



April 25, 2018

The Honorable Mick Mulvaney
Acting Director
Consumer Financial Protection Bureau
1700 G St., NW
Washington, DC 20552

Re: Docket No. CFPB-2018-0001 (submitted electronically)

Dear Acting Director Mulvaney:

On behalf of the members of The Real Estate Services Providers Council, Inc. (RESPRO®), I appreciate the opportunity to comment on the Request for Information on the CFPB's use of Civil Investigative Demands (CIDs).

RESPRO® represents the largest and most successful settlement services companies operating throughout the United States. Our members and their more than 600,000 employees and agents facilitate millions of real estate and mortgage transactions each year. A critical element in the smooth operation of this system is consistency and certainty in laws, rules, regulations and their enforcement. The Consumer Financial Protection Bureau (CFPB or Bureau) should endeavor to provide clear guidance on the rules under its purview consistent with the underlying statutes and enforce laws consistent with their longstanding interpretation. It should endeavor to protect consumers but also be fair to those industries it regulates.

Civil Investigative Demands (CIDs) and Enforcement

RESPRO® has experience with many laws under CFPB authority. Of those, the Real Estate Settlement Procedures Act (RESPA) touches our mission the most. CFPB enforcement efforts with regard to RESPA have not been completely without merit though there have been and continue to be a number of concerns. The main complaint is overreach on a variety of levels. I will focus on CIDs here but one can make similar complaints with regard to enforcement actions and in other areas.

The purpose of the CID should be to gather information where there is an allegation of violations of law or rules. The CID should be narrowly tailored to that allegation and state them specifically. Instead, we all too often see open-ended or overly broad CIDs that seem to be fishing expeditions. The CFPB and its staff, because of the prosecutorial power it has been granted also have greater responsibility to act justly and be fair. The role is not the same as a plaintiff's lawyer or a defense attorney. Those in the role of prosecutor have to always be mindful of the fine lines between prosecution and persecution, between use of power and abuse of power.

Overburdening regulated firms or individuals with costly demands to produce information where there is little evidence of wrong doing or where less costly regulatory actions could be taken looks more like persecution to the objective observer. This is especially so when even stricter and more costly burdens are hanging over the head of the regulated entity or person and under the discretion of the CFPB staff and director. The very clear notion that one could spend thousands, millions, or

tens of millions of dollars before one even goes before a duly appointed judge is quite onerous. An overly broad CID is only the beginning of what could be a very costly and onerous process. Therefore the CID must be the appropriate avenue to investigate and begin to address the potential harm and if it is, must be narrowly tailored to the issues of concern.

1/2) Process for initiating investigations and CIDs

The process for initiating investigations reveals the fundamental flaws in the structure of the CFPB with a single director at its head who has delegated authority to his subordinates (at least during Director Cordray's term). In contrast, Federal Trade Commission CIDs are ultimately the responsibility of the Commission, that is, the leadership of the FTC who can then deliberate upon, modify, or reject the proposed investigation. The CFPB director has delegated this authority to deputies but that is almost irrelevant because all power lies in the director. If there is a question, the single director resolves it himself which reveals the flaw- there is no deliberative process or give and take to determine the wisdom, fairness or parameters of an investigation, CID and related actions.¹ It is not the kind of structure or process we are used to in our Constitutional Republic with its checks and balances. At the very least, a committee should review a potential investigation and set parameters for the investigators and their demands consistent with the law. It may slow down the process somewhat but it would make it less suspect.²

The CFPB structure and processes in this area is perhaps the quintessential example of a system arguably designed to skirt or avoid the Constitutional judicial system. For much of the adjudicative process it is its own little world. Many targeted firms or individuals must survive their significant time in that world at great expense if they wish to reach an impartial arbiter or they just settle or agree to a consent order. If this system is allowed to remain in this form, at the very least, the accused ought to have a committee, with the potential for opposing views, sign off on subjecting them to this imposition.³

3) Steps the CFPB can take to improve recipients understanding

The CFPB should be very specific in delineating the purpose of the CID. It should be finely tailored to the specific allegation or potential charge that led to the initiation of the CID in the first place. Given the one-sided nature of CFPB authority, it is only fair that the scope of CIDs be limited and should not be license to initiate taxpayer funded fishing expeditions.

