



April 26, 2018

VIA ELECTRONIC DELIVERY TO REGULATIONS.GOV

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

Re: *Comments of ACA International on Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes, Docket Number CFPB-2018-0001*

Dear Ms. Jackson:

ACA International (“ACA”), the Association of Credit and Collection Professionals, submits these comments in response to the request by the Bureau of Consumer Financial Protection (“Bureau”) for comments in response to its “Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes,” 83 Fed. Reg. 3686 (Jan. 26, 2018); 83 Fed. Reg. 12567 (March 22, 2018). ACA appreciates the opportunity to provide input on the Bureau’s Request for Information.

I. BACKGROUND ON ACA INTERNATIONAL

ACA International is the leading trade association for credit and collection professionals. Founded in 1939, and with offices in Washington, D.C. and Minneapolis, Minnesota, ACA represents approximately 3,000 members, including credit grantors, third-party collection agencies, asset buyers, attorneys, and vendor affiliates in an industry that employs more than 230,000 employees worldwide. Given its longstanding history and broad membership, ACA is uniquely positioned to assist the Bureau with information gathering related to debt collection, as well to collaborate with the Bureau on how its proposed policies and regulations will impact the credit and collection industry.

ACA members include the smallest of businesses that operate within a limited geographic range of a single state, and the largest of publicly held, multinational corporations that operate in every state. The majority of ACA-member debt collection companies, however, are small businesses with nearly 70 percent maintaining fewer than 20 employees.

As part of the process of attempting to recover outstanding payments, ACA members are an extension of every community's businesses. ACA members work with these businesses, large and small, to obtain payment for the goods and services already received by consumers. In years past, the combined effort of ACA members has resulted in the annual recovery of billions of dollars – dollars that are returned to and reinvested by businesses and dollars that would otherwise constitute losses on the financial statements of those businesses. Without an effective collection process, the economic viability of these businesses and, by extension, the American economy in general, is threatened. Recovering rightfully-owed consumer debt enables organizations to survive, helps prevent job losses, keeps credit, goods, and services available, and reduces the need for tax increases to cover governmental budget shortfalls.

Importantly, ACA members are committed to fair, reasonable, and respectful practices and take their obligations in collecting debt very seriously. As legitimate credit and collection professionals, ACA members play a key role in helping consumers fulfill their financial goals and responsibilities while facilitating broad access to the credit market.

II. COMMENTS OF ACA INTERNATIONAL

In its Request for Information (“RFI”), the Bureau seeks comments in response to a list of questions. ACA’s comments address both overarching points and specific questions raised by the Bureau.

Overarching Points

A well-functioning Bureau is critical to maintaining an effective consumer financial marketplace. The Bureau must promulgate, interpret, and enforce consumer law uniformly and fairly. To fulfill these objectives, the Bureau should have proper structural and procedural mechanisms in place and a focus on thoughtful consumer protection that can provide stability over time, regardless of political leadership. The Bureau’s methods of carrying out its mission have raised many concerns and need to be addressed.

The Bureau has at times used its investigative powers without considering alternative, more tailored approaches or weighing the impacts of its actions on regulated entities, the consumer financial marketplace, or opportunity costs affecting the Bureau’s resources. The Bureau should be required to assess these factors before taking action. In general, the Bureau should revise its approaches to align with specific investigative concerns and objectives, which would reduce the burden and cost of complying with the CID process, avoiding unnecessary disruption of business and excessive compliance costs, including employee overtime. The Bureau should provide notice to CID recipients as to the basis for the investigation and allow an opportunity to rebut or offer context for allegations. This could save time and resources for all parties and lead to faster results, producing a fairer process and orienting the investigation on changes needed to protect consumers.

Many parties object that the Bureau has misused the CID process as “regulation by enforcement” or a fishing expedition to look for some violation of law. Some feel the Bureau has used the CID process to learn about an industry, when instead it should pursue other approaches for educational or research purposes. Others feel the process has been used to find some arguably objectionable practice that could be characterized as an unfair, deceptive, or

abusive act or practice (“UDAAP”), producing a settlement under duress; respondents describe the approach as “punitive.” CID recipients urge the Bureau to articulate its concerns at the outset and establish an open and productive dialogue about how to pursue a focused and proper investigation.

In proceeding with this RFI process, the Bureau should establish a clear and transparent record of its actions in response to comments. Reforms should be adopted, consistent with appropriate regulatory process, in the form of fair, clear, consistent, and binding policies, procedures, and rules.

Specific Points on Which the Bureau Seeks Comment

1. *The Bureau’s processes for initiating investigations, including 12 C.F.R. 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’s processes for initiating investigations are opaque. The power to initiate an investigation is given to only a few individuals, without any system of accountability. This approach can result in an abuse of discretion. The Federal Trade Commission (“FTC”), in contrast, vests the power to initiate an investigation in its Commissioners and in limited circumstances delegates it to Directors and Deputy or Assistant Directors. The Bureau needs greater transparency and better coordination among a broader group of officials prior to the initiation of an investigation, to ensure proper use of this powerful tool, particularly in light of the many concerns that have been raised about the Bureau’s abuse of this power, as noted above.
- The Bureau should be required in appropriate instances to consult with prudential regulators before commencing an investigation.
- The Bureau is perceived as sending CIDs to the largest firms in the industry, without any effort to talk with the company or examine its practices; this type of “fishing expedition” should not be permitted.
- The Bureau should implement a policy that encourages Bureau staff to permit voluntary responses outside the CID process when the regulated entity shows willingness to comply, reserving the CID process for situations where it is actually needed.

