



STATE OF CALIFORNIA  
OFFICE OF THE ATTORNEY GENERAL  
XAVIER BECERRA  
ATTORNEY GENERAL

April 25, 2018

Ms. Monica Jackson  
Office of the Executive Secretary  
Consumer Financial Protection Bureau  
1700 G Street NW  
Washington, DC 20552  
E-Mail: FederalRegisterComments@cfpb.gov

**Re: Request for Information re: Bureau Civil Investigative Demands and Associated Processes [Docket No. CFPB-2018-0001]**

Dear Acting Director Mulvaney and Ms. Jackson:

On behalf of the undersigned Attorneys General, we write in support of the Consumer Financial Protection Bureau's (Bureau) historical and continued use of civil investigative demands. Civil investigative demands are an indispensable investigative tool and widely recognized as necessary for governmental entities to fulfill their legislative mandates. Their use is widespread throughout federal, state, and local government. Moreover, as our states' chief law enforcement officers, we have repeatedly witnessed the Bureau use its investigative authority in a fair and reasonable manner that seeks to limit the burdens on recipients while still achieving the Bureau's statutory and regulatory goals. We strongly oppose any curtailment of the Bureau's investigative authority, as it would significantly hinder the Bureau's ability to fulfill its mandate of promoting fairness, transparency, and competitiveness in the markets for financial products and services.

1. The Bureau's Implementation of Its Investigative Authority Was Non-Controversial and Based on Established Law Enforcement Practices

The Bureau has been statutorily authorized to conduct investigations since its founding, and its implementation of this authority proved non-controversial. In the wake of the last financial crisis, the Congress established the Bureau to "implement and, where applicable, enforce Federal financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."<sup>1</sup> To enable the Bureau to

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<sup>1</sup> 12 U.S.C. § 5511 (a).

achieve this mandate, the Congress specifically provided it with administrative subpoena authority and the ability to compel testimony.<sup>2</sup>

While the statutory grant of civil investigative authority did not require separate rulemaking, on July 28, 2011, the Bureau issued an Interim Final Rule for the Rules Relating to Investigations (Interim Final Rule).<sup>3</sup> In developing the Interim Final Rule, the Bureau examined the well-established investigative procedures of other federal law enforcement agencies, including the Federal Trade Commission (FTC) and the Securities Exchange Commission.<sup>4</sup> Given the similarities between the Bureau and the FTC, the Bureau drew heavily on the FTC's procedures in crafting its Interim Final Rule.<sup>5</sup> The Bureau also sought comments on its Interim Final Rule.<sup>6</sup>

The Interim Final Rule proved non-controversial. The Bureau received only seven responses to its invitation for comments.<sup>7</sup> Most of the commenters supported the Interim Final Rule, and where the commenters objected to portions of the Interim Final Rule, the Bureau addressed those comments and, when appropriate, modified the Interim Final Rule.<sup>8</sup>

On June 29, 2012, the Bureau published its final rules relating to investigations, which, like the Interim Final Rule, relied heavily on the well-established procedures of the FTC.<sup>9</sup> These rules remain in effect, and as set forth below, are an excellent example of the type of civil investigative procedures that have long benefited law enforcement and, by extension, the American public.

2. Civil Investigative Subpoena Authority Is Common Throughout Federal, State, and Local Governments
  - a. The Legislative Grant of Civil Investigative Demand Authority Allows Agencies To Fulfill Their Mandates

Without sufficient administrative subpoena authority, government agencies could not fulfill their legislative mandates.<sup>10</sup> As such, the Congress has granted administrative subpoena

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<sup>2</sup> 12 U.S.C. § 5562 (b).

<sup>3</sup> Rules Relating to Investigations, 76 Fed. Reg. 45,168 (July 28, 2011).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Id.* at p. 45,170.

<sup>7</sup> Rules Relating to Investigations, 77 Fed. Reg. 39,101, 39,102 (June 29, 2012).

<sup>8</sup> *Id.* at pp. 38,102-38,108.

<sup>9</sup> *Id.* at p. 39,102 (final rule codified at 12 C.F.R. § 1080.1, et seq.).

<sup>10</sup> See, e.g., Office of Legal Policy, United States Department of Justice, *Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities (DOJ Report)*, at p. 6 (2002), available at [https://www.justice.gov/archive/olp/rpt\\_to\\_congress.pdf](https://www.justice.gov/archive/olp/rpt_to_congress.pdf) (citing Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 Vand. L. Rev. 573, 584 (1994)).

authority to federal agencies in hundreds of instances.<sup>11</sup> Moreover, administrative subpoena authority is common throughout agencies dedicated to the preservation of fair markets and the protections of consumers and investors. For over a century, the FTC has been authorized to issue subpoenas and compel testimony in the course of an investigation,<sup>12</sup> and, as discussed above, the FTC's procedures served as a model for the Bureau's own investigative rules. Indeed, the Congress has determined that civil investigative authority is so necessary to the proper exercise of the Executive Branch's responsibilities that it is more common to find federal agencies with it than without.<sup>13</sup>

Nor do civil investigative demands exist only in the federal system. In California, for example, the Government Code empowers the head of each department in the state, including the Attorney General as the head of the Department of Justice, to issue subpoenas and to use other tools to investigate "all matters relating to the business activities and subjects under the jurisdiction of the department."<sup>14</sup> This grant of civil investigative authority has been crucial to the California Attorney General's mission of protecting consumers and honest competitors and, when appropriate, prosecuting violations of state law. Like their counterparts at the CFPB, FTC and other federal agencies, California prosecutors have used this authority responsibly and with appropriate regard for the rights of investigative targets and third party witnesses.

