

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



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IN RE ACTIVE NETWORK, LLC.

2019-MISC-ACTIVE Network, LLC-0001

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**DECISION AND ORDER ON PETITION BY ACTIVE NETWORK, LLC TO SET  
ASIDE CIVIL INVESTIGATIVE DEMAND**

ACTIVE Network, LLC (ACTIVE) petitioned for an order to set aside a civil investigative demand (CID) from the Bureau's Office of Enforcement. For the reasons set forth below, the Petition is granted in part and denied in part.

**FACTUAL BACKGROUND**

On February 19, 2019, the Bureau served on ACTIVE a civil investigative demand seeking information related to ACTIVE's payment processing activities and the company's ACTIVE Advantage membership product. The CID's notification of purpose explained:

The purpose of this investigation is to determine whether payment processors or associated persons, in connection with offering or providing payment processing services, have: (1) made false or misleading representations to consumers or improperly imposed charges on consumers in a manner that is unfair, deceptive, or abusive in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536; or (2) failed to follow the requirements applicable to preauthorized transfers in a manner that violates Regulation E, 12 C.F.R. Part 1005, principally Subpart A, implementing the Electronic Fund Transfer Act, 15 U.S.C. § 1693 et seq. 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 included nine interrogatories, one request for a written report, and ten requests for documents and tangible things. ACTIVE conferred with Enforcement counsel about responding to the CID on March 11, 2019. ACTIVE filed a timely petition to set aside the CID on March 22, 2019.

## LEGAL DETERMINATION

ACTIVE's principal claim is that the CID is outside the Bureau's authority. ACTIVE argues that it is not a covered person under the Consumer Financial Protection Act because ACTIVE does not offer or provide payment processing services, and that ACTIVE is not a service provider because it does not provide services to a covered person. ACTIVE contends further that the Bureau does not have authority over ACTIVE with respect to the Electronic Fund Transfer Act because ACTIVE is not a financial institution.

ACTIVE's arguments regarding the Bureau's authority do not warrant setting aside the CID because the Bureau's investigation is not patently outside of the Bureau's authority. Nevertheless, I grant the Petition in part and exercise my discretion to modify the CID's notification of purpose so that it describes in greater detail the conduct the Bureau is investigating, consistent with the recently announced policy of the Bureau's Office of Enforcement. I deny the remainder of the Petition, and defer deciding ACTIVE's request for confidential treatment.

### I. The Bureau's Authority to Conduct the Investigation

The Bureau is authorized to issue CIDs to "any person" who may have information "relevant to a violation." 12 U.S.C. § 5562(c)(1). The recipient of a CID<sup>1</sup> cannot challenge an agency investigation by preemptively contesting the facts that the agency might find, at least where the investigation is not patently outside the agency's authority. *FTC v. Ken Roberts Co.*, 276 F.3d 583, 584 (D.C. Cir. 2001) ("Unless it is patently clear that an agency lacks the jurisdiction that it seeks to assert, an investigative subpoena will be enforced."). The Supreme Court has "consistently reaffirmed" the principle that "courts should not refuse to enforce an administrative subpoena when confronted by a fact-based claim regarding coverage or compliance with the law." *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1076 (9th Cir. 2001) (citing *United States v. Powell*, 379 U.S. 48, 57-58 (1964)); see also *SEC v. Savage*, 513 F.2d 188, 189 (7th Cir. 1975) (SEC not required to establish that company's contracts were "securities" subject to agency's jurisdiction before subpoena would be enforced); *CFPB v. Harbor Portfolio Advisors, LLC*, 2017 WL 631914, at \*3 (E.D. Mich. Feb. 16, 2017) ("Whether Respondents' transactions *actually* involve 'credit' is not at issue, and it would be premature for the Court to decide that question at this stage.").

The Bureau's CID to ACTIVE explains that the purpose of the Bureau's investigation is to determine whether payment processors or associated persons have violated (1) the Consumer

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<sup>1</sup> The courts "have treated CIDs as a form of administrative subpoena." See *CFPB v. Accrediting Council for Indep. Colleges & Sch.*, 854 F.3d 683, 688 (D.C. Cir. 2017).

Financial Protection Act's prohibition on unfair, deceptive, or abusive acts and practices or (2) the requirements for preauthorized transfers prescribed by Regulation E, implementing the Electronic Fund Transfer Act. The Petition argues that the Bureau lacks the authority to investigate either type of violation. I disagree.

