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

ENOVA INTERNATIONAL, INC

2021-MISC-Enova International, Inc.–0001

DECISION AND ORDER ON PETITION BY ENOVA INTERNATIONAL, INC. TO MODIFY OR SET ASIDE CIVIL INVESTIGATIVE DEMAND

Enova International, Inc. petitioned the Consumer Financial Protection Bureau for an order to modify or set aside a civil investigative demand. For the reasons set forth below, the petition is denied. Petitioner also requested confidential treatment of portions of their petition and portions of a declaration to their petition. That request is granted in part and denied in part.

FACTUAL BACKGROUND

The Bureau issued a civil investigative demand (CID) to Enova International, Inc. ("Enova") on May 24, 2021. In its entirety, the CID's Notification of Purpose stated:

> The purpose of this investigation is to determine whether short-term or small-dollar lenders or associated persons, in connection with the origination, servicing, and collection of payday loans, installment loans, or lines of credit, debited or attempted to debit consumers' bank accounts without having obtained their express informed consent; failed to honor loan extensions granted to consumers; failed to provide to consumers copies of their authorizations for electronic fund transfers that identified the bank account to be debited; debited the full payment instead of a loan extension fee to consumers granted a loan extension; or made false or misleading representations to consumers, in a manner that: (1) violates the consent order that was entered in File No. 2019-BCFP-0003 on January 25, 2019, which is an order prescribed by the Bureau under Sections 1053 and 1055 of the Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. §§ 5563, 5565; and (2) thereby also violated Section 1036(a)(1)(A) of the CFPA, 12 U.S.C. § 5536(a)(1)(A); or (3) was unfair or deceptive in violation of Sections 1031 and 1036 of the CFPA, 12 U.S.C. §§ 5531, 5536. The investigation also seeks to determine whether the above persons, in connection with the above products or services, failed to follow requirements applicable to preauthorized transfers or failed to retain required evidence of compliance in a manner that violates Regulation E, 12 C.F.R. §§ 1005.10, 1005.13, implementing the Electronic Fund Transfer Act, 15 U.S.C. § 1963, 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.

Enova took part in a meet-and-confer with Enforcement staff on June 3 and June 8 at which it discussed the issues raised in this petition. *See* 12 C.F.R. § 1080.6(c). Enova filed this petition to modify or set aside the CID on June 14. *See* 12 U.S.C. § 5562(f); 12 C.F.R. § 1080.6(e).[1]

LEGAL DETERMINATION

I. Petition to Modify or Set Aside the CID

Enova argues that the scope of the CID should be limited for three reasons. First, Enova argues that the Bureau has no basis to investigate subsidiaries of Enova that offer a specific credit product. Second, Enova argues that the CID should be narrowed to conform with a release from liability that the Bureau provided to Enova in a Consent Order entered on January 25, 2019. Third, Enova argues the Bureau cannot properly seek information for which the statute of limitations has already run. I reject these arguments for the reasons set forth below.

A. Whether the Scope of the CID Should Be Limited to CashNetUSA Subsidiaries

Enova contends that "there is no basis for the Bureau to investigate" NetCredit or any Enova subsidiaries other than those offering CashNetUSA products, and argues that the CID should be narrowed accordingly. Pet. at 5. Enova acknowledges that the Bureau previously uncovered issues with CashNetUSA in a prior investigation, but claims that CashNetUSA and NetCredit are so different that any issues with CashNetUSA provide no basis to investigate NetCredit. Pet. 5-8. Enova points to differences in personnel, practice, procedure, and technology between its NetCredit and CashNetUSA subsidiaries, arguing that these "companies are separate and unique entities." Pet. at 5-8. Coupled with the lack of any identified issues with NetCredit, Enova thus argues that "there is simply no basis for an investigation into NetCredit." Pet. at 7.

