

How To Respond To CFPB Civil Investigative Demands

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Under the Consumer Financial Protection Bureau's broad mandate, many companies outside the financial services industry may be subject to expensive civil investigations.

Congress created the CFPB in Dodd-Frank, a law intended to prevent the practices Congress felt led to the financial crisis (e.g., subprime mortgage lending and the securitization of subprime mortgages), and more generally to protect consumers from acts or practices in connection with consumer financial products that are unfair, deceptive or abusive.

Since the CFPB opened its doors in July 2011, its initial enforcement actions have focused where one might expect — the mortgage industry, credit cards, auto loans and debt relief organizations. But the CFPB's authority under Dodd-Frank — and thus its likely reach — is much broader. The CFPB has jurisdiction over “any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.” (See 12 U.S.C. 5531(a).) “Financial product or service” is defined broadly to include:



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- extending credit and servicing loans (including “acquiring, purchasing, selling, brokering, or other extensions of credit”);
- extending or brokering leases;
- providing real estate settlement services;
- acting as a custodian of funds;
- selling, providing or issuing stored value or payment instruments;
- providing check cashing, check collection or check guaranty services;
- providing payments or other financial data processing products or services to a consumer;
- providing financial advisory services;
- collecting, analyzing, maintaining or providing consumer report information; and
- collecting debt related to any consumer financial product or service.

(See 12 U.S.C. 5481(15)(i)-(x); see also 12 U.S.C. 5481(5) (defining “consumer financial product or service” to include “any financial product or service that is described in” 12 U.S.C. 5481(15) and “and is

offered or provided for use by consumers primarily for personal, family, or household purposes.”)

Therefore, any organization that arguably engages in the above activities (e.g., those that offer third-party financing in selling nonfinancial products or services to consumers)[1] or activities such as third-party debt collection and credit reporting that the CFPB received transferred authority to oversee, could receive a civil investigative demand from the bureau for documents and/or testimony.

Indeed, recent enforcement actions show the CFPB is already expanding its reach outside the core industries it regulates — a trend we expect to continue. For example, the CFPB recently brought an enforcement action against ITT Education Services — a for-profit technical school — relating to private student loans offered to ITT students through a third-party servicer. This approach suggests that the CFPB takes a broad view of its authority to regulate consumer financial products and services, and will not limit its enforcement activities to the financial services industry.[2] Accordingly, companies engaged in businesses related to consumer financial products should ensure they are aware of the possibility they will receive a CFPB CID, and understand how to respond.

How to Respond to a CFPB Investigation

CFPB regulations require companies to take steps to respond within days of service. The following high-level overview of the deadlines and key considerations will help affected companies plan and respond to a CID from the CFPB.

Immediate Action Items

Upon receipt of a CFPB CID, companies should develop a response plan and implement a legal hold.

First, upon receipt of a CID, the company has a duty to preserve all documents “potentially relevant” to the demand. This category of documents will likely extend beyond the documents the CID explicitly seeks, although at the outset of an investigation determining how far beyond can be difficult. Companies should consult with counsel and relevant employees (including IT personnel) on the scope of the legal hold. The CFPB has a special interest in companies’ direct interactions with consumers. The CFPB often seeks documents related to these interactions — some of which can be difficult or expensive to search and preserve. Depending on the company’s customer service practices, this could extend, for example, to call recordings or to employees’ notes from customer service or marketing calls. If retaining this data will be burdensome, the company should implement the hold and seek relief from the CFPB through the meet and confer process described in the next section.

Second, important response deadlines occur in a matter of days after service of a CID, so delays can impair a company’s ability to effectively respond in a timely manner. Among other things, counsel must meet with CFPB enforcement staff, raise all potential objections to enforcement of the CID, attempt to obtain modifications from the bureau, and (if unable to obtain satisfactory modifications) file a petition to modify or set aside the demand stating all unresolved objections with the Executive Secretary of the bureau — all within 20 days of service. Deadline extensions are available under CFPB regulations, but are within the discretion of bureau staff and are “disfavored” under current regulations. (See 12 C.F.R. 1080.6(e)(2).)

Accordingly, as soon as possible, recipients should analyze the feasibility of a complete response to the CID and evaluate the burdens posed by specific requests. This is particularly important because all legal and factual objections to compliance with the CID must be raised at the meeting with CFPB staff, which

bureau regulations state should occur within 10 days of service. (See 12 C.F.R. 1080.6(c).) CID recipients should identify unduly burdensome or costly requests prior to that time. In addition, recipients should evaluate whether to assert legal (e.g., statutory or constitutional) objections to the CID. By their terms, CFPB regulations require CID recipients to raise such objections at the conference. (See 12 C.F.R. 1080.6(c).) CFPB staff likely will not negotiate on these objections, but companies subject to a CID should still raise them to avoid the risk of waiver.

