



IN RE CHECKSMART)
 FINANCIAL COMPANY)
)
 2014-MISC-Checksmart)
 Financial Company-001)

DECISION AND ORDER ON PETITION BY CHECKSMART FINANCIAL COMPANY FOR AN ORDER SETTING ASIDE A CIVIL INVESTIGATIVE DEMAND

CheckSmart Financial Company petitioned the U.S. Consumer Financial Protection Bureau for an order modifying or setting aside a civil investigative demand (CID). For the following reasons, the petition is denied.

FACTUAL BACKGROUND

On August 27, 2013, the Bureau’s Office of Enforcement (“Enforcement”) issued a CID to CheckSmart, which stated in its “Notification of Purpose” that it had been issued “to determine whether payday lenders, check cashers, their affiliates, or other unnamed persons have been or are engaging in unlawful acts or practices in connection with the origination of payday loans and the cashing of payday loan proceed checks in violation of Sections 1031 and 1036 of the CFPA, 12 U.S.C. §§ 5531, 5536, or any other Federal consumer financial law,” and to determine “whether Bureau action to obtain legal or equitable relief would be in the public interest.” The CID posed twelve interrogatories and ten document requests seeking information related to different aspects of CheckSmart’s business model and operations. The CID required CheckSmart to schedule a meeting (“meet-and-confer”) with the Bureau within ten days of receipt of the CID, and to produce the requested documents by September 27, 2013.

On September 5, 2013, representatives of CheckSmart met and conferred with counsel from Enforcement by telephone in accordance with the Bureau’s Rules Relating to Investigation. 12 C.F.R. § 1080.6(c). During that meeting, CheckSmart raised several concerns relating to the costs associated with the recovery and processing of data requested by the CID. In addition, CheckSmart suggested narrowing the CID’s scope to cover only its transactions in Ohio. CheckSmart did not object to the CID’s production deadlines, its statement of the nature of the investigation, or other terms defined therein.

Subsequent to the meet and confer, CheckSmart repeated its prior requests to narrow the CID in a letter dated September 11, 2013. On September 13, 2013, Enforcement responded by declining to limit the CID to business conducted in Ohio. Enforcement did, however, agree to certain modifications to the CID’s interrogatories and document requests, in order to reduce CheckSmart’s costs of compliance with the CID.

Notwithstanding Enforcement’s modifications to the CID, CheckSmart filed its Petition to Set Aside or Modify the CID (“Petition”) on September 20, 2013. Thereafter, Enforcement continued to engage with CheckSmart in an effort to determine whether its business locations in states other than Ohio fell within the intended scope of the CID. On November 15, 2013, CheckSmart submitted a declaration to address Enforcement’s concerns. According to the declaration, CheckSmart “issues consumer loan proceeds to

customers from its Ohio-based locations in the form of a money order only,” whereas “[i]n all states other than Ohio, CheckSmart issues consumer loan proceeds to customers in cash only.” CheckSmart further explained that non-Ohio customers may affirmatively request conversion of their cash proceeds into a money order “without any encouragement or direction by CheckSmart.” Based on those assurances, Enforcement determined that storefronts not based in the state of Ohio are not within the intended scope of the CID, and further modified the CID on November 15, 2013, to require responses relating to CheckSmart’s Ohio-based locations only.

LEGAL DETERMINATION

CheckSmart raises a number of objections to the CID, some of which have been rendered moot by Enforcement’s subsequent modifications of the CID, and none of which provides a basis for setting aside or further modifying the CID.

First, CheckSmart contends that the Bureau’s CID does not provide sufficient notice of a lawfully authorized purpose because it did not adequately describe the conduct under investigation, and thus fails to comply with Section 1052(c)(2) of the Dodd Frank Act. *See* 12 U.S.C. § 5562(c)(2); 12 C.F.R. § 1080.5. CheckSmart failed to raise this argument during the meet-and-confer session, or in its letter dated September 11, 2013. The Bureau’s Rules Relating to Investigations state that an issue not raised during the meet-and-confer process may not be raised in a petition. 12 C.F.R. § 1080.6(c)(3). CheckSmart’s failure to timely raise this objection during the meet-and-confer is, by itself, a sufficient basis to reject it.