2. *The Bureau’s processes for the issuance of CIDs, including the nondelegable 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 Bureau’s processes could be improved by adopting approaches used by the FTC. As noted above, the FTC has a more formal structure and greater transparency in evaluating the issuance of a CID. The FTC engages in a cost-benefit analysis of the appropriateness of issuing a CID, an assessment that would benefit the Bureau as well.

- The Bureau should implement internal procedures for review, modification, and approval of CIDs prior to issuance to ensure consistency with the Bureau's rules, legal interpretations, public positions, and policies, including review by the office of the General Counsel.

- The Bureau should develop a process that defines endpoints for an investigation and provides CID recipients with status updates and a prompt "close-out" letter.

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.*

- Current CID notifications are vague and non-specific as to what potential violations or allegations the Bureau is investigating.

- The CID should specifically state what is being investigated and the theory of the investigation, limiting the scope of discovery to what is under investigation, as opposed to facilitating a fishing expedition.

- CID recipients have met with refusals from enforcement attorneys to provide any information on the reason for the investigation.

- The Bureau should establish a presumption towards disclosure of the source of the investigation unless there are objectively defensible bases for withholding that information.

- Experience with the meet-and-confer process has not been positive in many cases, and is characterized as adversarial, uninformative, hostile, and costly. Respondents also object to repetitive investigations, by different Bureau departments and with little coordination.

- The Bureau should empower line attorneys to engage with CID recipients regarding the purpose and scope of the investigation, in order to allow for meaningful discussion about the needs of the investigation, burden of particular requests, and workable alternatives. If not before, this kind of dialogue should occur at the meet-and-confer stage.

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.*

- The Bureau should adopt processes that require special approval for written reports and other highly burdensome requests (e.g., data analyses, email reviews, or large volumes of audio files). The Bureau should also establish standards for demonstrating

unreasonable burden for data requests, including scaling what is reasonable to the size of the entity. Requests for written reports should allow respondents to provide data in a form consistent with the entity's normal practices.

- The Bureau's requests should be tailored to the industry at issue, for example, a CID to a collection agency should not be framed in banking industry terms.

- The Bureau's authority to request materials pursuant to a CID should be limited to the scope of civil discovery under Federal Rule of Civil Procedure 26.

- The Bureau's process should provide an avenue for judicial review for parties to challenge an overly burdensome demand.

5. *The timeframes associated with each step of the CID process, including return dates, and the specific timeframes for meeting and conferring, and petitioning to modify or set aside a CID.*

- Many respondents felt the CID timelines were unreasonable, resembling a "fire drill" that stopped regular work in its tracks. Small businesses were particularly hard hit by the CFPB's timelines.

- The Bureau should build in more flexibility to its CID timelines, allowing good-faith negotiations of extensions. The Bureau should establish standards governing response timeframes and factors for consideration of requests for modifications.

- CID recipients' experience with CFPB attorneys reflects refusal to disclose the facts on which an investigation is based, as well as rejections of reasonable requests for extensions, and an unwillingness to moderate onerous document requests.

- Response time for a CID recipient should be tolled while a request for modification is prepared and considered.

- The Bureau should allow line attorneys to consider and approve modifications, with a right to seek review "up the line" if necessary.

- The Bureau should implement specific standards for appropriate use of tolling agreements, discouraging use late in the investigation or where the statute of limitations period is close to expiration.

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 allow a CID recipient's representative to attend the depositions of its employees. Deponents should have access to exhibits when reading and reviewing

deposition records.

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 the Federal Rule of Evidence 502 also apply to documents inadvertently produced in response to a CID.*

- No comments.

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)(iii).*

- The Bureau should adopt guidelines regarding when it will take testimony, including a requirement that the Bureau use less burdensome investigative tools first and to the extent possible.

- The Bureau should modify its rules to allow greater participation of counsel.

- The Bureau should restrict the scope of testimony to avoid matters outside the statute of limitations, without a showing of substantial need and good cause, specifically approved by the Director of Enforcement.

- The Bureau should provide standards for seeking information from former employees, including providing notice to the CID recipient.

- The Bureau should allow targets of an investigation to attend depositions.

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 and Deputy Assistant Directors of the Office of Enforcement to negotiate and approve the terms of satisfactory compliance with civil investigative demands and extending time for compliance.*

- Respondents found the meet-and-confer process costly and confusing.

- Bureau staff claimed that documents that had been turned over had not, and required the respondent to redo work or document previous submissions.

- The Bureau should accept representations of counsel on relevant facts regarding systems and data, instead of requiring personnel with specific knowledge of the systems and data to attend the meet and confer.
- Respondents object that Bureau line attorneys had no authority and constantly had to go to the Deputy Enforcement Attorney for approval, yet the respondent was not permitted to contact that decision-making official.

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

- The Bureau demanded documents in native, raw formats, with specific requirements, adding unnecessary cost and burden. Although the Submission Standards speak of alternatives, in practice none were allowed and the Bureau's demand for specific formats was non-negotiable. The document submission standards have been described as "draconian."
- The Bureau should permit certifications by multiple employees, with realistic requirements regarding completeness of responses.
- The Bureau's treatment of privileged materials should prevent enforcement attorneys from requesting privilege waivers to obtain privileged materials and using privileged materials from supervision officials.

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

- The petition process should be kept confidential to protect sensitive information, or an alternative, informal, non-public process should be established to request that CIDs be set aside or modified.

- 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 Bureau's regulations should be modified to allow petitions to be heard in the first instance by an Administrative Law Judge or in Federal court, instead of a hearing by the Director.

ACA appreciates the opportunity to provide comments to the Bureau in response to its RFI on the CID process.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark Neeb', with a stylized flourish at the end.

Mark Neeb
Chief Executive Officer