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Raines and Dhaliwal on Consumer Financial Protection Bureau CIDs

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Petitions To Modify or Set Aside CFPB Civil Investigative Demands: Analysis of Recent Decisions

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SUMMARY: Amanda M. Raines and A.J. Dhaliwal, of BuckleySandler LLP, discuss how the power of civil investigative demands (CIDs) has been brought into focus by two Consumer Financial Protection Bureau (CFPB) decisions denying petitions to modify or set aside CIDs and how those decisions provide guidance for parties assessing whether to challenge the CFPB's request for documents and responses. Topics include the importance of meet-and-confer sessions.

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ARTICLE: Since the Consumer Financial Protection Bureau (CFPB or Bureau) came on line in July 2011, it has been aggressively investigating whether financial institutions and service providers, among others, have been engaging in conduct that, if proven, violates a Federal consumer financial law. Among the many tools in the CFPB's investigative arsenal are civil investigative demands (CIDs).

While the use of CIDs in regulatory investigations is nothing new, the power of CIDs has been brought into focus by two recent CFPB decisions denying petitions to modify or set aside CIDs. These decisions provide guidance for parties assessing whether to challenge the CFPB's request for documents and responses. In this article, we analyze the reasoning behind these decisions and identify issues that companies must be cognizant of while navigating the investigation and petitioning phases. n1

The CFPB's Rules Regarding CIDs

Section 1052 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) and the CFPB's final Rules Relating to Investigations (Final Rules) set forth the parameters that govern the Bureau's investigations. Under Section 1052(c), "[w]henver the Bureau has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to a violation," the Bureau may issue a CID. n2 CIDs can be issued to compel documentary material, tangible things, written reports, answers to questions, and oral testimony.

The recipient of a CID can petition the Director of the Bureau for an order modifying or setting aside the CID. n3 The CFPB Final Rules impose several requirements on such petitions. First, any petition must be filed with the Executive Secretary of the Bureau with a copy to the Assistant Director of the Office of Enforcement within 20 calendar days after service of the CID, or, if the return date is less than 20 calendar days after service, then the petition must be filed prior to the return date. n4 Extensions of this deadline are disfavored. n5

Second, the petition "shall set forth all factual and legal objections to the civil investigative demand, including all appropriate arguments, affidavits, and other supporting documentation." n6 The attorney who objects to the CID must sign any objection.

Third, a petition must be accompanied by a signed statement representing that petitioner's counsel has conferred with counsel for the Bureau in good faith pursuant to section 1080.6(c), and the parties have been unable to reach an agreement. n7 Section 1080.6(c) requires the parties to meet-and-confer within 10 calendar days after receipt of the CID or before the deadline for filing a petition, whichever is earlier. n8 The signed statement must recite the date, time, and place of each such meet-and-confer session, and the names of all parties participating. n9 If some of the issues in controversy have been resolved, the statement shall specify the issues resolved and those remaining unresolved. n10

The filing of a timely petition stays the time permitted for compliance with the portion of the CID being challenged. n11 Further, if the petition is denied in whole or in part, the Director's ruling will set a new return date for compliance with the CID. n12

The petition to modify the CID will be sent, along with the CFPB investigator's statement in reply to the petition, n13 to the Director of the CFPB who will issue an order accepting or denying the petition. Unlike the confidential treatment provided to CID material and the investigation generally, once a recipient files a petition, and unless good cause can be shown otherwise at the time the petition is filed, the petition and Director's order in response are made public. n14

The CFPB's First Orders Deny Petitions to Modify or Set Aside CIDs

Although the CFPB has been conducting investigations since July 2011, it did not issue its first ruling on a petition to modify or set aside a CID until September 20, 2012. n15 In that case, the petition challenged a CID issued to a non-bank mortgage servicer (the Company) seeking responses to 21 interrogatories and 33 document requests. n16 Director Cordray denied the petition in its entirety and ordered the Company to comply with the CID within 21 days. n17 In doing so, he adopted the legal framework that would apply to such petitions and provided specific guidance for parties in determining their conduct in similar matters. n18