A. The Consumer Financial Protection Act

The Consumer Financial Protection Act (CFPA) makes it unlawful for covered persons and service providers to engage in unfair, deceptive, or abusive acts or practices in connection with consumer financial products or services. 12 U.S.C. §§ 5531, 5536. The CFPA further authorizes the Bureau to issue a CID to any person that "may have any information[] relevant to a violation" of Federal consumer financial law, including violations of the CFPA's prohibition on unfair, deceptive, and abusive acts and practices. 12 U.S.C. §§ 5562(c)(1), 5481(14).

ACTIVE contends that it is not a covered person because it does not offer or provide payment processing services. As relevant here, a "covered person" is one "that engages in offering or providing a consumer financial product or service." 12 U.S.C. § 5481(6)(A). A "consumer financial product or service" is a "financial product or service" that is offered or provided for use by consumers primarily for personal, family, or household purposes. *Id.* § 5481(5)(A). One of the categories of financial products or services set forth in the CFPA involves payment processing services. This category includes:

providing payments or other financial data processing products or services to a consumer by any technological means, including processing or storing financial or banking data for any payment instrument, or through any payments systems or network used for processing payments data, including payments made through an online banking system or mobile telecommunications network....

*Id.* § 5481(15)(A)(vii). The statute then provides an exception to this broad category that ACTIVE claims is relevant here:

[A] person shall not be deemed to be a covered person with respect to financial data processing solely because the person— (1) is a merchant, retailer, or seller of any nonfinancial good or service who engages in financial data processing by transmitting or storing payments data about a consumer exclusively for purpose of initiating payments instructions by the consumer to pay such person for the purchase of, or to complete a commercial transaction for, such nonfinancial good or service sold directly by such person to the consumer[.]

*Id.* § 5481(15)(A)(vii).

According to the Petition, "ACTIVE operates a website focused on selling registrations (i.e., tickets) for a variety of athletic and other recreational activities (e.g., endurance running

events, triathlons, art camps).” Petition at 2. The Petition says that ACTIVE “contracts with various event owners who agree to honor the registrations ACTIVE sells” and that “[i]n return, ACTIVE charges a fee to customers who buy registrations on its website.” *Id.* at 2-3. “In connection with the event registrations it sells, ACTIVE offers registrants the opportunity to join a membership program called ACTIVE Advantage, which provides discounts on registration fees.” *Id.* at 3.

On the basis of these factual assertions, ACTIVE argues that it does not offer or provide the payment processing products or services described in the statute because it contracts with a third party payment processor. But whether ACTIVE contracts with an outside company for payment processing does not determine whether it provides payments or other financial data processing products or services to consumers within the meaning of 12 U.S.C. § 5481(15)(A)(vii). ACTIVE concedes in the Petition, moreover, that it “provides a gateway for a customer to input payment information,” and that it “collect[s] payment information to forward to its payment processor.” Petition at 3, 8. And in securities filings, ACTIVE’s parent corporation describes ACTIVE as “deliver[ing] cloud-based enterprise software, *including payment technology solutions*, to event organizers in the communities and health and fitness vertical markets.” Global Payments Inc. 2018 Annual Report, Form 10-K, at 4 (Feb. 21, 2019) (emphasis added); *see also id.* at 5, 33 (same); ACTIVE Network, Delivering More Technology To More Organizers More Efficiently, <https://info.activenetwork.com/solutions/active-works-platform-services> (offering clients “[o]nline debit and credit card processing support as well as electronic check processing”).

In the alternative, ACTIVE says that even if it did offer or provide payment processing products or services, it is still not a covered person in light of the statutory exception for merchants, retailers, and sellers of nonfinancial goods or services. ACTIVE says that any payment processing activities it engages in are “exclusively for the purpose of initiating payments instructions by the consumer to pay [ACTIVE] for the purchase of, or to complete a commercial transaction for, [the registrations and/or Membership Product] sold directly by [ACTIVE] to the consumer.” Petition at 8 (quoting 12 U.S.C. § 5481(15)(A)(vii)(I)). The Bureau, however, is not required to accept as true ACTIVE’s factual assertions concerning its activities. Rather, the Bureau’s administrative subpoena authority lets the Bureau conduct an investigation so that the Bureau can determine for itself whether (among other things) ACTIVE engages in providing payments or other financial data processing products or services to consumers and, if so, whether ACTIVE nevertheless may not be deemed a covered person in light of the exception applicable to merchants, retailers, or sellers of any nonfinancial good or service. *See EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 699 (7th Cir. 2002) (“[A]ny agency with subpoena powers . . . is entitled to obtain the facts necessary to determine whether it can proceed to the enforcement stage.”); *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1052–53 (2d Cir. 1973) (“The [SEC] must be free without undue interference or delay to conduct

an investigation which will adequately develop a factual basis for a determination as to whether particular activities come within the Commission's regulatory authority.”)<sup>2</sup>

