

April 23, 2018

Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: CFPB Civil Investigative Demands and Associated Processes, Docket No. CFPB-2018-0001

Dear Ms. Jackson:

The 53 undersigned consumer, community, civil rights and legal services groups submit these comments in response to the Consumer Financial Protection Bureau's (CFPB's) Request for Information ("RFI") regarding Civil Investigative Demands (CIDs) and associated processes.

The Consumer Bureau must retain broad, flexible and nimble authority to investigate potential violations of the law and consumer harm. The bureau's investigation procedures must not bring in political calculations, hinder the ability to act quickly when there is ongoing consumer harm, or give lawbreakers tools to delay, hide evidence, or hamstring the Bureau's investigations. We elaborate on these points below.

1. The severe consumer protection failures that led to the creation of the Consumer Financial Protection Bureau are strong evidence why the Bureau must retain broad, flexible and nimble authority to investigate potential violations of the law and consumer harm.

The CFPB was created in response to the severe 2008 financial crisis that devastated the nation and American families. This crisis began with fundamental problems in the mortgage and other consumer credit markets but spread to the entire economy and harmed individuals and businesses alike. The financial marketplace was rife with reckless, unfair and abusive practices. Those practices had done immense damage to countless consumers, while helping bring on a financial and economic meltdown in which tens of millions of Americans lost homes, jobs, assets, savings and economic security. Responsible businesses large and small also suffered from the damage created by irresponsible companies.

Until the CFPB opened its doors in 2011, the responsibility of standing up for fair treatment of consumers by banks and other lenders had been scattered across half a dozen federal regulators, and often neglected by them. Other financial companies, such as debt collectors, credit reporting agencies and payday lenders, had faced little or no real federal oversight. The clear inadequacy of that arrangement, and the enormous harm consumers suffered as a result, led Congress to establish an agency expressly dedicated to this one task.

The CFPB was created in order to have the focus, tools, information, speed and flexibility to address existing and emerging problems in consumer financial markets. Congress held over 100 hearings and had extensive debate about ways to prevent similar consumer protection failures. Congress carefully considered how to craft an agency that would be independent of financial interests and politics, focus on consumer protection, and have the means and flexibility to address new problems quickly and responsibly as they arise. Many aspects of the Consumer Bureau's structure, including its investigative tools and procedures, were designed to serve these goals.

Since it was established, the Consumer Bureau has used its authority wisely to protect the public. The agency's supervision and enforcement actions have resulted in nearly \$12 billion in relief for more than 29 million consumers victimized by unlawful activity. There is undoubtedly still greater benefit to consumers that has occurred as a consequence of firms exercising greater care not to break the law given more rigorous enforcement.

The Bureau's investigation process is critical to the ability to achieve these results for the American public. The Bureau's processes for investigating potential violations of the law and consumer harm are appropriate and do not need to be changed. We urge the Bureau to resist calls to hinder investigations by politicizing them or by imposing procedures that cause delay.

The Bureau should be especially wary of calls by firms that were found to have broken the law to alter the procedures used to hold them accountable. The effect of weakening the investigative process would be to make it easier for lawbreaking firms to harm the public without facing consequences or being required to desist. This in turn penalizes law abiding firms who must compete with them.

2. The ability to initiate investigations and to promulgate investigative demands must remain in the hands of senior professional staff, and must not be subject to political calculations.

Some of the questions in the RFI hint at requiring the Director or other more senior officials to approve the opening of an investigation or the issuing of civil investigative demands. Approval by senior professional staff is already required, and in many cases the Dodd-Frank Act itself specifies who must approve an activity and whether that approval may be delegated. In addition, current procedures sometimes require recommendations from a panel of career professional staff and experts within the agency. These procedures ensure sufficient management control and expert input.

Requiring approval by the Director or other political appointees would risk politicizing the investigative process. The Director already has the authority to end an investigation and to set priorities for the Bureau's work. But requiring approval before new investigations are launched or pursued could bring an element of politics into the process and could be influenced by companies that might have the Director's ear. Not only the public, but also senior political staff at agencies benefit from having investigation decisions in the hands of staffers who are relatively immune to potential political repercussions of investigating the largest financial institutions in the world.

3. Speed can be important when there is ongoing consumer harm or a fast-spreading new problem, and staff must retain the authority to initiate demands quickly and expect quick responses, without front-office bottlenecks.

Requiring approval at a more senior level to open or pursue an investigation could unnecessarily delay an investigation. It is critical that the Bureau be able to act quickly when it has reason to believe that the law has been violated. The Director and other senior officials have many pressing duties, and investigatory decisions should not have to compete for attention with these other responsibilities of multiple levels of management. The agency must be able to move quickly to investigate suspected illegal activity and take necessary steps to enforce the law and protect consumers. A tremendous amount of consumer harm can happen in short periods of time.

For similar reasons, we believe that the presumptive timeframes for the CID process are appropriate and should not be extended. Professional staff already have the discretion to grant extensions when warranted. Industry will often want more time, but many requests are simple and can be responded to quickly. More complicated requests can be handled through extensions.

Delaying an initial CID needed for preliminary information to identify witnesses or issues, for example, can lead to delays on a whole series of CIDs. The base timelines must remain relatively short, with flexibility to extend them, in order not to delay important investigations of entities the Bureau has reason to believe are violating the law.

