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The Honorable Mick Mulvaney
Acting Director
Bureau of Consumer Financial Protection
1700 G Street, NW
Washington, D.C. 20552

Submitted via: <https://www.regulations.gov/comment?D=CFPB-2018-0001-0028>

Re: Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes; Docket No. CFPB-2018-0001

Dear Acting Director Mulvaney:

On behalf of the 1.3 million members of the National Association of REALTORS®, I appreciate the opportunity to comment on the Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes. As one of the many ways the Bureau investigates and enforces Federal consumer financial protection laws, the procedures for Civil Investigative Demands (CIDs) must be consistent, reasonable, and straightforward to promote fairness and certainty for covered entities.

The National Association of REALTORS® (NAR) is America's largest trade association, including NAR's five commercial real estate institutes and its societies and councils. REALTORS® are involved in all aspects of residential and commercial real estate transactions and belong to one or more of the approximately 1,200 local associations and boards, and 54 state and territory associations. REALTORS® are subject to Bureau enforcement along with many other industries in the real estate sales transaction chain. As a result, NAR advocates for thorough evaluation of CID processes to reduce unnecessary confusion and eliminate preventable costs in support of a more robust real estate industry.

NAR appreciates the ability to provide feedback through the series of Requests for Information (RFIs) to advance the Bureau's goals to protect consumers' financial interests. As discussed in further detail below, CID processes must be narrowly tailored, in line the Bureau's authority and statutory and regulatory objectives, and include necessary flexibility to address covered entities' concerns. Such changes, combined with improved communication by the Bureau, will promote better overall compliance with the CID process.

The Initiation, Issuance, and Understanding of CIDs Should be Clarified.

A typical CID recipient may not have the means to navigate the CID process or understand the ongoing demands, such as implementing a legal hold to preserve documents, without adequate legal assistance. The initial communication between the Bureau and the CID recipient has been described as "immediately adversarial," where the involvement of attorneys is the recipient's only way to



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facilitate communication during the process and understand the Bureau's objectives for the CID. Oftentimes, the attorneys involved are also educating enforcement staff on the underlying financial laws at issue, which further illustrates the difficulty in understanding the CID from the recipients' perspective and the need to better identify the Bureau's basis for initiation.

In order to make the beginning stages of the CID process more fruitful, the Bureau must be familiar with the business practices being investigated, the complexity of the underlying laws including the associated civil and criminal penalties, and be readily available when questions arise. If the Bureau has a better understanding of the broader environment under which the CID is sought, provides additional information such as clear objective standards outlining the entire process, and establishes open communication channels for inquiries or concerns, the recipient may have a better and more cordial understanding of how to respond. Changes such as this will also make for a smoother, more transparent process for the Bureau.

The Nature and Scope of Requests Should Be Limited.

CID recipients in the real estate industry may be independent contractors or small business owners who lack teams of compliance personnel or complex risk management systems that are often necessary to produce every document and record required by a broadly defined CID. As a result, when a CID is unclear and wide reaching, the burdens imposed on these entities can be extremely arduous.

For example, a CID recipient was required to provide payment documentation for every operating account expense dating back to the opening of the firm, well over a decade worth of transactional records. Another recipient reported buying additional servers and contracting technology personnel to accommodate CID data requests, which involved reviewing and preserving thousands of electronic records and emails, costing valuable time and money.

Not only do these requests require extensive due diligence to track down such records, but it may be vastly complicated due to document retention policies that result in destruction or deletion of such accountings after a specified period. These types of broad requests may also inadvertently put on hold other concerns that need to be addressed by the CID recipient to facilitate a timely real estate sales transaction or ensure sustainability of business operations. With the substantial costs imposed through the investigation phase, businesses may still end up shutting their doors, even without a resulting Bureau enforcement action.

In every case, there are also considerable legal costs associated with quantifying the burdens imposed by a broad CID in an attempt to seek modifications of the CID, such as through an extension of deadlines or narrowing the scope of information sought. Data submission standards must then be met, privilege claims asserted, and witnesses deposed – all under the guidance of legal professionals. Recipients must also ensure the documents and answers produced in response to the CID do not result in broader liability exposure.

The Bureau must better understand CID recipients' business policies and the burdens imposed through an ill-defined CID. The recipients are devoting substantial time and resources to complying and protecting against a broad CID, including expending significant means to cover indispensable legal teams to manage the entire process. The broad CIDs with drawn-out investigations subjecting businesses to onerous requests that result in no findings to justify further Bureau activity should serve as examples to narrow future activities. If there was improved communication and transparency earlier in the CID process, to pinpoint exactly what is necessary to further the Bureau's investigation rather than pursuing a "fishing expedition," then the burdens imposed on recipients would be more reasonable and Bureau time would be less wasteful.

The Bureau's Communications Should Be Improved.

One common theme with Bureau investigations has been ineffective communication throughout the entire CID process, where recipients are left facing arbitrary timelines with limited communications during and after complying with the often overly burdensome CID requests as described above. With the initiation of the CID being immediately adversarial, setting the tone for the entire process, the Bureau is severely limiting necessary feedback to implement a more effective investigation. The lack of clarity on the purpose and scope of the CID also results in inefficient and duplicative efforts to communicate to multiple Bureau staff, increasing confusion and causing delays.

There must be more concise direction by the Bureau during the CID process so that a recipient can properly defend against allegations down the road if needed. Tight timeframes for responding combined with a vague and far-reaching CID require extensions that can only be achieved by effective communication from all parties involved. Clear communication channels would resolve issues associated with timeframes for responding, meeting and conferring expectations, negotiations over modifications or to set aside a CID, and other requests during the processes. Well-defined points of contact would also facilitate timely responses, reduce the likelihood of inexact discovery, and enable flexibility when necessitating circumstances arise.

Conclusion

In assessing the efficiency and effectiveness of CID processes, the Bureau must thoroughly weigh these substantial costs against the perceived outcome of the investigation. NAR appreciates the Bureau's incorporation of feedback through the RFI when making this assessment and implementing future changes to CID procedures. The Bureau's actions illustrates transparency and willingness to improve through meaningful burden reduction. We look forward to continuing to work together on these important issues for the broader benefit of the real estate industry.

Sincerely,



Elizabeth Mendenhall

2018 President, National Association of REALTORS®