

## **Request for Information Regarding Bureau of Civil Investigative Demands and Associated Processes**

### **Docket No. CFPB 2018-001**

The Native American Financial Services Association (NAFSA) is a 501 (c)(6) non-profit trade association headquartered in Washington, D.C. NAFSA was formed in 2012 to advocate for tribal sovereignty, the protection of consumer rights, and provide vital services to further economic development opportunities in Indian Country. As the Nation's leading tribal financial services trade association, NAFSA works directly with Indian tribes, tribal enterprises, and other Native-owned businesses to increase revenue, jobs and economic activity in Indian Country. Additionally, NAFSA has taken a lead role in developing business and economic development policy positions that respect tribal sovereignty, the adherence to applicable federal laws, and the promotion of responsible and sustainable economic opportunities.

Learning the lessons of those that came before them, tribes over the past few years have set out to create a business model that will ensure the sustainability and credibility of tribal lending enterprises (TLEs) for years to come. The creation of NAFSA in 2012 signaled a seismic shift in tribal expectations regarding financial services and the exercise of self-determination. To avoid the pitfalls of a joint enterprise model that traded sovereign rights for small revenue, NAFSA members worked to develop a sophisticated set of consumer protections and minimum operation requirements memorialized in industry best practices.

Members establish TLEs through existing tribal commercial enterprise laws. Tribes then typically pass a series of lending laws that closely mirror federal regulations like the Consumer Financial Protection Act, the Truth in Lending Act, and the Fair Debt Collection Practice Act. Finally, tribes create independent regulatory commissions to oversee consumer complaints and advise the tribe on improvements that can be made to the regulatory structure and lending codes. Some current commissioners for tribal regulatory authorities include a former State Bank Commissioner from Colorado, a CFPB acting enforcement director, a former U.S attorney, and a prior attorney general for the State of Arizona.

To solidify the importance of tribal regulation to TLEs, the Dodd-Frank Act recognizes tribes as co-regulators of TLEs and financial services on tribal lands. A robust and modern regulatory structure is an essential protection against challenges to the sovereign status of TLEs and a credible and responsible way to garner consumer trust.

NAFSA supports its members' efforts to limit the CFPB's authority enforcing CIDs against sovereign tribal entities. Although the U.S. Supreme Court failed to resolve this disputed split in reasoning between federal circuit courts last year, NAFSA recommends the CFPB restrict its CID authority with tribes and TLEs in favor of the co-regulatory system properly envisioned in the Dodd-Frank Act.

Federally-recognized tribes are defined in Title X of the Dodd-Frank Act (Consumer Financial

Protection Act) as “states.” When “states” are mentioned in the Act, it is almost always in reference to their co-regulatory relationship with the CFPB. For example, the CFPB is instructed to coordinate “fair lending efforts with other Federal regulators and State regulators.”<sup>1</sup> The CFPB is also advised to “coordinate with [...] Federal agencies and State regulators, as appropriate, to promote consistent regulatory treatment of consumer financial and investment products and services.”<sup>2</sup>

The Act goes further by requiring the CFPB to respect state and tribal laws: “[n]o provision of this title, except as provided in section 1083, shall be construed as modifying, limiting, or superseding the operation of any provision of an enumerated consumer law that relates to the application of a law in effect in any State with respect to such Federal law.”<sup>3</sup>

In guidance developed by the U.S. Department of the Treasury shortly after the passage of the Dodd-Frank Act, tribes were empowered to create their own consumer financial protection codes. The Treasury guidance also encouraged tribes to “enforce the CFPB’s rules in areas under their jurisdiction, the same way that states will be permitted to enforce those rules.”<sup>4</sup>

Tribal regulatory bodies enforce tribal and federal consumer laws, often adopting lending codes that mimic federal consumer protection laws. NAFSA Best Practices go above and beyond federal requirements in some instances, like requiring member TLEs to offer loan rescission. In the past, our members have made multiple attempts to develop MOUs with CFPB officials, invite agency personnel to visit tribal lands, and provide the Bureau with copies of tribal lending codes. In each instance, the CFPB rebuked tribal efforts and refused to engage in a government-to-government relationship with tribes as is common with other tribal-agency interactions.

TLEs are vitally important for tribes struggling with geographic and economic isolation. The long-term credibility and sustainability of tribal lending is dependent upon the consistent and respected application of tribal and federal laws to lending operations. Tribal regulatory commissions are in the best position to regulate TLEs and enforce consumer finance laws. In response to directives in the Dodd-Frank Act and guidance from the Treasury department, tribes developed parallel consumer laws and independent regulatory commissions to oversee TLEs. NAFSA recommends the CFPB respect tribal efforts to self-determine economic outcomes and defer to tribal regulators in the execution of any investigative inquiry.

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<sup>1</sup> 12 U.S.C. § 5493(c)(2)(B).

<sup>2</sup> 12 U.S.C. § 5495.

<sup>3</sup> 12 U.S.C. § 5551(b).

<sup>4</sup> U.S. Department of the Treasury, *The Dodd-Frank Wall Street Reform and Consumer Protection Act Benefits Native Americans*, October 2010, available at

<https://www.treasury.gov/initiatives/wsr/Documents/Fact%20Sheet%20-%20Benefits%20Native%20Americans,%20Oct%202010%20FINAL.pdf>.