4) Nature and Scope of CIDs

As noted earlier, CIDs should be narrowly tailored to investigating a specific charge that is a clear violation of law or rules consistent with Congressional intent. Also, the requests for documents and other materials should conform to the timeframe of the possible wrong-doing or violation, the

¹ Look at the PHH case, PHH appealed a \$6.4 million decision to the Director and he turned it into a \$109 million decision. Usually it is not the appeals court that "throws the book at them."

² Ideally there would be an independent arbiter like a judge at every level to determine whether fundamental fairness and the rules are being observed. It seems fundamentally unfair to have what is for all intents and purposes the prosecutors also acting in the role of judges.

³ Ideally a different system would be created where there is more separation between accusers and adjudicators.

statute of limitations, and any recordkeeping requirement limitations. There should not be never-ending lookback.

5) Timeframes

At a minimum there should be at least 30 days to comply with a CID or file for an extension. Extensions should be granted when good reasons are given such as a reasonably detailed description as to why documents or materials cannot be produced in the requisite timeframe. Realistically, CFPB should tailor its timeframes to the amount of time reasonably required to gather the necessary materials and not use the timeframes as another compliance trap.

6/7) Conforming to Federal Rules of Civil Procedure and Evidence

The taking of testimony and handling the inadvertent production of privileged information should be consistent with the Federal Rules and Civil Procedure and Evidence. It is easier for both agencies and those being investigated to comply with and understand their respected rights when one applies the consistent and for the most part long-held standards under both rules. Also, agencies should not be allowed to choose their own rules in an effort to expand liability, expose the subject of an investigation to additional litigation, or give an additional advantage to the Bureau.

8) Limits on advice of counsel and objections

CFPB should not be permitted to further limit the ability to object, the ability to obtain the advice of counsel, and any related rights found in the statutory language or under the Constitution.

9) Processes for meeting and conferring on CIDs

The processes for meeting and conferring on CIDs should focus on providing a fair and level playing field consistent with earlier comments. Unless there is an egregious allegation or violation of law, efforts should be made with an eye toward fixing problems and providing appropriate redress and not affixing blame and prescribing punishment. The goals should be to correct non-compliant behavior and provide appropriate consumer redress, not make headlines in the news media. Thus the CID process should be aimed at finding what if anything is wrong and fixing it and assuming a compliant or willing respondent, it should avoid being adversarial if possible.

10) Requirements for responding

Once again, making response times more reasonable would go a long way toward making the process fairer and also allowing for the assembly of a complete record. At present, timing requirements and the requirement of sworn affidavits serve to create traps or lock parties into positions that are not accurate simply because they were rushed to completion to meet an unreasonable deadline. We once heard of criminals getting released on a technicality and often recoiled despite the demands of the rule of law and justice. Today, we have the opposite, people or firms being convicted or persecuted on a technicality.

It is simply wrong to hold one to a set of facts or set of evidence that is inaccurate and/or incomplete simply because over time (and through no fault or intentional delay or act of the



accused) they were not produced by an arbitrary deadline. This is almost as bad as denying or hiding exculpatory evidence as it has the same effect, an unjust outcome not based on the full facts.

11) Processes for petitions to modify or set aside

a) CFPB should let the petitioner see staff responses to the petitioner as a matter of fundamental fairness akin to basic Constitutional rights to confront one's accuser and to be made aware of the case against one.

b) Petitions to set aside should not be made public unless the parties consent. While there is some value to others under the regulatory auspices of the CFPB, the disclosure of petitions and other investigative materials can be needlessly harmful. It essentially exposes the existence of the investigation to public and the concomitant disapprobation even when no charge has been proven. All too often guilt is assumed and irreparable reputational harm is done before the facts have been ascertained. This should be avoided.

c) We have not undertaken significant study of actual costs. Nonetheless, it is obvious that if the CID process is tilted so far in favor of the regulator, it only becomes one more burdensome step before one can argue their case before an impartial arbiter (all the while the legal bills and staff time build up). If the process were more like arbitration or otherwise less adversarial, it could be a useful tool to avoid litigation. That is not how it is today and there is much room for improvement.

Conclusion:

Once again, RESPRO® appreciates the opportunity to comment and to urge you to unstack the deck against those who are regulated and being investigated by the CFPB. They do not deserve special treatment, but they all deserve fair treatment. Thank you for your time and consideration on this matter and many others that affect RESPRO®, its members, and their clients and customers. If we may be of any assistance, please do not hesitate to contact me at ktrepeta@respro.org or (202) 862-2051.

With best regards,

Kenneth R. Trepeta Esq.
President and Executive Director