

6 Steps For Responding To A Civil Investigative Demand

Law360, New York (August 16, 2013, 12:31 PM ET) -- “You never get a second chance to make a first impression.” This old saying should be the theme for responding to a civil investigative demand from the Consumer Financial Protection Bureau. As part of its investigative powers, the new consumer watchdog is authorized to demand the production of documents and other information on short notice. You may literally have just hours to formulate a plan to respond to a CID, the execution of which could either protect or lead to the demise of your company.

So what should you do when you first learn that your company has been served with a CID?

Call Your Lawyer

If you ever needed your attorney, now is the time. A knowledgeable regulatory attorney who has experience with consumer protection regulators will help you decipher the requests contained in the CID and understand the nature and scope of the CFPB’s investigation:

- What information does the CID seek?
- Is your company the regulator’s target or merely a “person of interest” named to provide information or documents that may support claims against the true target?
- Does the CID implicate potential violations of federal consumer financial law or hot issues that have been the subject of recent CFPB focus?

This first-cut analysis will provide critical insights that can guide your strategy in responding to the regulator’s demands.

You should bring your attorney into the CID response process as quickly as possible to establish attorney-client communication privilege for any internal communications relating to the company’s response and the attorney work product privilege for your lawyer’s investigation.

Although these privileges generally will not shield the production of documents and information that existed before the CID was issued, any background information you provide to your lawyer, as well as your lawyer’s investigation in preparing your response, normally will not be discoverable by the bureau.

Call Your Techies

As soon as you identify the scope of the documents and information the CFPB has demanded from your organization, you need to bring in your information technology people. Their involvement from the outset is critical for a successful CID response. The very first action they should take is immediately to disengage any email, voicemail and other document management programs in place that may delete, archive or otherwise modify documents or information covered by the CID.

Your technical experts will also be invaluable in helping you determine where and how the responsive documents are stored, as well as how they can be retrieved in a timely and economical fashion. Time is of the essence since the deadlines for notifying the CFPB of any anticipated production problems or delays are extremely short.

You will need information from your technical personnel for discussions with CFPB regarding time estimates for searching and producing documents and information, search term formats, whether you will need special software and/or outside consultants to extract the requested information, the projected costs of compliance and the nature of any anticipated problems that may arise in connection with the search and extraction process. Finally, you will need the assistance of these experts in discussions with the CFPB about complying with the CID.

Turn off the Shredder

As soon as you learn that the CFPB is seeking your company's documents or other information, you must immediately take reasonable steps to preserve all related documents and information, regardless of whether it will eventually be produced to the government.

Among other things, you must immediately notify everyone in your organization with access to documents or information that relate to the investigation that reasonable steps must be taken to make them available for review and possible production to the CFPB. You should also turn off any autodelete and other document retention programs that systematically eliminate or otherwise render documents unusable after the passage of time.

In addition to locating and protecting paper files, you must take reasonable steps to preserve electronic evidence ranging from data stored on computer drives and tapes, smartphones and other devices to voice recordings and any other forms of information or documents that may fall within the scope of the CFPB's demands.

You should also coordinate with your IT person or department to ensure that all networks and machines with relevant information stored upon them are surveyed and imaged so that changes cannot occur that may affect the data that has been requested.

Call the CFPB

Shortly after you receive the CID, and once you have taken reasonable steps to ensure that the demanded documents and information will remain available, your counsel should contact the bureau's attorneys and/or investigators to discuss any potential problems you are likely to encounter in completing the production and to negotiate the resolution of these problems.

If you determine that all of the information requested cannot be produced within the initial deadline set by the CFPB, this is a good time to discuss whether a “rolling production” can be made of the documents as they become available.

The first purpose of this early communication is to initiate a dialogue with the CFPB’s staff regarding the scope of the documents and information needed to complete the response. For the purposes of these discussions, your counsel will need as much information as possible about the nature of any costs and challenges associated with producing the various categories of documents that the CFPB has demanded, including production difficulties based on privacy issues, storage and retrieval issues, proprietary concerns, information in the hands of third parties.

You should identify any problems you can reasonably anticipate that may cause you to need additional time to respond to the CID or that will make some categories of information difficult or impossible to produce. These issues should be explored in detail with counsel beforehand and then raised with the CFPB staff at the earliest opportunity.

A second critical reason for an early meeting with the CFPB staff is to comply with the agency’s meet and confer requirements, which are prerequisite to raising any legal challenges to the CID’s scope or on other grounds. According to the bureau’s rules, before you can bring a petition to modify or set aside a CID, you must meet and confer with the CFPB investigator within 10 calendar days of receiving the CID to discuss (and attempt to resolve) any issues regarding compliance.

You must also arrange for the availability of other company personnel with the knowledge needed to resolve issues related to complying with the CID, including any personnel who are familiar with the company’s information and records management systems and organizational structure and/or technical personnel who are familiar with the company’s electronically stored information systems and methods of retrieval to participate in these meetings.

If you do not “meaningfully engage” in this meet and confer process, the CFPB will not even consider a petition to modify or set aside, challenging the CID. In addition, the CFPB will only consider those issues that are addressed during the meet and confer process.

Decide Whether You Want the Whole World to Know

If you contemplate bringing a petition to modify or set aside the CID based on a challenge to the scope of the demand or other legal defenses, such as a legally protected privilege, it is important to understand that the CFPB will publicize your petition along with any subsequent order issued by the CFPB’s director, ruling on your petition.

In other words, if you choose to challenge the agency, the CFPB will publicize the investigation of your company that was, up until that point, not public, on the bureau’s website for the whole world to see — including the nature of the alleged violations under investigation by the CFPB. The CFPB’s rules relating to investigations provide that all petitions, and any orders issued by the director in response to those petitions, are part of the bureau’s public record “unless the Bureau determines otherwise for good cause shown.”

Last fall, the CFPB made good on this threat to disclose CID challenges in two separate investigations. Both challenges were denied — the director of the CFPB ruled that PHH Corporation failed to meet its burden to demonstrate that a CID was irrelevant or unduly burdensome, and Next Generation Debt

Settlement failed to comply with the agency's meet and confer requirements and failed to file its petition on a timely basis.

Although PHH had previously disclosed the investigation in a public filing, the CFPB published details about the nature of the agency's investigation, including specific information and document demands that were under contention, on its website.

Get Busy

No matter what strategy you decide to employ in responding to the CFPB's demands, you will have to move quickly to identify and produce the documents and information sought by the bureau. Even if you do not file a petition to modify or set aside the CID, the clock will run quickly on your efforts to assemble and produce the required documents.

It is critical that you immediately put together and coordinate your response team, including in-house and outside counsel, as well as compliance and IT personnel, and provide thorough and timely responses to the CFPB's demands.

Our experience has been that companies that are able to effectively manage their response to government investigations can often limit or avoid regulatory exposure altogether. On the other hand, businesses that respond to CIDs in a disorganized, ineffective or untimely manner are often targeted by regulators for subsequent enforcement actions.

The best approach for regulated businesses is to take proactive action before the regulator is at the door, establishing policies and procedures for the collection and maintenance of documents that demonstrate the company's compliance in a readily retrievable form, facilitating quick and effective productions. Apart from helping you get a better night's sleep, the payoffs for taking effective preparation measures beforehand substantially exceed the efforts that are required.

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