Similarly, the New York Attorney General has broad authority to issue subpoenas and take testimony when investigating "repeated fraudulent or illegal acts or otherwise [] persistent fraud or illegality in the carrying on, conducting or transaction of business" or "[d]eceptive acts or practices in the conduct of any business."<sup>15</sup> Likewise, the Virginia Attorney General has authority to issue civil investigative demands to compel the production of documents, answers to written interrogatories, and oral testimony in connection with investigating suspected violations of consumer protection laws.<sup>16</sup> In Maryland, "[i]n the course of any examination, investigation,

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<sup>11</sup> *DOJ Report* at p. 5.

<sup>12</sup> 15 U.S.C. § 49; 16 C.F.R. § 2.1 et seq.

<sup>13</sup> See *DOJ Report* at pp. 44-309 (compiling subpoena authorities submitted by federal agencies other than the Departments of Justice and Treasury). Congress has given such authority either through specific legislative grant or through the Inspector General Act of 1978.

<sup>14</sup> Cal. Gov. Code §§ 11180(a), 11181.

<sup>15</sup> See N.Y. Exec. Law § 63(12); N.Y. G.B.L. §§ 349(a), (f). New York courts have long recognized that these statutes grant the Attorney General "broad" investigative authority to issue subpoenas to "conduct investigations into possible violations of the law." See *Am. Dental Coop., Inc. v. Attorney-General*, 127 A.D.2d 274, 279 (1st Dep't 1987). The New York Attorney General "is not required to demonstrate probable cause or [to] disclose the details of his investigation." *Id.* at 280. The subpoena must simply bear "a reasonable relation to the subject-matter under investigation and to the public purpose to be achieved." *Matter of LaBelle Creole Int'l v. Attorney General*, 10 N.Y.2d 192, 196 (1961) (citation omitted)

<sup>16</sup> See, e.g., Va. Code § 59.1-9.10 (Virginia Civil Investigative Demand statute within the Virginia Antitrust Act); Va. Code § 59.1-201.1 (Virginia Consumer Protection Act); Va. Code § 6.2-1629(B) (Virginia Mortgage Lenders and Mortgage Brokers Law); Va. Code § 59.1-516(B) (Virginia Telephone Privacy Protection Act); Va. Code § 57-59(C) (Virginia Solicitation

or hearing conducted by him, the Attorney General may subpoena witnesses, administer oaths, examine an individual under oath, and compel production of records, books, papers, contracts, and other documents.”<sup>17</sup> The New Mexico Attorney General may issue a Civil Investigative Demand for documents or recordings, which he believes to be ‘relevant to the subject matter of an investigation of a probable violation’ of the state’s Unfair Trade Practices Act. .<sup>18</sup>

Moreover, New Mexico, Maryland, Pennsylvania and California, among other states, follow the principle laid out in *U.S. v. Morton Salt Co.*, 338 U.S. 632 (1950) which analogized executive investigative powers to those of a grand jury which “can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.” Id at 642-43. This is “official curiosity” standard set forth by the Court provides: “Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.”

b. Judicial Supervision Ensures that Recipients’ Rights Are Protected

Federal courts ensure that the Bureau does not overstep its bounds in exercising its civil investigative demand authority. First, the recipient of a demand from the Bureau may petition a district court to set it aside.<sup>19</sup> In addition, the Bureau’s demands are not self-enforcing: should a recipient not comply with the demand, the Bureau must turn to a district court for enforcement.<sup>20</sup>

As a result of this judicial supervision, a recipient’s rights are well-protected. Indeed, a recipient’s refusal to comply with a civil investigative demand carries with it no penalty until and unless (1) the Bureau petitions a district court for enforcement, (2) the district court orders the recipient to comply with the demand, *and* (3) the recipient refuses to comply with the court order.<sup>21</sup> As such, the Bureau’s investigative authority allows the Bureau to achieve its mandate while still providing ample safeguards to protect recipients’ rights. And while federal courts have not shied away from refusing to uphold investigative demands when they believe the Bureau has overstepped its bounds,<sup>22</sup> courts for the most part have determined that the Bureau has used its investigative authority properly.<sup>23</sup>

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of Contributions Law).

<sup>17</sup> Md. Code Ann., Comm. Law § 13-405(a).

<sup>18</sup> NMSA 1978 Section 57-12-12.

<sup>19</sup> 12 U.S.C. § 5562(f).

<sup>20</sup> 12 U.S.C. § 5562(e).

<sup>21</sup> 12 U.S.C. § 5562.