### B. The Electronic Fund Transfer Act and Regulation E

ACTIVE argues that the Bureau lacks the authority to investigate ACTIVE under the Electronic Fund Transfer Act (EFTA) because ACTIVE is not a “financial institution” within the meaning of EFTA and its implementing regulation, Regulation E. To support this claim, ACTIVE points to 15 U.S.C. § 1693h, which sets forth the damages for which “a financial institution shall be liable to a consumer.” But section 1693h is not the basis for the Bureau’s enforcement of EFTA. Rather, 15 U.S.C. § 1693o provides that “compliance with the requirements imposed under [EFTA] shall be enforced” by the Bureau “with respect to any person subject to [EFTA].” Moreover, while Regulation E “[g]enerally” applies to financial institutions,” “[f]or purposes of §§ 1005.3(b)(2) and (3), 1005.10(b), (d), and (e), 1005.13, and 1005.20,” Regulation E also “applies to *any person*, other than [certain motor vehicle dealers].” 12 C.F.R. § 1005.3(a) (emphasis added). Here the Bureau is investigating potential violations of section 1005.10(b). *See, e.g., id.* § 1005.10(b) (describing obligations of the “person that obtains the authorization” for a preauthorized electronic fund transfer from a consumer’s account); *id.* pt. 1005, Supp. I, cmt. 10(b)-2 (“The account-holding financial institution does not violate the regulation when a third party payee fails to obtain the authorization in writing or fails to give a copy to the consumer; rather it is the third-party payee that is in violation of the regulation.”). Accordingly, ACTIVE’s argument that it is not a financial institution does not affect whether the Bureau can conduct this investigation.

### C. Notification of Purpose

On April 23, 2019, the Bureau issued a statement advising the public that the Office of Enforcement has changed its practices so that notifications of purpose contained in its CIDs provide the recipients of CIDs with even more information regarding the focus of Bureau investigations. Consistent with this approach, and in order to provide ACTIVE with a better understanding of the nature of the Bureau’s investigation, I am exercising the discretion afforded by section 1052(f)(1) of the CFPA and 12 C.F.R. § 1080.6(e)(4), to modify the notification of purpose contained in this CID as follows:

The purpose of this investigation is to determine whether ACTIVE Network, LLC or associated persons: (1) is a covered person that offers or provides payment processing services; (2) has, in

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<sup>2</sup> ACTIVE appears to suggest (Petition at 10 n.7) that pursuant to subtitle B of the CFPA the Bureau lacks authority to litigate against persons who are not subject to the Bureau’s supervisory authority under 12 U.S.C. §§ 5514, 5515, and 5516. Any such argument would be without merit. Sections 5515 and 5516 are not relevant here because ACTIVE is not an insured depository or credit union. And section 5514, which concerns the Bureau’s supervision of nondepository covered persons, does not limit the persons against whom the Bureau may bring enforcement actions.

connection with offering or providing payment processing services, made false or misleading representations to consumers or improperly imposed charges on consumers in a manner that is unfair, deceptive, or abusive in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536; or (3) has failed to follow the requirements for written authorization by consumers for preauthorized transfers in a manner that violates Regulation E, 12 C.F.R. § 1005.10(b), implementing the Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq.* The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

As a result, to the extent that the Petition sought to challenge the original, unmodified notification of purpose, *see* Petition at 5, that challenge would not provide a basis for setting aside or further modifying the CID, as the modified statement clearly satisfies the statutory standard. *See, e.g., CFPB v. Seila Law, LLC*, 923 F.3d 680, 685 (9th Cir. 2019) (upholding CID where the notification of purpose “suffice[d] to put [the recipient] on notice of the nature of the conduct the CFPB is investigating” and was “not so general as to raise vagueness or overbreadth concerns”); *CFPB v. Heartland Campus Sols., ECSI*, 747 F. App’x 44, 48 n.3 (3d Cir. 2018) (“Congress required [the Bureau] to identify only the type of conduct that may violate the law and the law being violated.”).

## II. The CID’s Requests

Aside from generally reserving ACTIVE’s right to withhold privileged documents, the Petition asserts a single objection to the CID’s requests for documents and other information. According to the Petition, interrogatory 1 is overly broad “because it seeks information about a third-party [sic], [REDACTED]” Petition at 11. This objection appears to misread the interrogatory, which, by its terms, is limited to the organizational structure of “parents, subsidiaries, affiliates, unincorporated divisions, or joint ventures” of ACTIVE (as well as any predecessor or successor in interest). I therefore reject the Petition’s overbreadth claim.