Meeting with CFPB Enforcement Staff

Consistent with the purpose of resolving “all issues regarding compliance,” the CID recipient is required to ensure that “personnel with the knowledge necessary to resolve any issues relevant to compliance with the demand” are available to participate in the meeting with CFPB staff. (See 12 C.F.R. 1080.6(c)(1).) CFPB regulations note that such personnel should include both “individuals knowledgeable about the recipient’s information or records management systems and/or the recipient’s organizational structure,” and “a person familiar with its ESI systems and methods of retrieval.” (See 12 C.F.R. 1080.6(c)(2).) The failure to do so could be viewed as a failure to “meaningfully engage” in the meet and confer process under 12 C.F.R. 1080.6(c)(3).[3]

CFPB regulations state that the bureau will not entertain petitions to set aside from parties that have not “meaningfully engaged” in this process, and “will consider only issues raised during the meet and confer process.” (See 12 C.F.R. 1080.6(c)(3).) Thus, CID recipients should not only actively engage in the meet and confer process but also raise all legal and factual objections to the CID at the conference.

Consider Filing a Petition to Modify or Set Aside a CID

CFPB regulations provide the CID recipient 20 days from the date of service to object to the demand by filing a petition to set aside or modify the CID with the Executive Secretary of the bureau. (See 12 C.F.R. 1080.6(e).) The petition must “set forth all factual and legal objections to the civil investigative demand, including all appropriate arguments, affidavits and other supporting documentation.” (See 12 C.F.R. 1080.6(e).) The return date of the CID is then stayed while a party’s petition is pending for decision. (See 12 C.F.R. 1080.6(f).)

Particularly when a CID recipient desires to cooperate with the CFPB, filing a petition to set aside may appear adversarial and at odds with this goal. However, CID recipients should nonetheless consider filing a petition to set aside to guard against the risk of waiving objections to enforcement of the CID. Failing to raise objections to the CID through the meet and confer process[4] and in a petition to set aside could be deemed to waive the company’s right to raise those objections if the CFPB subsequently sues to enforce the demand.

The meet and confer process is of course designed to resolve objections before the petition becomes due. However, while a modification that satisfies both parties is desirable for obvious reasons, negotiating and finalizing modifications prior to the deadline to file a petition (20 days of service) can prove difficult due to the short deadline and the fact that CFPB regulations require senior officials in the bureau’s Enforcement Division to approve all modifications.

CFPB regulations provide that “Nondelegable authority to issue CIDs” (and thereby the authority to modify or withdraw them) is vested in “the Director of the Bureau, the Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement.” (See 12 C.F.R. 1080.6(a).) Because the authority to modify CIDs is nondelegable, the enforcement attorneys who attend the meet

and confer will not have the authority to grant modifications. Accordingly, they will not be in a position to promise particular modifications at the meet and confer, and will thus have a limited ability to negotiate on the scope of the CID. This situation tends to prevent parties from resolving objections at the meet and confer stage. Further, approval of modifications takes time, which places the recipient of a CID in a difficult position. The deadline to file a petition to set aside is 10 days after the meet and confer deadline, and — depending on the complexity of the CID and the recipient’s objections — a party must begin preparing the petition while awaiting a response from the CFPB on proposed modifications.

One final consideration for CID recipients evaluating whether to file a petition is that petitions to set aside — and any written decision from the CFPB Director on the petition’s merits — may be made public. CFPB regulations state that “petitions and the Director’s orders in response to those petitions are part of the bureau’s public records unless the it determines otherwise for good cause shown.” (See 12 C.F.R. 1080.6(g).) A number of petitions to set aside and related orders are posted on the CFPB’s website,[5] notably some petitions have been made public while decisions on them are pending.

CFPB regulations contemplate the possibility of petitions receiving confidential treatment “for good cause shown.” (See 12 C.F.R. 1080.6(g).) However, the CFPB has indicated it will not take a broad view of this requirement. In an order denying a request for confidential treatment, the CFPB Deputy Director indicated that the bureau “will generally employ the standards for withholding material from public disclosure established by the [Freedom of Information Act’s] amendments to the Administrative Procedure Act, 5 U.S.C. § 552.”[6] The decision reserved discretion to depart from FOIA standards for petitions or portions of petitions, but did not indicate when this would be appropriate. Therefore, absent further guidance, parties should assume that portions of petitions that do not fall within a FOIA exemption will not meet the good cause standard and will be made public. Applying this standard, the CFPB has held that business names, the fact they have received CIDs, and basic organizational documents attached to petitions are not entitled to confidential treatment.[7]

CID recipients seeking confidential treatment for their petitions should note that under CFPB regulations, any showing of good cause for confidential treatment must be made no later than the time the petition is filed. (See 12 C.F.R. 1080.6(g).)

Key Elements of a Petition to Set Aside

As noted above, the petition must “set forth all factual and legal objections to the [CID], including all appropriate arguments, affidavits and other supporting documentation.” (See 12 C.F.R. 1080.6(e).) The failure to do so will likely waive these objections, and thus prevent the CID recipient from raising them if the CFPB subsequently files suit (in federal court) to enforce the demand.

CFPB regulations also note that petitions to set aside should, where appropriate, be supported by “affidavits, and other supporting documentation,” and past bureau orders denying petitions have emphasized the need for specificity in objections based on undue burden.[8] (See 12 C.F.R. 1080.6(e).) If the CID recipient wishes to make factual objections about the burden and cost of compliance, the it should support these claims with affidavits from relevant personnel (e.g., IT staff) and other supporting documentation.