Even if CheckSmart had properly raised this argument, it would fail on the merits. CheckSmart argues that the Notification of Purpose “fails to satisfy the statutory requirement” and that it “merely identifies two general categories of business and covers the vast operations of originating short term small dollar amount loans and the cashing of the loan proceed checks.” Petition at 5. Section 1052(c)(2) of the Dodd-Frank Act requires a 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.” 12 U.S.C. § 5562(c)(2); *see also* 12 C.F.R. § 1080.5. The CID contains notification that the Bureau is investigating the “origination of payday loans and the cashing of payday loan proceeds.” The notification also expressly informs CheckSmart that the Bureau is investigating possible violations of Sections 1031 and 1036 of the CFPA, or any other Federal consumer financial law. The Bureau has previously found that notifications functionally equivalent to the one in this CID satisfied Section 1052(c)(2). *See In Re Aspire Financial Inc.*, 2013-MISC-Aspire Financial-001 at 2 (Apr. 16, 2013) (hereinafter *Aspire*); *In re PHH Corp.*, 2012-MISC-PHH Corp-001, at 5-6 (Sept. 20, 2012) (hereinafter *PHH Corp.*).¹ In addition, the conduct of potential interest to the Bureau is apparent from even a cursory reading of the CID’s detailed interrogatories and document requests. Accordingly, as in both *Aspire* and *PHH Corp.*, the recipient of the CID has been fully informed of the conduct of interest to the Bureau and the potentially applicable provisions of law. *See Material Handling Institute, Inc. v. McLaren*, 426, 426 F.2d 90, 92 (3d Cir. 1970).

Second, CheckSmart asserts that the CID must be set aside because its applicable time period extends “before the statutory authorities relied upon were even in existence.” Petition at 1. CheckSmart argues that because Sections 1031 and 1036 of the CFPA were not in effect prior to July 21, 2011, the Bureau may not enforce a violation of those provisions predicated on acts occurring before that date. Petition at 6.² CheckSmart suggests that the CID is unduly burdensome in that “any substantial burden” on

¹ The *PHH Corp.* decision is available at http://files.consumerfinance.gov/f/201209_cfpb_setaside_phhcorp_0001.pdf. The *Aspire* decision is available at http://files.consumerfinance.gov/f/201304_CFPB_MISC-Aspire-Financial-0001Order.pdf.

² In a footnote, CheckSmart suggests that conduct occurring prior to the Director’s appointment may not be

CheckSmart would be “excessive” because the Bureau has “no possible legitimate interest in the documents requested” because they existed prior to the designated transfer date. Petition at 7.

This contention is without merit. The Bureau’s CID authority under Section 1052(c)(1) of the Dodd-Frank Act expressly extends to all information “relevant to a violation.” 12 U.S.C. § 5562(c)(1). As an initial matter, the CID is intended to discover whether the actions taken by CheckSmart or others violated not only Sections 1031 and 1036 of the CFPA but also any other provision of Federal consumer financial law. The factual premise of CheckSmart’s objection—that the Bureau is seeking material that predates the effective date of the relevant provision of substantive law—is, therefore, incorrect.

More fundamentally, even if conduct occurring prior to the designated transfer date were not actionable, information concerning CheckSmart’s practices in the offering of payday loans throughout the approximately five-year period covered by the CID could still be relevant to actionable violations. For example, such information may assist Enforcement in evaluating CheckSmart’s knowledge of, and intent to comply or not comply with, applicable legal provisions governing those activities conducted after July 21, 2011. In addition, this information may provide important background about the initial design and implementation of CheckSmart’s potentially actionable activities. Accordingly, since documents and information that existed prior to the designated transfer date are relevant to potential violations of law, CheckSmart’s argument regarding the temporal scope of the CID must fail. *See PHH Corp.* at 7; *Aspire* at 3 (rejecting similar arguments).

Third, CheckSmart contends that the Bureau’s definition of “CheckSmart” is an unreasonable “attempt to reach other entities and persons, merely based on their association with CheckSmart.” Petition at 8. CheckSmart argues that because the conduct relevant to the CID occurred only with respect to CheckSmart’s subsidiaries in the state of Ohio, the Bureau should modify the definition of “CheckSmart” to mean “those subsidiaries of [CheckSmart] that offer loans pursuant to the Ohio Mortgage Loan Act and/or check cashing services licensed by the Ohio Department of Financial Institutions.” Petition at 9. As noted above, subsequent to the filing of the petition, the Bureau modified the CID to limit its scope to CheckSmart’s Ohio-based locations based on a signed declaration by CheckSmart President Kyle Hanson that only Ohio-based locations issue loans in the form of a money order without a specific consumer request. The CID does not require information relating to “any person or entity even remotely connected with CheckSmart” (Petition at 8). While the definition of “CheckSmart” is broadly written to encompass relevant entities and persons, the Interrogatories mostly seek information relating to those storefronts that offer both “consumer loans in the form of a check, money order, or other payment instrument and check cashing services.” Modification Letter 2 (Sept. 13, 2013). According to CheckSmart, that combination of services is offered only from its Ohio-based storefronts. This objection, therefore, is moot.

