

What To Know About New CFPB Investigative Demand Policy

By **Tori Shinohara and Ori Lev** (June 11, 2019, 4:09 PM EDT)

On April 23, 2019, the Consumer Financial Protection Bureau announced a policy change to its civil investigative demand, or CID, process to provide entities with more information about the nature of the bureau's investigations.[1] The CFPB indicated that it will provide additional information in its CIDs about the potentially applicable provisions of law that may have been violated.

In addition, the bureau announced that, going forward, it will typically specify in its CIDs the business activities that are subject to its authority. The bureau also indicated that, in investigations where determining the extent of the bureau's authority over the relevant activity is one of the significant purposes of the investigation, bureau staff may specifically include that issue in the CID's notification of purpose "in the interest of further transparency." [2] These changes will provide additional information to entities under CFPB investigation about the focus of the investigation and potential future allegations.

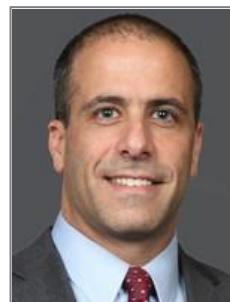
Section 1052 of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires the bureau, in every CID, to state "the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." [3] To comply with this statutory obligation, the first page of every CID issued by the bureau contains a section titled "Notification of Purpose Pursuant to 12 C.F.R. § 1080.5." This notification of purpose section is designed to provide the CID recipient with information about the nature of the bureau's investigation and the provisions of law that may have been violated.

Historically, however, the notifications of purpose in CIDs issued by the bureau often have been broad, vague and have provided targets of investigations with minimal information about the specific conduct being investigated or the potential legal violations the bureau believes may have occurred. For example, in the past, a CID's notification of purpose may have advised an entity that the CFPB was investigating potential violations of broad statutory provisions, such as the Dodd-Frank Act's prohibition against unfair, deceptive, or abusive acts or practices (known as UDAAP), or potential violations of an entire federal consumer financial law, such as the Fair Debt Collection Practices Act.

Notifications of purpose also rarely contained specificity about the potentially violative business conduct or activity. As a result, a CID's notification of purpose typically provided little value to entities facing a



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CFPB investigation. Instead, targets of investigations were forced to read the tea leaves of the CID's requests in an attempt to determine the bureau's likely focus and to predict possible allegations.

The CFPB's April 23 announcement acknowledges that the policy shift is the result of several recent developments. First, recent court decisions have invalidated CIDs issued by the bureau for failing to meet the minimum statutory requirement for notifications of purpose set forth in the Dodd-Frank Act.[4]

In a 2017 decision, the U.S. Court of Appeals for the D.C. Circuit held that, although a notification of purpose may use broad terms to articulate an investigation's purpose, Section 1052 of the Dodd-Frank Act requires that the bureau provide the recipient of the CID with "sufficient notice as to the nature of the conduct and the alleged violation under investigation." [5] In a 2018 decision, the U.S. Court of Appeals for the Fifth Circuit reversed a lower court decision upholding a CID's broad notification of purpose, holding that "the CFPB does not have the unfettered authority to cast about for potential wrongdoing." [6]

Another factor cited for the recent policy change was a 2017 report issued by the bureau's Office of Inspector General criticizing the Office of Enforcement's policy of issuing CIDs with broad notifications of purpose in order to "allow an investigation to develop over time." [7] Although the OIG report found that the CFPB generally complied with the statutory requirement with respect to the CIDs sampled, the OIG took issue with the fact that the bureau's internal guidance directed staff to describe the nature of the conduct and the potentially applicable law in very broad terms and did not expressly remind enforcement attorneys of the need for notifications of purpose to be compliant with relevant case law developments. [8]

In response to this recommendation, the bureau's Office of Enforcement revised its policy in August 2017 to remind staff that notifications of purpose must comply with recent case law developments. [9] Nevertheless, this policy update did not appear to have a practical effect on subsequently issued CIDs.

The third development that contributed to the April 23 policy change was a January 2018 request for information, or RFI, put out by the bureau on the CID process. Then-acting Director Mick Mulvaney solicited comments on various bureau functions through RFIs, including an RFI regarding the bureau's processes related to CIDs. [10] Among other things, commenters criticized the lack of transparency in the CID process.

After criticism by the courts, the OIG and industry stakeholders, the bureau's announcement that it will provide more information about the nature and purpose of its investigations may be viewed by some as long overdue. This announcement appears to signal that Kathy Kraninger, the CFPB's new director, favors transparency and is attuned to industry concerns.

And, shortly after the policy change was announced, the bureau put its policy into action by modifying the notifications of purpose in seven CIDs that were the subject of petitions to modify or set aside the CIDs. [11] Although none of the petitions to modify or set aside the CIDs succeeded in wholly setting aside the CID, in each of the orders, Kraninger modified the CID's notification of purpose to provide the petitioner with additional detail about the specific conduct being investigated and, in several cases, the specific provisions of law that may have been violated.