The CID, served on May 22, was issued in connection with an investigation regarding whether ceding premiums from private mortgage insurance companies to captive reinsurance subsidiaries of certain mortgage lenders violates Section 8 of the Real Estate Settlement Procedures Act (RESPA). n19 On May 29, the Company and the Bureau conducted a telephonic meet-and-confer, during which the Company objected to the applicable time periods and substantive aspects of the requests. n20 A day later, the CFPB sent a letter indicating a willingness to take a flexible approach to the CID to accommodate any identifiable undue burdens and offering to recommend four specific modifications to the CID in light of the Company's concerns. n21

On June 4, 2012, the Company responded by specifying numerous objections and requesting an extension of time to file a petition. The CFPB replied on June 7 by accepting certain proposed resolutions and providing justifications for rejecting others. The CFPB further denied the Company's request for an extension to file a petition. The Company responded that it remained committed to working with the CFPB to resolve differences and again sought an extension of the deadline to file a petition. The CFPB denied the request to extend the deadline on June 11, thereby causing the Company to file its petition to modify or set aside the CID.

In the petition filed on June 12, the Company raised three main objections: (i) the CID did not state the nature of the conduct under the investigation; n22 (ii) the CID was overly broad, unduly burdensome, and irrelevant; n23 and (iii) the CID requested materials going back more than 11 years when RESPA's statute of limitations was 3 years and the CFPB's enforcement power cannot be predicated on acts prior to July 21, 2010. n24

In denying the petition, the Bureau began by explaining that CIDs play a "crucial role" in the Bureau's ability to carry out its duty to enforce consumer financial laws. n25 It stated that the purpose of CIDs are to "close the [information] gap" between the Bureau and the subject company and/or individual in order for the Bureau to determine whether the investigation is worth pursuing, and if so, to what extent. n26

The CFPB then set forth the standard it will use to consider and resolve petitions to modify or set aside CIDs, adopting the deferential standard of review relied upon by Circuit Courts of Appeals in proceedings to enforce administrative subpoenas. That standard provides that a CID will be enforced if it satisfies the following requirements: (i) the investigation is for a lawfully authorized purpose; (ii) the information requested is relevant to the investigation; and (iii) procedural requirements are followed. n27 If the Bureau establishes these factors, the CID will be enforced unless the petitioner demonstrates the CID imposes an "undue burden" or constitutes an abuse of process.

With respect to the Company's claim that the CID failed to state the nature of the conduct at issue, the Company argued that the CID's description of the purpose of the investigation was broad enough to encompass every aspect of mortgage lending, and thus did not satisfy the notice requirement established by the Dodd-Frank Act. n28 In rejecting this contention, the Bureau found that "notice was provided from the outset and repeatedly thereafter" beginning as early as January 3 and through to May 22 in the CID's "Notification of Purpose." In support of this finding, the CFPB cited cases standing for the proposition that the subject matter of investigations can be provided "quite generally." n29

With respect to the Company's assertion that the CID was an overly broad and unduly burdensome "fishing expedition," n30 the Bureau noted that the petition "offered little or no detail to make the kind of showing required to substantiate these claims." n31 It explained that in order to meet its legal burden, the petitioner needed to show the specific nature and the magnitude of the hardship and state specifically how compliance will harm its business. The CFPB noted also that it could not properly evaluate the burden of requesting responsive material because the Company failed to include its information technology personnel in the meet-and-confer discussions, despite the enforcement team's request. n32 The Bureau further noted that it already had made substantial modifications to the CID through the meet-and-confer process, and the Bureau's enforcement team had stated that it was willing to consider other potential limitations. n33

Finally, with respect to the Company's objection that the CID sought documents, items, and information exceeding the applicable limitations period, the CFPB maintained that the relevant issue was not whether the information itself was actionable but rather whether that information was relevant to conduct that was actionable. n34 It cited authority that allowed discovery beyond the statute of limitations period and noted the importance of collecting relevant information in order to accurately and completely investigate a matter. n35

On October 5, the CFPB issued its second decision on a petition to modify or set aside a CID. n36 The petitioner, Next Generation Debt Settlement, Inc. (Next Generation), challenged a CID instructing it to appear for an investigational hearing, which is similar to a deposition, on September 12. n37 Director Cordray denied the petition in its entirety and ordered Next Generation to appear at an investigational hearing within 10 days of the Order. n38