Fourth, CheckSmart contends that the Bureau’s definition of “Consumer Loan” is burdensome because it determines a scope that “potentially covers almost all loan transactions for every one of CheckSmart’s subsidiaries, which are not properly the subject of the CID.” Petition at 10. The CID defines “Consumer Loan” to mean “any loan that your company offers that is secured by a consumer’s postdated check or checks.” CheckSmart proposes to redefine this term to mean “any loan offered by ay subsidiary of [CheckSmart], the proceeds of which are regularly delivered to borrowers in the form of a money order or other non-cash form.” Petition at 10. Subsequent to CheckSmart’s petition, and based on the sworn representations of CheckSmart’s President, Enforcement agreed to limit the CID to information relating to

relevant to the Bureau’s investigation. Petition at 6 n.2. But CheckSmart fails to explain why the appointment of a Director to the Bureau has any bearing on whether it violated the law, or otherwise provides a basis for modifying or setting aside the CID.

Ohio-based storefronts, which according to CheckSmart are the only storefronts that routinely deliver loan proceeds by money order. Accordingly, CheckSmart's objection to the scope of the term "Consumer Loan" is moot.

Fifth, CheckSmart contends that the CID's instructions are burdensome. CheckSmart objects to the "Scope of Search" instruction on the grounds that whether someone is acting as an "agent" is a legal conclusion, that "consultant" is an objective interpretation, and that the demands for information from attorneys are indefensible. Petition at 10. In addition, CheckSmart objects to the term "Constructive Custody" as overly burdensome because it would allow the Bureau to compel production of documents that are not actually in its possession, custody or control, such as former employees and companies with whom it no longer is associated. Petition at 10-11. Finally, the Petition includes an objection to the instructions on "Document Identification," "Information Identification," "Submission of Documents in lieu of Reports or Answers," and "Instruction P" (regarding references to "year" or "annual") because compliance is oppressive in light of the overly broad scope of the CID. Petition at 11.

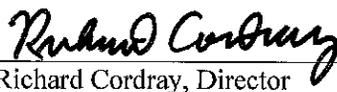
CheckSmart failed to raise these objections during the meet-and-confer session or in its September 11th letter that requested modifications to the CID. As stated above, the Rules on Investigations are clear that an issue not raised during the meet-and-confer process may not be raised in a petition. 12 C.F.R. § 1080.6(c)(3). Accordingly, CheckSmart's failure to timely raise these objections precludes its consideration of the issue in this context.

Even if CheckSmart had timely raised these objections, however, they would be rejected. CheckSmart has not made a "good-faith effort to show 'the exact nature and extent of hardship' imposed, and state specifically how compliance will harm its business." *PHH Corp.* at 6 (quoting *FTC v. Markin*, 391 F. Supp. 865, 870-71 (W.D. Mich. 1974)). The Petition offers little detail to make the kind of showing required to substantiate its claims. Although CheckSmart claims that the Bureau has no legal authority to require these instructions, it ignores the broad authority granted to the Bureau by Rule 1080.6(a)(1)(ii) ("Production of documentary material in response to a [CID] shall be made under a sworn certificate, *in such form as the demand designates...*") (emphasis added) and Rule 1080.6(3)(ii) ("Responses to a [CID] for a written report or answers to questions shall be made under a sworn certificate, *in such form as the demand designates...*") (emphasis added). 12 C.F.R. § 1080.6(a)(1)(ii), 1080.6(a)(3)(ii).

Finally, CheckSmart closes its petition by asserting a series of general objections to "vague, ambiguous or overly broad words or terms" used throughout the CID. Petition at 12. According to *PHH Corp.*, however, "[a] petition to quash is a mechanism for raising specific objections to the CID, substantiated by factual information and legal argument, for resolution by the Director." *PHH Corp.* at 8. In this case, as in *PHH Corp.*, the Petition's long list of conclusory objections falls short of that standard.

CONCLUSION

For the foregoing reasons, CheckSmart's petition to modify or set aside the Civil Investigative Demand in this matter is denied. Within 30 calendar days of this Decision and Order, CheckSmart is directed to produce all responsive documents, items, and information within its possession, custody, or control that are covered by the CID. CheckSmart is also welcome to engage in further discussions with the Bureau's enforcement team to request any brief further extension of the CID deadline that may be deemed appropriate by the Assistant Director for Enforcement or a Deputy Assistant Director for Enforcement.


Richard Cordray, Director

January 22, 2014