

March 28, 2018

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Office of the Executive Secretary  
Consumer Financial Protection Bureau  
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Washington, DC 20552.

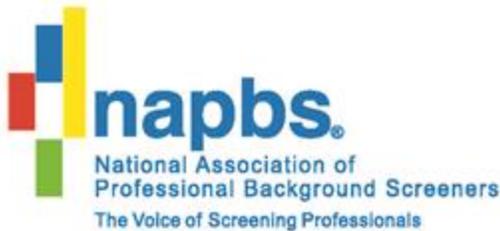
**Re:** Response of The National Association of Professional Background Screeners (“NAPBS”) to Request For Information Regarding Bureau’s Civil Investigative Demand (CID) Processes -- Docket No. CFPB-2018-0001

The National Association of Professional Background Screeners (“NAPBS”) is an international trade association of over 900 member companies. Its members provide employment and tenant background screening and related services to virtually every industry around the globe. The reports prepared by NAPBS’s background screening members are used by employers and landlords every day to ensure that workplaces and residential communities are safe for all who work, reside or visit there. NAPBS members range from large background screening companies to individually-owned businesses, each of which must comply with applicable law, including when they obtain, handle, or use public record data. NAPBS members also include court record retrieval services and companies that provide access to public record data to background screeners.

In the aftermath of the financial crisis, Congress tasked the Consumer Financial Protection Bureau (“CFPB”) with policing and regulating consumer financial products and services. Despite its limited mandate, the CFPB expanded its investigatory powers under the Civil Investigative Demand (CID) process to encompass companies and industries wholly unrelated to consumer financial products and services, including the employment and tenant background screening industry. NAPBS is therefore vitally interested in ensuring that its members, and other companies not providing a “financial product or service,” can obtain appropriate protection from CFPB overreach. Moreover, should the CFPB maintain use of its CID authority, it must fulfill the statutorily-required fair notice requirement by providing a concrete and specific notification of purpose to CID recipients. Accordingly, NAPBS and its members offer the following comments on the CFPB’s Civil Investigative Demand (CID) processes.

**The CFPB should issue CIDs consistent with its statutory purpose to regulate “consumer financial products or services under Federal consumer financial laws.”**

The majority of NAPBS’s members are consumer reporting agencies who provide consumer reports for employment or tenant screening purposes to employers and landlords and whose activities are governed by the Fair Credit Reporting Act (“FCRA”). However, consumer reports



that are used or expected to be used solely with regard to employment or residential lease applications or tenancy are not a “financial product or service” as defined by the Consumer Financial Protection Act (“CFPA”).<sup>1</sup> Further, those NAPBS members that retrieve court records or provide access to public record data or other available records to NAPBS’s consumer reporting agency members are not providing a “financial product or service,” nor are they covered by the FCRA. As a result, they are not subject to supervisory or enforcement authority the CFPB.<sup>2</sup>

Unfortunately, NAPBS members, and other companies not providing a “financial product or service,” have been inappropriately subjected to the CID process. Congress did not intend to provide such vast investigatory power to the CFPB, an agency tasked with policing and regulating consumer financial products and services. Of particular concern is the matter that it is not clear to CID recipients as to whether it is a third party from which information is being sought relative to an investigation of another (covered) company, or if they are a possible target. By outstripping its Congressional mandate, the CFPB forces CID recipients to either comply with inappropriate investigatory power or pursue time-consuming, costly challenges to the CFPB’s overreach. Third parties in particular should be afforded more protection from such undue burdens. As such, CIDs should not be issued outside of the CFPB’s specific mandate to police and regulate financial products and services.