Fundamentally, this is a fact-based argument that goes to whether NetCredit violated the law. It therefore is not a valid rationale to resist enforcement of a CID. "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 . . . has been consistently reaffirmed by the Supreme Court." *EEOC v. Karuk Tribe Hous. Auth.,* 260 F.3d 1071, 1076 (9th Cir. 2001) (citing *Okla. Press Publ'g Co. v. Walling,* 327 U.S. 186, 216 (1946)); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950); *United States v. Powell*, 379 U.S. 48, 57-58 (1964). The reason for this is that 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). Since a fact-based claim regarding an entity's liability cannot be used to avoid complying with an administrative subpoena, I reject Enova's argument that the scope of the CID should be limited to its NetCredit subsidiaries.

[1] Enova's petition is untimely. Petitions to modify or set aside a CID must be filed within 20 calendar days after a CID is served unless a CID's return date is less than 20 days after service. 12 C.F.R. 1080.6(e). Here, the CID was served on May 24, 2021. Enova did not file its petition until June 14, 2021, 21 days after the CID was served. Enova presumably did this because the 20th day was a Sunday. The Bureau's rules do not extend the time for filing when the 20th day falls on a weekend or holiday. However, in my discretion, I have chosen to accept and respond to Enova's petition in this instance.

B. Whether the Prior Release Warrants Narrowing the CID

Enova next argues the CID should be limited to seek information relating only to conduct after January 25, 2019 because a consent order that the Bureau entered on that date released Enova from any claims based on earlier conduct. Pet. at 8-10. An argument that a claim is subject to a release is a substantive defense to that claim. Even if this argument could be raised in defense of any potential claims, it is not a basis to resist enforcement of a CID. "If parties under investigation could contest substantive issues in an [administrative subpoena] enforcement proceeding, when the agency lacks the information to establish its case, administrative investigations would be foreclosed or at least substantially delayed." *FTC v. Texaco, Inc.*, 555 F.2d 862, 879 (D.C. Cir. 1977) (en banc); *see also Karuk Tribe Hous. Auth.*, 260 F.3d at 1076 ("[C]ourts should not refuse to enforce an administrative subpoena when confronted by a fact-based claim regarding coverage or compliance with the law.").

Moreover, Enova also misunderstands the scope of the release. The 2019 Consent Order releases Enova from "all potential liability for law violations that the Bureau has or might have asserted based on the practices described in Section V of this Consent Order, to the extent such practices occurred before the Effective Date and the Bureau knows about them as of the Effective Date." Consent Order ¶ 69. By its terms, this release is limited to violations "based on the practices described in Section V of this Consent Order." That section describes Enova's violations in making unauthorized debits following the use of lead-generator-acquired bank account information and failing to honor loan extensions from July 21, 2011 until January 22, 2019. The prior release thus has no bearing on several different aspects of the current CID, including: possible violations of law in connection with loan servicing and origination, improper proof of electronic transfer/debts, possible misrepresentations to consumers, and compliance with Regulation E's requirements for preauthorized transfers. As such, the release provides no conceivable basis to limit the CID for most of the possible legal violations the CID seeks to investigate.

The release also would not preclude claims asserting the other potential violations that the CID seeks to investigate—making debits without express informed consent and failing to honor loan extensions. Again, the release covers only violations "based on the practices described in Section V" of the Consent Order. Section V describes unauthorized debits that resulted from overwriting consumers' bank account details with lead-generator-acquired bank account information and failures to honor loan extensions that occurred after consumers sought expedited "Flash Cash" funding. The CID at issue here is concerned with unauthorized debits generally and failures to honor loan extensions generally, a broader category of possible legal violations than those covered by Section V. The prior release did not release Enova from all possible claims generally related to any unauthorized debits or any failure to honor a loan extension, which seems to be Enova's current reading of the release. *Cf. FTC v. Texaco, Inc.*, 555 F.2d at 874 (D.C. Cir. 1977) (en banc) (rejecting CID recipient's attempt to impose "an erroneous interpretation of the scope of the FTC's inquiry" and then seeking "to limit the investigation to the confines of this distorted interpretation").

