

Bureau of Consumer Financial Protection
1700 G Street NW
Washington, D.C. 20552



IN RE BANK OF AMERICA CORP.)

2019-MISC-Bank of America Corp.-0001)

**DECISION AND ORDER ON PETITION BY BANK OF AMERICA CORP. TO SET
ASIDE OR MODIFY CIVIL INVESTIGATIVE DEMAND**

Bank of America Corp. (BAC or Bank) has filed a petition with the Bureau seeking to set aside or, in the alternative, modify a civil investigative demand (CID) that the Bureau served on it on March 1, 2019, and that the Office of Enforcement modified by letter dated March 20, 2019. For the reasons set forth below, the petition is denied. BAC also requests confidential treatment of certain information in the petition. I defer deciding that request, as explained further below.

FACTUAL BACKGROUND

On March 1, 2019, the Bureau issued a CID to BAC as part of an investigation into whether depository institutions or other persons had engaged in unlawful acts or practices in connection with unauthorized consumer bank, credit card, and other accounts. As originally issued, the March 1 CID contained four interrogatories, six requests for documents, and one request for a written report. The CID set March 31, 2019, as the date for compliance.

The Bureau's rules require the recipient of a CID to meet and confer with a Bureau investigator regarding compliance. 12 C.F.R. § 1080.6(c). Pursuant to that requirement, BAC's counsel met with Bureau investigators on March 13, 2019. During that meeting, BAC argued (1) that the central issue in this investigation had already been addressed by other regulators, (2) that the CID is unduly burdensome, and (3) that any further inquiry in this matter should be handled by the Bureau's Office of Supervision. On March 19, 2019, BAC followed up with a letter requesting modifications to the CID and to the deadline to petition to modify or set aside the CID. On March 20, in response to these requests, the Office of Enforcement modified the CID, including to narrow the time period of the information it sought. The Office of Enforcement also extended the deadline for petitioning for an order setting aside or modifying the CID to March 28, 2019. BAC timely filed a petition on that date.

LEGAL DETERMINATION

BAC's petition raises three arguments: (1) that the Bureau's investigation is "unnecessary," "redundant," and "unduly burdensome" because, according to BAC, the evidence that it has already provided to the Bureau [REDACTED] has established that it had no systemic sales misconduct issues; (2) that the CID creates "unreasonable and unnecessary burdens"; and (3) that any further inquiry into BAC's sales practices should be conducted by the Office of Supervision, not by the Office of Enforcement. I address each argument in turn.

I. DETERMINATION ON PETITION TO MODIFY OR SET ASIDE

A. Argument that the CID is Unnecessary and Redundant

BAC first argues that the CID should be set aside because "further investigation is unnecessary and redundant," and imposes undue burdens, because information that BAC already provided to the Bureau [REDACTED] "has shown no systemic sales misconduct issue at the Bank." Pet. at 6. In other words, BAC argues that it has shown that it did not violate the law, so the Bureau should close its investigation. See Pet. at 2 & n.3.

At the outset, I note that the Petition does not appear to contend that the CID is legally improper because BAC already established that it did not violate the law. Nor could it. As the Bureau has explained before, "an entity's fact-based arguments about whether it has complied with" the law "are not valid defenses to the enforcement of a CID." *In re Firstsource Advantage, LLC*, 2017-MISC-Firstsource Advantage, LLC-0001 (July 23, 2018), at 2.¹ Rather, the Supreme Court has "consistently reaffirmed" that "a fact-based claim regarding ... compliance with the law" is not a ground for a court to refuse to enforce a CID. *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1076 (9th Cir. 2001). This is because an agency "could not fulfill its investigative responsibilities, if ... it first had to make a finding of liability." *In re Sealed Case*, 42 F.3d 1412, 1416 (D.C. Cir. 1994).