4. The Bureau's investigation procedures should not provide opportunities for lawbreakers to delay, limit or hide evidence, or hamstring the Bureau.

The RFIs ask a number of questions, including about the specificity of the CID's notice of purpose, the nature and scope of the CIDs, application of the Federal Rules of Civil Procedure, the role of counsel, and the process for challenging CIDs.

We believe that the Bureau's current procedures are appropriate, and many of the changes that the questions hint at could unduly delay investigations, allowing consumer harm to continue, and give lawbreakers tools to thwart the Bureau's work to protect the public.

The Bureau's procedures already require that CIDs identify the purpose of the demand. Further levels of red tape or details could limit the avenues that the CFPB may pursue, or encourage recipients to limit their responses or conceal evidence.

As in civil court discovery, broad initial demands are often narrowed or specified through the meet and confer process. But broad initial requests are important in order to cover the range of evidence that might reveal a violation of the law. If the Bureau is limited to the evidence it already knows about or is forced to make the demands unduly specific, that could allow lawbreakers to hide evidence of their violations through strategically narrow responses.

CFPB staff are already required to engage in reasonable negotiations, and can modify CIDs for good cause. Potential lawbreakers should not be given opportunities to waste time demanding extended meetings, concessions or extensions. Indeed, delaying tactics could be more in the interests of industry attorneys who are generating billable hours than of responsible companies that wish to see an investigation come to its conclusion. Notably, injured consumers do not have a say in the investigation process.

For the same reasons, the processes for challenging CIDs already provide sufficient protections to companies. Encouraging more litigation before the Bureau has even concluded an investigation could only harm the public. The rules on the transparency of CID petitions, which follow longstanding FTC rules, also serve the public and discourage delay tactics and special treatment.

Nor is it necessary or appropriate to extend the Federal Rules of Civil Procedure to Bureau investigations. The FRCP are designed for litigation after a complaint is filed in court, and are not crafted for government investigations. They are overseen by a judge with authority to rule on disputes. While many aspects of the FRCP are replicated in the Bureau's procedures, applying the rules en masse could give recalcitrant companies opportunities to cause delay and to create burdensome hurdles that would hinder discovery and enforcement against law violations.

Similarly, the statutory right in fair housing investigations for a deposition witness to consult counsel about any question should not be extended to all investigations. Witnesses have a right to consult counsel about privileged matters, but a broader right could lead to undue coaching of witnesses, and is inappropriate in these other kinds of investigations, where the CFPB does not have the same procedure for compelling answers as in fair housing investigations.

Any changes to the Bureau's procedures that would hinder or delay its investigations would harm the public and also lead to more inefficient use of taxpayer funds.

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It is the civic duty of all companies and individuals to cooperate when The Bureau works to minimize the burden of these investigations, but any investigation can impose some burdens, which is inevitable if the Consumer Bureau is to fulfill its role in protecting the public.

Moreover, some of the comments that the Bureau receives about its investigative demands may come from companies that were ultimately found to have broken the law or to have mistreated consumers. The Bureau must keep in mind that unscrupulous companies will exploit any changes the Bureau makes.

Maintaining a robust, flexible and efficient investigation process is essential to the Consumer Bureau's mission. Thank you for the opportunity to submit these comments.

Yours very truly,

Alabama Appleseed Center for Law & Justice
Allied Progress
Americans for Financial Reform
Arizona Community Action Association
Arizona Public Interest Research Group (Arizona PIRG)
Arkansans Against Abusive Payday Lending
Atlanta Legal Aid Society, Inc.
California Reinvestment Coalition
CASH Campaign of Maryland
Center for Economic Integrity
Center for Progressive Reform
Center for Responsible Lending
Connecticut Fair Housing Center
Connecticut Legal Services, Inc.
Consumer Action
Consumer Advocacy and Protection Society (CAPS) (CA)
Consumer Federation of America
Consumers Union
Demos
Florida Alliance for Consumer Protection
Georgia Watch
Greater Boston Legal Services (on behalf of its low-income clients)
Heartland Alliance for Human Needs & Human Rights (IL)
Interfaith Center on Corporate Responsibility
Jacksonville Area Legal Aid, Inc. (FL)
Kentucky Equal Justice Center
Legal Aid Society of Southwest Ohio, LLC
Legal Aid Society of the District of Columbia
Maryland Consumer Rights Coalition
Montana Organizing Project
NAACP
National Association of Consumer Advocates
National Center for Law and Economic Justice
National Community Reinvestment Coalition (NCRC)
National Consumer Law Center (on behalf of its low income clients)
New Jersey Citizen Action
North Carolina Justice Center
People's Action Institute
Prosperity Now
Public Citizen

Public Justice Center (Baltimore, MD)
Public Law Center (Santa Ana, CA)
Reinvestment Partners (NC)
SC Appleseed Legal Justice Center
Southern Poverty Law Center
Tennessee Citizen Action
Texas Appleseed
U.S. PIRG
UnidosUS (formerly NCLR)
Virginia Citizens Consumer Council
Virginia Organizing
Virginia Poverty Law Center
VOICE - OKC (OK)
West Virginia Center on Budget and Policy
Woodstock Institute