On April 25 — two days after the April 23 policy change announcement — five orders modifying notifications of purpose associated with the challenged CIDs were signed by Kraninger. On May 21, Kraninger issued two more orders in which notifications of purpose were modified. In most cases, the petitioners specifically argued that the CIDs’ notifications of purpose were statutorily deficient. In several cases, however, the petitioners did not raise arguments about the adequacy of the notifications of purpose. In these cases, Kraninger nonetheless exercised her discretion and modified the notifications of purpose for the CIDs at issue sua sponte. In the orders, Kraninger cited to the April 23 announcement as the reason for the modifications to the notifications of purpose.

The recent orders modifying notifications of purpose stand in contrast to similar earlier orders issued by the bureau denying petitions to set aside or modify CIDs. In the most recent order prior to Kraninger’s tenure, in June 2018, Mulvaney published a decision and order in response to a petition to modify or set aside a CID issued to Firstsource Advantage LLC. The notification of purpose in the CID at issue was very broad and simply advised Firstsource that the bureau was investigating “unlawful acts and practices in connection with the collection of debt” in violation of the FDCPA and the Dodd-Frank Act’s prohibitions against UDAAPs.[12]

Despite Firstsource’s assertions that the CID’s notification of purpose was statutorily deficient, Mulvaney denied the petition and found that the CID met the statutory notification requirement. Mulvaney further stated that the statutory notification of purpose requirement does not require a “detailed narrative” or any “meaningful dialogue” about the purpose of an investigation.[13] Under the new bureau policy, this notification of purpose would have been modified to provide greater specificity about the conduct under investigation. But the outcome of the petition to set aside the CID would not have changed, as the bureau to date still has not granted any petitions to set aside a CID in its entirety.

Although the bureau’s recent policy change will provide only incrementally more information to targets of investigations, it may signal that the new director is willing to provide greater transparency to the industry more broadly. For those entities on the receiving end of a CID from the CFPB, obtaining additional clarity regarding the focus of the investigation and the conduct the bureau views as potentially problematic may provide additional time to craft legal and factual defenses to potential allegations.

More detailed notifications of purpose may also serve to narrow the scope of requests in CIDs or provide CID recipients with additional grounds to challenge requests that appear to be unrelated to the purpose of the investigation. As one of the courts that invalidated a CID noted, overly broad notifications of purpose impede judicial review of the appropriateness of CIDs: “broad language used to describe th[e] purpose makes it impossible to apply” the judicial test for administrative subpoena enforcement because a court “cannot determine, for example, whether the information sought in the CID is reasonably relevant to the CFPB’s investigation without knowing what ‘unlawful acts and practices’ are under investigation.”[14] Conversely, more specific notifications of purpose may provide CID recipients with stronger arguments to push back on CID requests that appear to be mere “fishing expeditions” untied to the purpose of the investigation.

Only time will tell whether the bureau’s new policy will result in more narrowly tailored CID requests, but, at a minimum, it should provide CID recipients with greater notice of the focus of the CFPB’s investigation. And that alone is a welcome change.

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[1] See <https://www.consumerfinance.gov/about-us/newsroom/cfpb-announces-policy-change-regarding-bureau-civil-investigative-demands>.

[2] *Id.*

[3] 12 U.S.C. § 5562(c)(2); see 12 C.F.R. § 1080.5.

[4] See, e.g., *CFPB v. Accrediting Council for Independent Colleges and Schools (“ACICS”)*, 854 F.3d 683 (D.C. Cir. 2017); *CFPB v. The Source for Public Data, L.P.*, 903 F.3d 456 (5th Cir. 2018).

[5] *ACICS*, 854 F.3d at 690.

[6] *The Source for Public Data, L.P.*, 903 F.3d at 460 (internal quotations omitted).

[7] Consumer Financial Protection Bureau, Office of Inspector General, *The CFPB Generally Complies with Requirements for Issuing Civil Investigative Demands but Can Improve Certain Guidance and Centralize Recordkeeping*, at 8 (Sept. 20, 2017) (available at <https://oig.federalreserve.gov/reports/cfpb-civil-investigative-demands-sep2017.pdf>) [hereinafter, *OIG Report*].

[8] *OIG Report* at 7-8.

[9] *Id.* at 12.

[10] See 83 Fed. Reg. 12567 (March 22, 2018).

[11] See generally <https://www.consumerfinance.gov/policy-compliance/enforcement/petitions>.

[12] See *In Re Firstsource Advantage, LLC*, Decision and Order on Petition by Firstsource Advantage, LLC to Modify or Set Aside the Bureau’s Second Civil Investigative Demand, 2017-MISC-Firstsource Advantage, LLC-0001 (July 23, 2018). The full notification of purpose read: “to determine whether debt collectors, depository institutions, or other persons have engaged or are engaging in unlawful acts and practices in connection with the collection of debt in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010 [“(CFPA)”), 12 U.S.C. §§ 5531, 5536; the Fair Debt Collection Practices Act [“(FDCPA)”), 15 U.S.C. § 1692 et seq.; or any other Federal consumer financial law.” *Id.* at 1.

[13] *Id.* at 3.

[14] *ACICS*, 854 F.3d at 691 (internal quotations and citations omitted).