In addition, the release also applies only "to the extent . . . the Bureau knows about [the practices] as of the" date of the Consent Order. Consent Order ¶ 69. The CID seeks information about potential violations the Bureau did not know about. Enova argues that the Bureau had "full knowledge of Enova's business practices at the time it entered into the Consent Order" based on a "thorough examination of Enova's business practices" that the Office of Enforcement previously conducted. Pet. at 9. In the same petition, though, Enova notes that it "has over one hundred direct and indirect subsidiaries, offering products as varied as international money transfer services, small business lending, and online lending to Brazilian consumers." Pet. at 2. Given the

size of Enova's subsidiary structure and the marked variation in services, Enova's suggestion that the Bureau must have known about any other violations is unpersuasive. For these reasons, I reject Enova's argument that the timeframe of this investigation should be limited based on the prior release.

C. Whether the CID Should Be Narrowed Based on the Statute of Limitations

Enova's final argument is that the CID improperly "extends beyond any statutes of limitations" and should be limited to cover only May 24, 2018 until May 24, 2021, the time period that Enova contends is "potentially actionable." Pet. at 10.

This argument fails for two reasons. First, statutes of limitations would not bar the Bureau from bringing claims for conduct that occurred before May 24, 2018. The CFPA prohibits actions no more than three years *after the date of discovery* of the violation. 12 U.S.C. § 5564(g)(1).[2] The plain text of the CFPA thus dictates that the statute of limitations does not start running until a violation is actually discovered. The CID seeks information on potential violations that the Bureau has not discovered yet, and for which the statute of limitations therefore has not begun to run. Enova contends that the Bureau, "in the exercise of reasonable diligence," at least should have discovered violations previously. Pet. at 11. But even if Enova were correct that the CFPA's statute of limitations begins to run when the Bureau should have discovered actionable conduct, Enova has not shown that the Bureau should have made any such discovery here, particularly given that Enova consists of hundreds of subsidiaries with an array of services.

Second, as Enova itself acknowledges, Pet. at 11, the Bureau can properly seek information regarding conduct outside the applicable limitations period. That is because "the standard for determining whether the temporal scope of a CID is proper 'is whether such information is relevant to conduct for which liability can be imposed.'" *CFPB v. Future Income Payments, LLC* 252 F. Supp. 3d 961, 969 (C.D. Cal. 2017) (quoting *CFPB v. Harbour Portfolio Advisors, LLC*, No. 16-14183, 2017 WL 631914, at *5 (E.D. Mich. Feb. 16, 2017)), *vacated in irrelevant part*, No. 17-55721 (9th Cir. Oct. 18, 2018). Thus, even if "the only actionable conduct occurred within the past three years" (which is not the case), the Bureau could still "properly demand [additional] information" that is "reasonably relevant to conduct occurring within the statute of limitations period." *Id.* Here, older information is relevant to fully understanding Enova's practices and operations, including its more recent conduct. Enova's sole argument for why information outside the (alleged) statute of limitations is irrelevant is that "the Bureau is investigating Enova's compliance with the [2019] Consent Order," so conduct predating the Consent Order cannot be relevant. Pet. at 11. That characterization of this investigation is incorrect as the CID seeks information concerning not just potential violations of the Consent Order, but also potential violations of the CFPA's prohibition on unfair, deceptive, or abusive acts or practices and Regulation E. For these reasons, there is no basis to limit the time period the CID covers.

II. Request for Confidential Treatment

Enova requests confidential treatment of portions of the petition as well as an attached declaration to the petition. Request at 1. Enova's request for confidential treatment is granted in part and denied in part. Although I deny the request to keep information confidential under

[2] Enova incorrectly contends that there is a one-year statute of limitations under the Electronic Fund Transfer Act ("EFTA"). Pet. at 10. EFTA's one-year limitations period applies only to private actions, not to actions by the Bureau. *See In re Integrity Advance, LLC & James R. Carnes*, CFPB No. 2015-CFPB-0029, at 16-17 (Jan. 8, 2021).

Exemption 4, as explained below, I will give Enova a supplemental opportunity to substantiate its claim that Exemption 4 should apply to parts of its petition before making it public.