Instead, BAC claims that the CID is "unduly burdensome" in light of the fact that it has (in its view) already submitted evidence showing that it did not violate the law. Pet. at 2 n.3. But an administrative subpoena is unduly burdensome as a matter of law only where "compliance threatens to unduly disrupt or seriously hinder normal operations of a business." *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (en banc); accord, e.g., *NLRB v. Am. Med. Response, Inc.*, 438 F.3d 188, 193 n.4 (2d Cir. 2006) ("[C]ourts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business." (internal quotations omitted)). BAC has not even suggested that the CID imposes that sort of burden.

In substance, BAC effectively requests that the Bureau, in the exercise of its discretion, set aside the CID (and close the investigation) on the ground that the evidence it has already

¹ https://www.consumerfinance.gov/documents/6675/bcfp_firstsource-advantage-llc_decision-order-on-petition_2018-07.pdf.

provided sufficiently establishes that BAC did not commit any systemic violations of federal consumer financial law by opening unauthorized accounts. Such a request is not properly made in a petition to modify or set aside a CID. Such a petition is a means by which a CID recipient can raise “any failure of the demand to comply with [the statutory provisions governing CIDs, 12 U.S.C. § 5562]” or “any constitutional or other legal right or privilege of such person.” 12 U.S.C. § 5562(f)(3). It is not a means by which entities can challenge the Bureau’s discretionary decisions on what lawful investigations it should pursue. As the Bureau recently explained, an order on a petition to modify or set aside a CID “is appropriately addressed only to the limited question whether the Petition has identified legal grounds to set aside or modify” a CID. *See In re FastBucks Holding Corp.*, No. 2018-MISC-FastBucks Holding Corporation-0001 (Apr. 25, 2019), at 2. Because BAC’s objections relating to what it believes it has already established do not raise a “legal ground” to set aside the CID, I decline to set aside the CID on that basis.

B. Argument that the CID is Unduly Burdensome

Next, BAC argues that the CID is unduly burdensome. At the outset, I note that it appears that BAC did not “meaningfully engage[]” in the meet-and-confer process described in the Bureau’s rules, 12 C.F.R. § 1080.6(c), to raise its burden objections. Although BAC generally raised burden concerns with Bureau investigators, it provided no specifics about the burden that the CID posed, which prevented Bureau investigators from meaningfully considering modifications that could minimize burden while still enabling the Bureau investigators to get the information they need. In its Petition, BAC claims that a meet-and-confer “is neither an appropriate nor practical setting for the Bank to provide an in-the-weeds explanation” of its burden. Pet. at 11 n.22. This is incorrect; the meet-and-confer process is designed to give a CID recipient and the Bureau an opportunity to “attempt to resolve all issues regarding compliance” with a CID, 12 C.F.R. § 1080.6(c), and that can happen only if the parties meaningfully engage on the issues, including by discussing burden and the logistics of responding in detail where appropriate. BAC’s failure to meaningfully engage in the meet-and-confer process is alone sufficient grounds to reject the burden arguments raised in BAC’s petition. *See* 12 C.F.R. § 1080.6(c)(3) (“The Bureau will not consider petitions to set aside or modify a civil investigative demand unless the recipient has meaningfully engaged in the meet and confer process described in this subsection and will consider only issues raised during the meet and confer process.”).

Even if BAC had meaningfully engaged in the meet-and-confer process, it has not established that the CID should be set aside or modified on the basis of burden. The recipient of a CID bears the burden to show that a request is “unduly burdensome.” *FTC v. Texaco, Inc.*, 555 F.2d at 882. That “burden is not easily met where”—as BAC has not disputed here—“the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose.” *Id.* That is why, on review, courts will not “modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.” *Id.*; *accord, e.g., NLRB v. Am. Med. Response, Inc.*, 438 F.3d at 193 n.4.