The CID, served on August 3, was issued in connection with an investigation into whether certain companies engaged in unlawful acts or practices in the advertising, marketing, or sale of debt settlement services. On August 20, the Bureau contacted Next Generation to confirm its attendance at the investigational hearing. n39 Receiving no response, on August 29, the Bureau sent a letter confirming Next Generation's attendance at the investigational hearing and alerting it to the fact that it had failed to meet-and-confer with the Bureau staff in accordance with the Bureau's rules regarding investigation. n40 On September 4, the Bureau received an e-mail from Next Generation's CEO, requesting that the CID be set aside. n41 Next Generation offered eight reasons why it should not be required to respond to the CID, all of which focused on potential defenses. n42

The Director denied the petition for three reasons. First, the petition was not filed within the time permitted under the rules regarding investigations. Next Generation's petition was due on August 24, 2012 but was not filed until September 4, and Next Generation did not offer any arguments as to why its petition should be considered in spite of its untimeliness. n43 Second, the Company failed to meet-and-confer with Bureau staff before filing the petition, and the CFPB's rules are clear that only those issues discussed in the meet-and-confer process will be considered. n44 Finally, the Bureau ruled that even if Next Generation satisfied the rules of investigation, its petition had no merit. n45 In the petition, Next Generation asserted substantive defenses to charges the Bureau did not assert, arguing that Next Generation does not engage in direct consumer marketing or telemarketing or commit other acts that might violate federal consumer financial law. n46 But facts relating to whether Next Generation is covered by or has violated a federal consumer financial law are not defenses to the enforcement of a CID, even if they might eventually be defenses to legal claims contemplated in the CID. n47

Lessons of The CID Rulings

Petitioning a newly-founded government agency in unchartered territories always is a difficult exercise. The increasing number of CFPB investigations and enforcement actions will make that exercise even more challenging. In light of the Bureau's first two decisions on petitions to modify or set aside a CID, potential CID recipients may wonder: how is the CFPB likely to respond to future petitions?

First, within days of receiving the CID, petitioners must be prepared to assess the extent to which they wish to challenge the scope and breadth of the CID. As the meet-and-confer is required within 10 calendar days after receipt, it is crucial for recipients to hit the ground running with (i) appropriate personnel who can provide the basis for arguing

the undue burden of responding to requests, and (ii) assistance from counsel to get recipients up to speed on the nature of the CID, forming responses, and time limits.

Second, the short turnaround time for filing a petition calls for quick strategic decision-making by the recipient. If the recipient chooses to file the petition, thereby preserving its objections and slowing down the CID process to gain time to examine its internal material, the petition and any order relating to it likely will be made public. Recipients may be forced to choose between preserving their right to object and public disclosure of a CFPB investigation.

Third, petitioners must be specific in their objections to a CID. Petitioners should specifically describe the burdens of supplying requested information and how the information sought is irrelevant to the investigation. The Bureau has criticized the use of "general objections," dismissing the arguments associated with those types of objections. n48

Fourth, petitioners must set forth objections that pertain to the requests presented in the CID. Next Generation argued in its petition that the CID should be waived or modified because the company had substantive defenses to any enforcement action. The CFPB rejected those arguments, stating that the Bureau has investigative authority "to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Bureau's judgment, the facts thus discovered should justify doing so." n49 This part of the ruling sends a message *that a defense to the merits to the CFPB's investigations is not a defense to the CID itself.*

Last, given the deferential standard of review which will be applied to such petitions, the meet-and-confer sessions take on increased importance. The meet-and-confer session is an opportunity to narrow the scope of the requests and close the information gap between the CFPB and the subject of its investigation. As a prerequisite to filing a petition, CID recipients are obligated to confer with the Bureau in a good-faith and productive effort to resolve issues. In fact, the Final Rules provide that "[t]he Bureau will not consider petitions to set aside or modify civil investigative demands *unless* the recipient has *meaningfully engaged* in the meet and confer process described in this subsection and *will consider only issues raised during the meet and confer process.*" n50 The CFPB's emphasis on cooperation was illustrated by its hardline approach to Next Generation's unresponsiveness and lack of effort to work with CFPB enforcement attorneys. Indeed, the Bureau noted in its first opinion that it already had made substantial modifications to the CID through the meet-and-confer process, suggesting that recipients are more likely to succeed with requests to modify a CID when they cooperate fully with Bureau attorneys from the onset, rather than take their chances with the Director.