**The CFPB’s notification of purpose should provide alleged wrongful conduct, or the person or activity that is subject to review.**

The CFPA tasks the CFPB with regulating “consumer financial products or services under the Federal consumer financial laws.”<sup>3</sup> In this role, the CFPB may, as appropriate, take enforcement actions to address violations of federal consumer financial laws.<sup>4</sup> In furtherance of its enforcement authority, the CFPB may conduct investigations through CIDs that require production of documents, tangible things, other information, or testimony.<sup>5</sup> However, any information that a CID requests must be “relevant to a violation” of Federal consumer financial law.<sup>6</sup> The CID must also “state the nature of the conduct constituting the alleged violation which

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<sup>1</sup> See 12 U.S.C. § 5481(15)(A)(ix)(I)(cc).

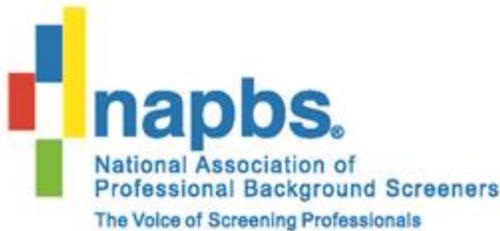
<sup>2</sup> The Federal Trade Commission retained its authority under Section 5 of the FTC Act regarding unfair and deceptive acts and practices and remains engaged in the background screening space. See Federal Trade Commission, “What Employment Background Screeners Need to Know About the Fair Credit Reporting Act” (Apr. 2016), available at <https://www.ftc.gov/tips-advice/business-center/guidance/what-employment-background-screening-companies-need-know-about>.

<sup>3</sup> 12 U.S.C. § 5491(a).

<sup>4</sup> 12 U.S.C. § 5511(c)(4).

<sup>5</sup> 12 U.S.C. § 5562(c)(1).

<sup>6</sup> *Id.* A “violation” means any act or omission that, if proved, would constitute a violation of any provision of Federal consumer financial law. 12 U.S.C. § 5561(5); The CFPA lists a number of “enumerated laws” in defining



is under investigation and the provision of law applicable to such violation.”<sup>7</sup> This requirement ensures that the recipient of a CID is provided with fair notice as to the nature of the CFPB's investigation. And because the validity of a CID is measured by the purposes stated in the notification of purpose, the adequacy of the notification of purpose is an important statutory requirement.<sup>8</sup> Without an adequately defined notice of purpose, courts are prevented from exercising their gatekeeping function under the controlling “reasonable relevance” standard.<sup>9</sup>

Unfortunately, CIDs are often issued with overly broad notifications, thereby precluding companies from raising legitimate concerns about bureaucratic overreach in the courts. For example, in a CID dated January 5, 2017, directed to The Source for Public Data (“SPD”), the CFPB provided the following notification of purpose:

The purpose of this investigation is to determine whether consumer reporting agencies, persons using consumer reports, or other persons have engaged or are engaging in unlawful acts and practices in connection with the provision or use of public records information in violation of the Fair Credit Reporting Act, 15 U.S.C § 1681, et seq., Regulation V, 12 C.F.R. Part 1022, or any other federal consumer financial law. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

The CID being issued contained a notification so broad that any conceivable person in the United States who touches public records would be subject to the CFPB's investigative powers and would be on notice of an alleged violation. At its broadest level, the investigation purports to cover “persons” who have engaged in “unlawful acts” in connection with the “provision or use of public records.” While the reasonable relevance standard permits some form of judicial inquiry into whether an administrative subpoena may be lawfully enforced, the CFPB's notification of purpose is so broadly written that the court cannot effectively perform its function, and the CID's recipient is deprived of its rights to fair notice and to lawfully challenge the scope of the CID. A more helpful and narrowly defined notification of purpose to the Source for Public Data would include information about the CFPB's intended target, the specific section(s) of the FCRA implicated in the notification, and an explanation of how the section(s) in question were violated.