BAC has not attempted to make this showing. BAC’s petition states that the Bank has spent [REDACTED] responding to the Bureau’s CIDs so far, and that its efforts “have significant operational” impacts because [REDACTED] employees have spent [REDACTED]

hours to complete reviews for other regulators. Pet. at 9. The Petition also asserts in conclusory fashion that diverting employees to respond to the Bureau's CID "would harm the Bank and its customers." Pet. at 12-13. BAC has not even asserted—let alone provided evidence showing—that responding to the CID would "threaten[] to unduly disrupt or seriously hinder normal operations," *Texaco*, 555 F.2d at 882. Its claim of undue burden fails for that independent reason as well. *Accord EEOC v. Randstad*, 685 F.3d 433, 452 (4th Cir. 2012) (concluding that evidence "was insufficient as a matter of law" to establish undue burden where company did not show "that gathering the requested information would threaten or seriously disrupt [the company's] business operations" (internal quotations omitted)).

To the extent that BAC requests that the Bureau, in its discretion, set aside or modify particular parts of the CID on the basis of burden, I address those requests in the section addressing "Requests for Modification" below.

C. Argument that Further Work Should Be Conducted by Supervision

Finally, BAC argues that any further inquiry into BAC's sales practices should be conducted through the supervisory process, not through an enforcement investigation. The Petition does not appear to contend that using CIDs (or using other investigative tools) is legally improper. Nor could it, for the controlling statutory framework affords the Bureau the discretion to decide how best to deploy the Bureau's resources, and which tools to use in which circumstances. Instead, BAC appears to request that the Bureau, in its discretion, use its supervisory tools, rather than its enforcement tools, to determine whether BAC committed unlawful sales practices. This is not a request properly made in a petition to modify or set aside a CID, for the same reasons that it is not proper to use a CID petition to ask that the Bureau close an investigation because (in the recipient's view) it has already shown that it engaged in no wrongdoing. I accordingly decline that request.

D. Requests for Modification

In the alternative, BAC asks the Bureau to modify the CID in several respects. I address each requested modification in turn.

1. Applicable Period for Responsive Information

First, BAC asks that the Bureau narrow the time period for which the CID requests information so that it begins no earlier than March 1, 2014 because any earlier conduct would fall outside "any relevant statute[] of limitations." Pet. at 13-14. I deny this request for two reasons. First, the Bureau can properly seek information regarding conduct outside the applicable limitations period. Conduct outside a limitations period can bear on conduct within the limitations period. *See, e.g., CFPB v. Future Income Payments, LLC*, 252 F. Supp. 3d 961, 969 (C.D. Cal. 2017) ("[E]ven assuming that the only actionable conduct occurred within the past three years, the CFPB may properly demand information for an additional two years because this information is reasonably relevant to conduct occurring within the statute of limitations period."), *vacated in irrelevant part*, No. 17-55721 (9th Cir. Oct. 18, 2018); *CFPB v. Harbour Portfolio Advisors, LLC*, No. 16-14183, 2017 WL 631914, *5 (E.D. Mich. Feb. 16,

2017) (similar). Second, BAC is mistaken about when the limitations period begins. To take just one example, unauthorized account openings could violate the CFPB's prohibition on unfair, deceptive, and abusive practices, 12 U.S.C. § 5536(a)(1)(B). The Bureau must bring such claims within three years of "the date of *discovery* of the violation." 12 U.S.C. § 5564(g)(1) (emphasis added). BAC makes no argument that the Bureau has already "discovered" violations such that this limitations period has begun to run, let alone that it has expired. I therefore decline to modify the applicable period for responsive information.

2. Interrogatory 1

BAC next asks the Bureau to modify Interrogatory 1 to seek information regarding a narrower time period. BAC argues that it already produced [REDACTED] an analysis covering a narrower timeframe than Interrogatory 1 covers, and the results of that other analysis, BAC contends, "are not consistent with any systemic concerns." Pet. at 12. Thus, BAC contends, it would be unduly burdensome to conduct the analysis necessary to respond to Interrogatory 1 for the longer timeframe—as that additional analysis would likely just "affirm the results of the multiple reviews the Bank has already undertaken." Pet. at 12-13. BAC accordingly asks that the Bureau narrow the time period and accept the analysis that it performed [REDACTED] as a complete response to Interrogatory 1.