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n1 Amanda M. Raines is Counsel and A.J. Dhaliwal is Associate Attorney at BuckleySandler LLP. They are actively advising financial services clients in connection with examinations and investigations involving the CFPB.

n2 Dodd-Frank Wall Street Reform and Consumer Protection Act, (HR 4173), Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010), Section 1052(c)(1); *see also* Rules Relating to Investigations, 12 C.F.R. Part 1080 *et seq.*

n3 Dodd-Frank Act, § 1052(f).

n4 12 C.F.R. § 1080.6(e).

n5 12 C.F.R. § 1080.6(e)(2).

n6 12 C.F.R. § 1080.6(e).

n7 12 C.F.R. § 1080.6(e)(1).

n8 12 C.F.R. § 1080.6(c).

n9 12 C.F.R. § 1080.6(e)(1).

n10 *Id.*

n11 12 C.F.R. § 1080.6(f)

n12 *Id.*

n13 The Bureau investigator may provide the Director with a statement setting forth any factual and legal response to a petition. 12 C.F.R. § 1080.6(e)(3). That statement, however, does not have to be served on the petitioner. *Id.*

n14 12 C.F.R. § 1080.6(g)

n15 *Decision and Order on PHH Corporation's Petition to Modify or Set Aside Civil Investigative Demand, In Re PHH Corporation, 2012-MISC-PHH Corp-0001 (Sept. 20, 2012), available at http://files.consumerfinance.gov/f/201209_cfpb_phhcorp_petition_0001.pdf [hereinafter September Order].*

n16 *PHH Corporation's Petition to Modify or Set Aside Civil Investigative Demand (June 1, 2012), available at http://files.consumerfinance.gov/f/201209_cfpb_phhcorp_petition_0001.pdf [hereinafter June Petition].*

n17 *See* September Order, *supra* note 15, at 1.

n18 *Id.*

n19 *Id.*

n20 *Id.* at 2.

n21 *Id.*

n22 *See* June Petition, *supra* note 16, at 2.

n23 *Id.* at 5.

n24 *Id.* at 3. The Company also asserted eight general objections to the CID.

n25 *See* September Order, *supra* note 15, at 3.

n26 *Id.* (emphasis added).

n27 *Id.* at 5.

n28 *See* June Petition, *supra* note 16, at 2.

n29 *See* September Order, *supra* note 15, at 6.

n30 *See* June Petition, *supra* note 16, at 7.

n31 *See* September Order, *supra* note 15, at 6.

n32 *Id.* at 2-3.

n33 *Id.* at 7.

n34 *Id.* at 7-8.

n35 *Id.* at 8.

n36 *Decision and Order on Next Generation Debt Settlement, Inc.'s Petition to Modify or Set Aside Civil Investigative Demand*, In Re Next Generation Debt Settlement, Inc., 2012-MISC-Next Generation Debt Settlement-0001 (Oct. 5, 2012), available at http://files.consumerfinance.gov/f/201210_cfpb_2012-MISC-Next-Generation-Debt-Settlement-0001-Order.pdf [hereinafter Next Generation Order].

n37 *Id.* at 1. Investigational hearings are conducted by Bureau for the purpose of hearing the testimony of witnesses and receiving documentary material, tangible things, or other information relating to any subject under investigation. See 12 C.F.R. § 1080.7(b). These hearings are conducted under oath or affirmation and stenographically reported. *Id.*

n38 See Next Generation Order, *supra* note 36, at 1.

n39 *Id.*

n40 *Id.*

n41 *Next Generation Debt Settlement, Inc.'s Petition to Modify or Set Aside Civil Investigative Demand* (Sept. 4, 2012), available at http://files.consumerfinance.gov/f/201210_cfpb_2012-MISC-Next-Generation-Debt-Settlement-Inc-0001-3_Redacted.pdf [hereinafter Next Generation Petition].

n42 *Id.* at 1-2.

n43 See Next Generation Order, *supra* note 36, at 2.

n44 *Id.*

n45 *Id.*

n46 *Id.*

n47 *Id.*

n48 See September Order, *supra* note 15, at 8.

n49 See, Next Generation Order, *supra* note 36, at 2.

n50 12 C.F.R. part 1080.6(c)(3) (emphasis added).

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