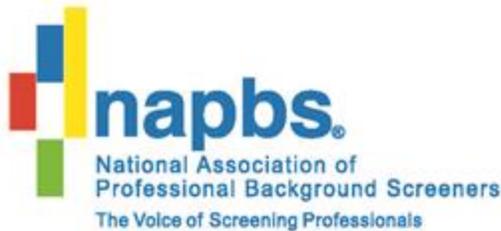
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“Federal consumer financial law” that include, for relevant purposes of the Petition, the FCRA. 12 U.S.C. §§ 5481(12), (14).

<sup>7</sup> 12 U.S.C. § 5562(c)(2).

<sup>8</sup> CFPB v. ACICS, 854 F.3d at 683, 690 (D.C. Cir. 2017).

<sup>9</sup> See *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950); *Burlington Northern Railroad Co. v. Office of Inspector General, Railroad Retirement Board*, 983 F.2d 631, 637 (5th Cir. 1993).



The CFPB must also describe the “provision of law applicable” to the alleged violation in such a way that it links the alleged wrongful conduct with the alleged violation. In broadly issued CIDs, the recipient can determine nothing about the suspected violations under investigation by the CFPB, let alone assess whether those violations fall under the CFPB’s limited authority over “financial products or services,” which could be the sole basis for any investigation or ultimate enforcement action.<sup>10</sup> For these reasons, as well as the length of the FCRA, we urge the CFPB to specify the statutory sections that have been violated in their notification of purpose.

By way of example, a number of NAPBS members are court researchers: individuals and companies that research and obtain criminal records from courts and provide them to the consumer reporting agencies, who then decide whether to include information from those records in their consumer reports provided to potential employers, landlords, or other users. The court researcher’s activity of obtaining public record data falls outside of the FCRA. And, the provision of information for employment or residential lease or tenancy decisions is specifically excluded from the definition of “financial product or service” under the CFPA.<sup>11</sup> Yet under the CFPB’s vague notification of purpose, those court researchers would have to endure a complete investigation and possible enforcement action before they would have any opportunity to challenge the CFPB’s authority.

NAPBS members and other CID recipients suffer when the CFPB circumvents its fair notice requirement. Whether through genuine misunderstanding of its statutory obligations to provide CID recipients fair notice of the purpose of its investigation, or through a desire to obfuscate, the CFPB’s notifications of purpose—which could often implicate any person who conducts commerce in the United States—have repeatedly come into question before the courts.<sup>12</sup> Congress gave the CFPB a clear directive to provide fair notice of the conduct under investigation; the CFPB statement in this instance, and many others, falls far short of that directive.

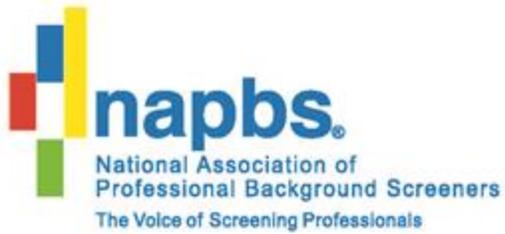
As such, NAPBS and its members recommend that the CFPB’s notification of purpose should fulfill the spirit and intent of § 1052 of the CFPA by identifying the particular, alleged wrongful conduct, or the person or activity, that is subject to review, along with a direct citation to the specific provision of the law allegedly violated. By providing concrete, specific notification as to the purpose of the investigation, the CFPB will serve the Congressional purpose of providing due process to recipients of CIDs, the recipients will gain a better understanding of the specific types of information sought from them, and frivolous challenges to proper CIDs will be discouraged.

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<sup>10</sup> 12 U.S.C. § 5481(15)

<sup>11</sup> 12 U.S.C. § 5481(15)(A)(ix)(I)(cc).

<sup>12</sup> See ACICS, 854 F.3d at 690-92.



NAPBS thanks the CFPB for the opportunity to share its comments regarding the CID process, and sincerely hopes its comments are beneficial to the CFPB's review of the CID process.

Sincerely,

A handwritten signature in black ink, appearing to read "Melissa Sorenson", written in a cursive style.

Melissa Sorenson, Executive Director  
National Association of Professional Background Screeners