I decline this request. In the meet-and-confer process, BAC indicated that the review it completed for the narrower time period would not actually answer the question posed by the Bureau's interrogatory even if the time period for the interrogatory were narrowed. In other words, to answer the question posed, the Bank has indicated that it will have to conduct a new analysis, regardless of whether the time period is narrowed. I therefore decline to accept the analysis regarding the narrower time period as a complete response to Interrogatory 1. The Bank is welcome to continue to discuss, and to seek to resolve, issues about the burden of Interrogatory 1 with the Office of Enforcement.

3. Request for Written Report

BAC next asks the Bureau to strike the Request for Written Report from the CID. The CID's Request for Written Report instructs BAC to provide certain information about [REDACTED]. BAC claims that providing this information would be unduly burdensome because "[t]here is no automated way for the Bank to collect this information." Pet. at 10. In addition, BAC objects that this request appears to "be a vehicle by which [REDACTED] which, BAC contends, would not be valid because before March 2017, the Bank [REDACTED]. Pet. at 10.

These contentions underscore the importance of meaningfully engaging in the meet-and-confer process. Although not entirely clear, the Bank seems to say that it has [REDACTED] in branches before March 2017. It is not apparent, then, why responding to the Request for Written Report would be burdensome. If [REDACTED] the Bank can say so—and

the Bank has not explained why it would require manual account-level review to identify those accounts. And even if providing the requested information regarding other accounts (*i.e.*, accounts not opened in person at bank branches or opened in a branch in or after March 2017) would require manual review, the Bank has not provided any information about how many other such accounts exist. Further, the Bank has not described how the relevant information is maintained, so the Bureau has no opportunity to consider an alternative approach. All of these issues could have been explored during the meet-and-confer process had the Bank raised its burden concern with sufficient specificity at that time.

Based on the limited information in the Petition, I decline to modify the CID to strike the Request for Written Report. The Bank is welcome to continue to discuss, and to seek to resolve, issues about the burden of the Request for Written Report with the Office of Enforcement.

4. Document Request 3

Next, BAC requests that Document Request 3 be stricken on the ground that it is unduly burdensome. BAC claims that this document request “raise[s] a host of privilege issues,” and that analyzing these issues and producing a privilege log would be “a time-consuming exercise that is disproportionate to the Bureau’s need for the information” given that BAC has already shown that it did not engage in systemic misconduct. Pet. at 10-11.

Many requests for documents require review for privilege, and having to conduct such a review does not amount to a burden that warrants striking this request from the CID. And, as noted above, it is the Bureau’s responsibility to determine whether violations of law occurred, and I conclude that it is appropriate for the Bureau to continue its investigation here.

5. Document Requests 1, 2, 4, and 5

Finally, BAC asks the Bureau to strike Document Requests 1, 2, 4, and 5 from the CID on the ground that they, too, implicate privilege issues and seek documents from a broader range of custodians. According to BAC, these requests are “facially burdensome.” Pet. at 11. BAC has not identified potential custodians, or even categories of custodians, and instead asserts that it “should be obvious” that “[s]imply identifying all the custodians ... is burdensome in its own right.” Pet. at 11 n.22. This, again, highlights why recipients of CIDs must meaningfully engage in the meet-and-confer process. Had BAC done so, the Bureau’s Office of Enforcement could have explored ways to narrow the request, as it did for Document Request 3. Moreover, BAC’s assertions of burden now, in addition to being waived, are far too conclusory to warrant striking or modifying the requests. BAC is welcome to continue to discuss potential modifications with the Office of Enforcement.