## III. Confidentiality

Finally, ACTIVE requests confidential treatment of the Petition and related materials, at least with respect to the identities of ACTIVE and its service provider. The Bureau’s regulations governing investigations provide that a CID petition and the Bureau’s order in response thereto 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). 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 Jawad Nesheiwat*, 2018-MISC-Jawad Nesheiwat-0001 (Apr. 22, 2019), at 3; *In re Firstsource Advantage, LLC*, 2017-MISC-Firstsource Advantage, LLC-0001 (July 23, 2018), at 6-7; *see 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.”). This standard mirrors that of the Federal Trade Commission. *See*

16 C.F.R. § 4.9(c)(1); *John Doe Co. v. CFPB*, 235 F. Supp. 3d 194, 199 (D.D.C. 2017) (describing the FTC's longstanding rules as "virtually identical" to those of the Bureau). 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).

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. 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 there exists other good cause 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.

The Petition advances three arguments for confidential treatment. These arguments fail to meet ACTIVE's burden to demonstrate that good cause exists to withhold the Petition and this Decision and Order from the public. *First*, the Petition claims that because Bureau investigations are generally nonpublic under 12 C.F.R. § 1080.14(b), "nondisclosure is the norm" for CID petitions and orders. Petition at 12. This is incorrect. As explained above, the Bureau's rules (just like those of the FTC) make publication the "norm" for CID petitions and orders.

*Second*, the Petition asserts that "disclosure of ACTIVE's identity would serve no legitimate purpose." *Id.* This is also incorrect. The public has an interest in the publication of the Bureau's orders responding to CID petitions. That is why CID petitions and orders are presumptively public documents. And, as the FTC has concluded, withholding from CID petitions and orders "information that reveals the identity of the subject of a nonpublic investigation would impair the public's ability to assess and understand these important rulings." FTC, Rules of Practice, 77 Fed. Reg. 59294, 59300 (Sept. 27, 2012).

*Third*, the Petition claims that ACTIVE has a "substantial privacy interest in maintaining the confidentiality of the CID" because "it could suffer harm as a presumptive target of an ongoing nonpublic investigation." *Id.* The Petition fails to identify, however, any basis in the FOIA or any other law to support this claimed privacy interest. Indeed, while FOIA Exemptions 6 and 7(C) permit agencies to withhold records to protect personal privacy under certain circumstances, those Exemptions do not apply to ACTIVE because it is a corporation rather than a natural person. See *FCC v. AT&T Inc.*, 562 U.S. 397, 409-10 (2011).

Nevertheless, I believe that it is possible that the Petition (and, by extension, this Decision and Order) could contain 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 ACTIVE 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, at a minimum, "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 ACTIVE filed its confidentiality request, ACTIVE did not have an opportunity to establish that information it seeks to keep confidential meets that standard. I will accordingly give ACTIVE that opportunity.

In particular, within ten calendar days of when ACTIVE is notified of this Decision and Order, ACTIVE may 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. This detailed statement should not identify information that ACTIVE 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 ACTIVE believes are protected by Exemption 4, ACTIVE 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 ACTIVE) is not covered. In substantiating the claim that identified portions of the Petition are protected by Exemption 4, ACTIVE must submit a sworn statement establishing that the identified information would customarily be kept private. In addition, ACTIVE 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 ACTIVE does not submit a detailed statement as described in this paragraph within ten calendar days after receiving notice of this order, ACTIVE will be considered to have no objection to the disclosure of the Petition and this Decision and Order without redaction. I will decide ACTIVE's request for confidentiality, and notify ACTIVE of that decision, promptly after receiving ACTIVE'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 ACTIVE is notified of the decision on its request for confidentiality.

## CONCLUSION

For the foregoing reasons, I grant the Petition in part and deny it in part. In particular, the CID's notification of purpose is modified as discussed above. Subject to this change, ACTIVE is directed to comply in full with the CID within 30 days of this Decision and Order. ACTIVE is welcome to engage in discussions with Bureau staff about any further suggestions for modifying the CID, which may be adopted by the Assistant Director for Enforcement or Deputy Enforcement Director, as appropriate.

I defer deciding ACTIVE's request for confidential treatment of the Petition. As explained in more detail above, ACTIVE may, within ten calendar days of being notified of this Decision and Order, submit a detailed statement that (1) identifies with particularity those portions of the Petition and this Decision and Order that ACTIVE 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 ACTIVE does not submit



a detailed statement within ten calendar days of being notified of this Decision and Order, ACTIVE will be considered to have no objection to the disclosure of any portion of the Petition or this Decision and Order. I will issue a supplemental decision resolving ACTIVE's request for confidentiality promptly after receiving ACTIVE's detailed statement or after the ten-day period has passed.

July 29, 2019

  
Kathleen L. Kraninger, Director