materials. For example, the certification requires that one employee attest – under penalty of perjury – that the company has provided responsive documents to the CFPB in response to the CID. But the process for locating, identifying and reviewing responsive materials is almost never relegated to one person at a company. The current language of the certification contemplates one person being able to attest to all of these production-related processes, and the Bureau has regularly declined to allow parties to amend – even slightly – the language of the certification to reflect the methods actually used to locate, identify, review and then produce responsive materials and documents. We encourage the Bureau to change the language of the certification to reflect the realities of how recipients actually respond to CID requests for documents and materials.

[16] 12 C.F.R. § 1080.6(c)(3).
[17] *See id.* § 1080.6(c).

11. 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.

Given the relationship among the Petitioner and Office of Enforcement (as adversarial parties), and the Director (as neutral adjudicator), *ex parte* communication with the Director should not be permitted. Indeed, the Bureau's Rules of Adjudication already prohibit *ex parte* communications. The current practice reduces transparency and prevents the CID recipient from having a full understanding of how the Office of Enforcement has cast the investigation, the CID, and the petition. The current practice gives the Office of Enforcement the opportunity to respond to a petitioner's arguments but does not present the petitioner with the same rights, creating an unfair decision-making process that also can harm the agency's credibility over the long-term.

b. Whether petitions and the Director's orders should be made public, consistent with applicable laws.

The detrimental effect of a CFPB investigation is compounded when the fact of it becomes public. Accordingly, investigations are not made public until there is a consent order, a filing (if any) of a complaint or notice of charges, or until the subject of the investigation discloses the investigation as part of its reporting requirements. However, under the Bureau's current rules and practice, CID recipients cannot dispute the CID or its scope without making public the fact of the CID. This is unfair and harmful to CID recipients who are forced to choose between a confidential investigation and protecting their legal rights.[18] The Bureau's rules should be revised to ensure that if a party chooses to file a petition to modify or quash a CID in order to protect its rights, then the petition and disposition of that petition should only be made public after making redactions sufficient to ensure that the identity of the petitioner remains confidential.[19]

[18] *See, e.g.*, *John Doe Co. No. 1 v. CFPB*, 195 F. Supp. 3d 9, 24 (D.D.C. 2016).

[19] *See id.* (upholding pseudonymous treatment of plaintiff) ("Plaintiffs are disadvantaged by their inability meaningfully to respond to the insinuation that they have engaged in wrongdoing that would likely result from the premature disclosure of an inchoate investigation."). Regarding the confidentiality of CIDs, the CFPB has previously proposed expanding the scope of § 1070.42 to address its enforcement activities in addition to its supervisory activities. 78 Fed. Reg. 11484, 11484 (Feb. 15, 2013). The 2016 Notice of Proposed Rule Making ("NPRM") would accord CIDs and NORA letters the same treatment as other confidential supervisory information, and thereby limit a CID recipient's ability to disclose the CID to third parties. Investigative information is not the same as supervisory information however, and a CID recipient may desire, or be required, to disclose it to third parties such as insurance carriers, counterparties, transaction or joint venture partners, or others. As part of the Bureau's review of the CID process, this NPRM should be withdrawn, and that any rules adopted fit within the Bureau's authority under the Dodd-Frank Act. *See* Electronic Transactions Association, Comments on Amendments Relating to Disclosure of Records and Information, RIN 3170-AA63 (Oct 25, 2016).

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.

The administrative petition to modify or set aside process has the potential to provide benefits that outweigh a federal court-only mechanism for quashing or modifying a CID. But, as noted above, this is only true if the administrative petition process does not make the fact of a CID public and if this process also is made more transparent and equitable.

* * *

We appreciate you taking the time to consider these important issues. If you have any questions or wish to discuss any issues, please contact me at Stalbott@electran.org.

Respectfully submitted,

Scott Talbott
Senior Vice President of Government Affairs
Electronic Transactions Association