II. MODIFICATION OF THE NOTIFICATION OF PURPOSE

BAC does not challenge the sufficiency of the notification of purpose in the CID, which describes the scope of the investigation as required by 12 U.S.C. § 5562(c)(2) and 12 C.F.R. § 1080.5. Nevertheless, pursuant to my authority under 12 C.F.R. § 1080.6(e)(4), I will modify the CID’s notification of purpose to provide even more information about the nature of the

conduct under investigation and the applicable provisions of law, consistent with the recently announced policy of the Bureau's Office of Enforcement. Accordingly, the notification in the CID will now read as follows:

The purpose of this investigation is to determine whether depository institutions or associated persons, in connection with deposit or credit card accounts, have: (1) opened accounts without consumers' authorization, in a manner that is unfair or abusive in violation of Sections 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536; (2) failed to perform the duties of a furnisher of information to consumer reporting agencies with respect to such unauthorized accounts, in a manner that violates the Fair Credit Reporting Act, 15 U.S.C. § 1681s-2, or Regulation V, 12 C.F.R. pt. 1022 subpt. E; (3) failed to provide required disclosures to consumers whose accounts were opened without authorization, in a manner that violates Regulation E, 12 C.F.R. § 1005.7, Regulation Z, 12 C.F.R. pt. 2016 subpt. B, or Regulation DD, 12 C.F.R. § 1030.4; or (4) issued access devices or credit cards without consumers' authorization, in a manner that violates Regulation E, 12 C.F.R. § 1005.5, or Regulation Z, 12 C.F.R. § 1026.12. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

III. DETERMINATION ON REQUEST FOR CONFIDENTIALITY

BAC requests that its Petition be kept confidential in its entirety or, in the alternative, that certain portions be redacted. I defer decision on that request to give BAC the opportunity to substantiate its claim that parts of the Petition should be kept confidential consistent with Exemption 4 of the Freedom of Information Act, as explained further below.

The Bureau's regulations governing investigations provide that CID petitions and the Bureau's orders in response to those petitions are "part of the public records of the Bureau unless the Bureau determines otherwise for good cause shown." 12 C.F.R. § 1080.6(g). This standard mirrors that of the Federal Trade Commission. *See* 16 C.F.R. § 4.9(c)(1); *see also* FTC, Disclosure of Investigations, 42 Fed. Reg. 64135, 64135 (Dec. 22, 1977) (explaining, with respect to the FTC's similar CID petition process, that "the administrative interpretations of [the Commission's] laws and rules embodied in the motions and the applications, and the Commission's response thereto should be disclosed"). It is also consistent with the "general policy favoring disclosure of administrative agency proceedings." *FCC v. Schreiber*, 381 U.S. 279, 293 (1965) (affirming agency authority to promulgate a rule generally requiring public disclosure of investigative information). As the Bureau has explained, a petitioner bears the burden of demonstrating good cause that a petition should not be made public. *See In re Firstsource Advantage, LLC*, 2017-MISC-Firstsource Advantage, LLC-0001 (July 23, 2018), at

6-7²; *In re Great Plains Lending, LLC*, 2012-MISC-Great Plains Lending-001 (Sept. 12, 2013), at 2³; *cf. also Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37, 40 n.4 (D.D.C. 1997) (“In ‘reverse-FOIA’ cases, the party seeking to prevent a disclosure the government itself is otherwise willing to make assumes that burden.”). A petitioner must make the required showing of good cause “no later than the time the petition is filed.” 12 C.F.R. § 1080.6(g).

In evaluating whether a petitioner has shown “good cause” under 12 C.F.R. § 1080.6(g) to warrant withholding a petition and responsive order (or portions thereof) from the public record, the Bureau generally looks to the standards for withholding material from public disclosure established by the Freedom of Information Act (FOIA). *See In re Heartland Campus Sols., ECSI*, 2017-MISC-Heartland Campus Solutions, ESCI-001 (Sept. 8, 2017), at 9.⁴ Accordingly, the Bureau will publicly disclose a petition to modify or set aside a CID unless either (i) the petitioner has made a factual showing that the information in the petition falls within one of the FOIA exemptions or (ii) the Bureau determines that other good cause exists to withhold all or a portion of the petition from public disclosure and the withheld information is not otherwise required by law to be made public.

