



Online Lenders Alliance Response to Consumer Financial Protection Bureau Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes; Docket No.: CFPB-2018-0001

VIA ELECTRONIC SUBMISSION

April 26, 2018  
Monica Jackson  
Office of the Executive Secretary  
Consumer Financial Protection Bureau  
1700 G Street, NW Washington, DC 20552

Dear Ms. Jackson:

The Online Lenders Alliance (OLA) is pleased to submit comments in response to the Consumer Financial Protection Bureau's (CFPB) Request for Information Regarding Bureau Civil Investigative Demands and Associated Processes. We appreciate the opportunity to provide our perspective on this topic.

### **About OLA and Its Members**

OLA is the center for lending, technology and innovation, representing the growing industry of companies offering loans online. OLA is comprised of lenders, advertisers, specialty credit bureaus and software developers – the entire fintech community. Our members abide by a rigorous set of Best Practices and a Code of Conduct to ensure their customers are fully informed and treated fairly. OLA also serves as a resource to federal and state policymakers on issues related to access to credit. Beyond our role in serving and leading our members, OLA provides resources including a consumer hotline, that is a portal to report fraud, and consumer tips.

### **Background**

An increasingly common tool used during a government inquiry is the Civil Investigative Demand (CID). As a relatively new agency, the Consumer Financial Protection Bureau's (CFPB) use of CIDs is still evolving. Not to be confused with a subpoena that only requires the production of documents, a CID can require the recipient to produce documents as well as answer interrogatories or give oral testimony under oath. Moreover, the authority to issue a CID is quite broad. The issuing agency merely must have "reason to believe that any person may be in possession, custody, or control of documentary material or information relevant to an investigation." The potential breadth of a CID can raise critical issues for recipients, particularly those who may be under a concurrent investigation. And unlike interrogatories or depositions in

a civil case, CIDs are investigative, not discovery, tools, so only the government gets to use them.

Several federal statutes grant the government authority to issue CIDs. For the Consumer Financial Protection Bureau, authorization is granted by § 1052 of the Dodd-Frank Act. The past decade has seen a steady increase in agency use of CIDs. There are many factors that play into this shift including legislative changes that may have simplified the process of issuing a CID. The Online Lenders Alliance commends the Bureau's decision to examine CIDs and is pleased to provide an industry perspective on the CFPB's use of CIDs.

### **Impacted Businesses**

Company size or structure does not appear to impact the likelihood of CFPB engaging in an inquiry with an organization. It should be pointed out, however, that the short response time frame of 10 days allowed by most CFPB-issued CIDs can have a disproportional impact on smaller companies that have limited staff to respond to these inquiries. Moreover, CIDs can raise critical issues for all recipients, particularly those who may be under a concurrent investigation.

### **Inquiries**

Often when CFPB issues a notification, the CIDs tend to be very vague, many times only listing the industry being investigated and potentially applicable laws. These investigations can begin without a substantial examination history of the target and with no specific information. Just a single inquiry can be cumbersome. The potential breadth of a CID and the agency's latitude for follow-up actions means even a single CID can significantly hamstring a company.

### **Costs**

Companies that receive CIDs are destined to spend significant time, energy, and money gathering information in response to the inquiry. The costs associated with CIDs can be extensive. Some estimates by OLA members place the costs at hundreds of employee hours averaging over a quarter of a million dollars per company of internal costs. This, coupled with external costs that could reach well over a million dollars, can have a significant impact on an organization.

### **Time Commitments**

Monetary resources are not the only impact on a company. Often these investigations can drag on for a considerable amount of time. A duration of two years or longer is not unusual.

## **Outcomes**

CIDs appear to have yielded minimal results, given their costs, time requirements, and expansive nature. Anecdotal feedback on the outcomes of CIDs suggests that very few resulted in an action taken by the CFPB. This result calls into question the resources committed by both sides during these investigations.

## **Deficiencies in Challenging CIDs**

Under Part 308 of the FDIC Regulations (Procedures Applicable to Investigations Pursuant to Section 10(c) of the FDIA), “[a]ny person compelled or requested to furnish testimony, documentary evidence, or other information, shall upon request be shown and provided with a copy of the order initiating the proceeding.” Despite the increased risk for abuses of agency discretion, however, no such requirement exists in Part 1080.6 of the CFPB Regulations (civil investigative demands).

After a CID has been issued, Part 1080.6 allows a recipient of a CID to file a petition to modify or set the CID aside. The petition must be submitted within 20 calendar days after receipt of the CID and include “all factual and legal objections to the [CID], including all appropriate arguments, affidavits, and other supporting documentation,” and be signed by the objecting attorney. The problem is that once the petition is submitted, a CFPB official, typically an in-house attorney, provides a factual and legal response to the Director without serving the CID on the party objecting to its issuance. That party has no idea what position the CFPB attorney takes or what points they make. Once that is received, the Director has the authority to rule upon the petition. In effect, the CFPB has sole authority to determine whether to enforce the CID or not, there is no due process provided in terms of giving the protesting party the right to understand the CFPB’s position and respond, and the petitioner is left with having to go to court to block the CID without having the benefit of full disclosure of the internal process. The CFPB’s enforcement efforts in this area have been unpredictable, in large part because of the lack of comprehensive regulations or formal guidance, both of which are needed going forward.

## **Fintech Bill of Rights**

To aid in creating a balanced investigatory process, OLA members developed the *Fintech Bill of Rights* (attached). This initiative introduces supervisory fairness by adding “guardrails” governing agency information inquiries, limiting the open-ended nature of many CIDs. Given its unique structure, such guardrails are particularly important in the case of the CFPB. For companies under investigation, the proposal enhances current due process practices by requiring that CFPB provide greater specifics regarding the basis for an investigation. It also revises procedural rules for investigative hearings. Finally, it would enhance transparency in policy development by involving a broader array of impacted entities earlier in the process, increasing the likelihood that final rules and regulations would not have unintended consequences

## **Conclusion**

The CFPB mission is to ensure compliance with federal consumer financial laws, it should also be noted that in addition to CFPB many OLA companies are also subject to oversight by the Federal Trade Commission. A component of enforcement is the gathering of information, which makes a CID an important investigatory tool. However, the broad scope employed by CFPB, coupled with the potential expense to yield minimal results, can impose significant challenges on companies without necessarily improving enforcement. OLA hopes that this RFI process, coupled with the concepts contained in the *Fintech Bill of Rights*, can aid the CFPB in reforming its use of CIDs.

The members of OLA appreciate the opportunity to share our views. We look forward to working in a collaborative manner to reduce barriers and enhance consumer financial options.

If you have questions or would like additional information, I can be reached at [lmcgreevy@oladc.org](mailto:lmcgreevy@oladc.org).

Very Truly Yours,

A handwritten signature in blue ink that reads "Lisa McGreevy". The signature is fluid and cursive, with the first name "Lisa" being larger and more prominent than the last name "McGreevy".

Lisa S. McGreevy

President and CEO