The petition must also be accompanied by a signed statement that the recipient of the CID met with counsel for the CFPB and made a good faith effort to resolve the objections in the CID. (See 12 C.F.R. 1080.6(e)(1).) This statement assists the CFPB in determining whether the CID recipient waived any of its objections by failing to raise them through the meet and confer process. (See 12 C.F.R. 1080.6(c)(3).)

Consider Cooperating While the Petition is Pending for Decision

Authority to decide petitions is vested in CFPB Director Richard Cordray. (See 12 C.F.R. 1080.6(e)(4).) The Director has only published a few orders regarding petitions, a few of which Deputy Director Steve Antonakes has issued using delegated authority.[9] These decisions generally deny the petitioners' objections and order them to comply with the CID. Based upon this, parties seeking relief through the petition process are likely to be disappointed. However, that does mean there are not good reasons to participate.

First, as noted above, filing a petition preserves a party's objections for litigation in federal court if the party declines to cooperate or cooperation with CFPB staff breaks down.

Second, the petition process gives the parties additional time to resolve objections informally. As noted above, the return date of the CID is stayed while a party's petition is pending. (See 12 C.F.R. 1080.6(f).) And, based on past practice, there may be a substantial delay before a petition is decided. The Director has only published a few orders on petitions to set aside, and these generally have been issued several months after the petition was filed. Indeed, the CFPB's website includes a number of undecided petitions, including some that were filed months ago.[10]

Such a delay provides a CID recipient with an opportunity to continue to engage with CFPB staff about objections, attempt to reach a mutually agreeable resolution and move forward on areas of agreement (e.g., by producing documents voluntarily that can be collected without undue burden). Indeed, the stay period can serve as a functional extension of the meet and confer process, and thereby mitigate some of the difficulties posed by the 20-day petition deadline. If the parties are able to reach a resolution on the objections raised in the petition, it can be withdrawn or denied as moot to end the process without a decision on the merits.

Given the compressed timeframe for the meet and confer process, this approach offers a third path that should appeal to both parties, and may have special appeal to CID recipients who are concerned with the potential impact of public disclosure of their petition, as they may be able to avoid public disclosure of their petition by withdrawing it prior to decision.

Accordingly, CID recipients should factor the possibility of continued negotiation into their decision regarding whether to file a petition to set aside and consider raising this possibility with CFPB staff. In our experience, CFPB staff have shown a willingness to engage in these discussions and are useful in facilitating an agreed-upon resolution of a party's objections to a CFPB CID — much as the mandatory meet and confer process is intended to do.

The CFPB has broad statutory authority, and is likely to continue to look beyond the financial services industry for acts or practices in connection with transactions in consumer financial products that it considers to be "unfair, deceptive or abusive." (See 12 U.S.C. 5531(a).) Given the broad scope of the CFPB's authority, the potential expense of a bureau investigation and the short deadlines within which CID recipients must respond, companies engaged in businesses related to consumer financial products should ensure they are aware of the possibility they will receive a CFPB CID and understand how to respond.

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[1] In contrast, extensions of credit by retailers of nonfinancial goods and services are exempt from Dodd-Frank. See 12 U.S.C. 5517(a)(2).

[2] See <http://www.consumerfinance.gov/newsroom/cfpb-sues-for-profit-college-chain-itt-for-predatory-lending/>

[3] See *In re PHH Corp.*, 2012-MISC-PHH Corp.-0001 at 9 (Sept. 20, 2012), available at http://files.consumerfinance.gov/f/201209_cfpb_setaside_phhcorp_0001.pdf.

[4] CID recipients should also note that CFPB regulations state the bureau will not entertain petitions from parties that have not “meaningfully engaged” in the Meet and Confer process, and “will consider only issues raised during the Meet and Confer process.” 12 C.F.R. 1080.6(c)(3). Accordingly, the failure to do so can amount to a waiver even if a company files a Petition to Set Aside.

[5] See <http://www.consumerfinance.gov/guidance/petitions-to-modify-or-set-aside/>.

[6] *IN RE GREAT PLAINS LENDING LLC, MOBILOANS LLC & PLAIN GREEN LLC* at pgs. 2-3 (2012-MISC-Great Plains Lending-0002), http://files.consumerfinance.gov/f/201309_cfpb_decision-on-confidentiality_greatplainslending-0001.pdf.

[7] *Id.* at pgs. 4-8.

[8] See, e.g., *In re PHH Corp.*, 2012-MISC-PHH Corp.-0001 at 6 (Sept. 20, 2012) (stating “in order to meet its legal burden, the subject must undertake a good-faith effort to show ‘the exact nature and extent of the hardship’ imposed, and state specifically how compliance will harm its business”) (citation omitted), available at http://files.consumerfinance.gov/f/201209_cfpb_setaside_phhcorp_0001.pdf.

[9] See <http://www.consumerfinance.gov/guidance/petitions-to-modify-or-set-aside/>.

[10] See <http://www.consumerfinance.gov/guidance/petitions-to-modify-or-set-aside/>.