<sup>22</sup> See *CFPB v. Accrediting Council for Independent Colleges and Schools*, 854 F.3d 683 (D.C. Cir. 2017).

<sup>23</sup> See, e.g., *CFPB v. Heartland Campus Solutions, ESCI*, No. 17-1502, 2018 WL 1089806 (W.D. Pa. Feb. 28, 2018) [upholding CID]; *CFPB v. Seila Law, LLC*, No. 8:17-cv-01081, 2017 WL 6536586 (C.D. Cal. Aug. 25, 2017) [upholding CID after modifying two defined terms contained therein]; *CFPB v. Future Income Payments*, 252 F. Supp.3d 961 (C.D. Cal. 2017)

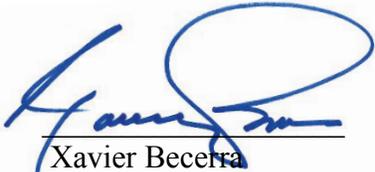
3. The Bureau Has Used Its Investigative Authority Responsibly and Effectively

As our states' chief law enforcement officers, each of the undersigned Attorneys General is familiar with the Bureau's use of its investigative subpoena authority in a manner that minimizes burdens on the recipient, while still allowing the Bureau to achieve its mandate. Our offices, for example, have witnessed firsthand the Bureau's responsible use of civil investigative demands in parallel investigations and/or prosecutions of (1) JPMorgan Chase & Co. for widespread debt-collection misconduct; (2) Ally Financial (formerly GMAC), Bank of America, Citibank, JPMorgan Chase & Co., and Wells Fargo relating to their illegal foreclosure practices; (3) Corinthian Colleges, Inc. for widespread misconduct related to student lending; 4) Rome Finance Company for charging military service members wildly inflated prices for goods through hidden finance charges and other deceptive practices; (5) companies that were alleged to have scammed 9/11 first responders suffering from cancer and other serious illnesses out of million dollars in compensation; and (6) a nationwide network of fly-by-night debt collection companies that had allegedly harassed, threatened, and deceived millions of consumers into paying inflated debts that they did not owe. In our experience, the CFPB has accommodated reasonable requests to narrow a CID's scope or to arrange a production schedule.

4. Conclusion

Because of its wide acceptance as an indispensable law enforcement tool, the authority to issue civil investigative demands is prevalent throughout all levels of American government. As our states' chief law enforcement officers, we have witnessed the Bureau use its investigatory subpoena authority in a manner that minimizes burdens on recipients while still allowing the Bureau to protect consumers and promote fair and transparent financial products and services. We oppose any effort to curtail the Bureau's civil investigative demand authority.

Sincerely,



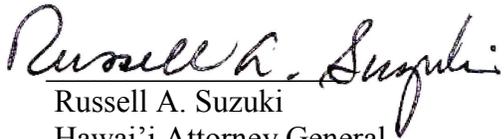
Xavier Becerra  
California Attorney General

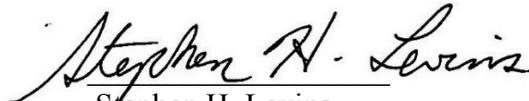


Matthew P. Denn  
Delaware Attorney General

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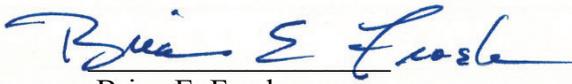
[upholding CID]; *CFPB v. Source for Public Data, LP*, No. 3:17-mc-16-G-BN, 2017 WL 2443135 (N.D. Tex. June 6, 2017) [upholding CID].

  
Russell A. Suzuki  
Hawai'i Attorney General

  
Stephen H. Levins  
Executive Director  
Hawai'i Office of Consumer Protection

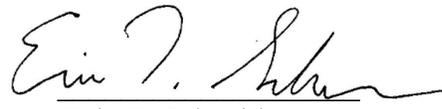
  
Lisa Madigan  
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Thomas J. Miller  
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Brian E. Frosh  
Maryland Attorney General

  
Lori Swanson  
Minnesota Attorney General

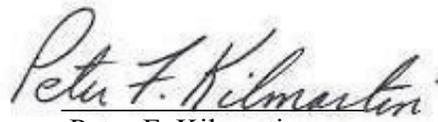
  
Hector Balderas  
New Mexico Attorney General

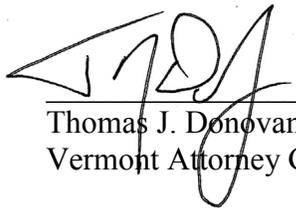
  
Eric T. Schneiderman  
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Joshua H. Stein  
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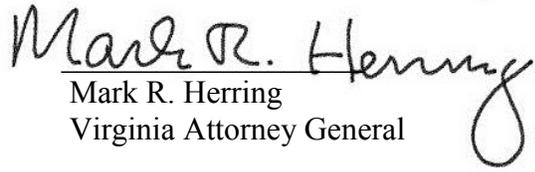
  
Ellen F. Rosenblum  
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Thomas J. Donovan, Jr.  
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