BAC offers four reasons why the Petition, or portions of it, should be kept confidential, including that the Petition contains information protected from disclosure by FOIA Exemption 4. Exemption 4 exempts from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). After BAC submitted its Petition and request for confidentiality, the Supreme Court decided *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019), which clarified the standard for determining what information may be withheld under Exemption 4. Under that newly articulated standard, information is protected by Exemption 4 only if “it is customarily kept private, or at least closely held, by the person imparting it.” 139 S. Ct. at 2363. Because the Supreme Court had not yet announced this standard at the time BAC filed its confidentiality request, BAC did not have an opportunity to establish that information it seeks to keep confidential meets that standard. I will accordingly give them that opportunity.

In particular, within ten calendar days of when BAC is notified of this Decision and Order, BAC may submit a detailed statement that (1) identifies with particularity those portions of the Petition that it believes constitute its trade secrets or its confidential commercial or financial information protected by Exemption 4 and (2) substantiates the claim that those portions fall within Exemption 4. This detailed statement should not identify information that BAC seeks to be kept confidential on any ground other than that it is protected by Exemption 4. In identifying the portions of the Petition that BAC believes are protected by Exemption 4, BAC

² https://www.consumerfinance.gov/documents/6675/bcftp_firstsource-advantage-llc_decision-order-on-petition_2018-07.pdf.

³ http://files.consumerfinance.gov/f/201309_cfpb_decision-on-confidentiality_greatplainslending-0001.pdf.

⁴ https://www.consumerfinance.gov/documents/5566/201709_cfpb_heartland-campus-solutions_decision-and-order-on-petition.pdf.

should bear in mind that Exemption 4 protects only information “obtained from a person.” 5 U.S.C. § 552(b)(4). As a result, information generated by the Bureau (rather than obtained from BAC) is not covered. In substantiating the claim that identified portions of the Petition are protected by Exemption 4, BAC must submit a sworn statement establishing that the identified information would customarily be kept private. In addition, BAC must explain why it is “reasonably foresee[able] that disclosure of the information would harm an interest protected by” Exemption 4. *See* 5 U.S.C. §§ 552(a)(8)(A)(i)(I), (b)(4). If BAC does not submit a detailed statement as described in this paragraph within ten calendar days after receiving notice of this order, BAC will be considered to have no objection to the disclosure of the Petition without redaction. I will decide BAC’s request for confidentiality, and notify BAC of that decision, after receiving BAC’s detailed statement or after the ten-day period has passed. The Petition and this Decision and Order (with the appropriate redactions), as well as a supplemental decision on the request for confidentiality, will be published no sooner than five calendar days after BAC is notified of the decision on its request for confidentiality. That supplemental decision on the request for confidentiality will also address the other grounds on which BAC has sought to keep the Petition confidential.

CONCLUSION

For the foregoing reasons, BAC’s petition to modify or set aside the CID is denied and the CID’s notification of purpose is modified as set forth above. BAC is directed to comply in full with the CID dated March 1, 2019, as modified by the letter of March 20, within 30 calendar days of this Order. BAC is welcome to engage in discussions with Bureau staff about any further suggestions for modifying the CID or staggering production, which may be adopted by the Assistant Director for Enforcement or Deputy Enforcement Director, as appropriate.

I defer deciding BAC’s request for confidential treatment of the Petition. As explained in more detail above, BAC may, within ten calendar days of being notified of this Order, submit a detailed statement that (1) identifies with particularity those portions of the Petition that it believes constitute trade secrets or confidential commercial or financial information protected by Exemption 4 and (2) substantiates the claim that those portions fall within Exemption 4. If BAC does not submit a detailed statement within ten calendar days of being notified of this Order, BAC will be considered to have no objection to the disclosure of any portion of the Petition. I will issue a supplemental decision resolving BAC’s request for confidentiality after receiving BAC’s detailed statement or after the ten-day period has passed.

July 19, 2019


Kathleen L. Kraninger, Director