Petitions to modify or set aside a CID 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). The petitioner bears the burden of demonstrating good cause. *In re Great Plains Lending, LLC,* 2013-MISC-Great Plains Lending-0001 (Sept. 26, 2013), at 2. This is consistent with a "general policy favoring disclosure of administrative agency proceedings." *FCC v. Schreiber*, 381 U.S. 279, 293 (1965). Moreover, an "agency's discretion in regard to procedural rules includes discretion in such matters as publicity and disclosure." *FTC v. Anderson*, 631 F.2d 741, 746 (D.C. Cir. 1979) (citing *Schreiber*, 381 U.S. at 291-94).

When determining whether a request for confidential treatment is supported by good cause, the Bureau 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-0001 (Sept. 8, 2017), at 9. The Bureau uses FOIA as a guidepost because it is a "comprehensive, practical, and widely-used statutory framework," and doing so allows the Bureau to avoid potential inconsistencies that may arise from applying a different standard to materials in the petition context than would be applied to those same materials when requested pursuant to FOIA. *Id.*; *see also In re Firstsource Advantage*, 2017-MISC-Firstsource Advantage, LLC-0001 (July 23, 2018), at 7. Under 12 C.F.R. § 1080.6(g), the Bureau also has discretion to keep portions of a petition confidential even if they would not be exempt under FOIA, so long as disclosure is not required by law. *In re Great Plains Lending, LLC,* 2013-MISC-Great Plains Lending-0001 (Sept. 26, 2013), at 3. Thus, 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.

Enova makes three arguments for confidential treatment. First, it argues that the petition constitutes an investigatory record obtained in connection with a law enforcement proceeding which is exempt from disclosure under Exemption 7(A) of FOIA. Second, Enova argues that the petition references proprietary business information, trade secrets, and/or other confidential commercial information that is exempt from disclosure under Exemption 4 of FOIA. Finally, Enova argues the petition contains information obtained for or related to examination, operating, or condition reports by the Bureau which are exempt from disclosure under Exemption 8 of FOIA. Request at 1-3. Enova has proposed redactions to its petition and the attached declaration purportedly based on these exemptions.

Enova fails to meet its burden to establish "good cause" to keep portions of its submissions confidential. Enova fails to specify which exemptions would apply to particular redactions and also fails to explain in any detail why these exemptions would justify redacting the proposed information. A petitioner does not meet its burden to establish good cause for keeping information from the public by asserting, without explanation, that certain FOIA exemptions apply. In the exercise of my discretion, however, I will address the applicability of the claimed exemptions. As explained below, I deny Enova's request to keep information confidential under Exemption 4 but will provide Enova an opportunity to supplement its confidentiality request with an explanation of why it believes Exemption 4 should apply, and what information that exemption would apply to. Additionally, although Enova has failed to show good cause, I have determined that good cause exists to redact some information under Exemptions 7(A) and 8.

A. Exemption 4

Exemption 4 applies to two broad categories of information: (a) "trade secrets" and (b) "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Courts have defined trade secret to be "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983); *see also Anderson v. HHS,* 907 F.2d 936, 944 (10th Cir. 1990). There must be a "direct relationship" between the trade secret and the productive process for this definition to apply. *Pub. Citizen Health Research Grp.*, 704 F.2d at 1288.

The second category of information that Exemption 4 covers is information that is (1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential. Information qualifies as "commercial" under the first prong of this Exemption so long as "the provider of the information has a commercial interest" in it. *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006). And the "obtained from a person" prong is satisfied where the information was supplied by an outside party rather than having "been generated within the Government." *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 148 (2d Cir. 2010). As for the third prong, information is "confidential" if, at a minimum, "it is customarily kept private, or at least closely held, by the person imparting it." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019). The Court also raised the possibility that information could be considered "confidential" for purposes of Exemption 4 only if a second requirement was met—namely, that the government have provided the submitter "some assurance that [the information] will remain secret." *Id.*

Again, Enova has failed to meet its burden to establish that any information should be kept confidential under Exemption 4. In particular, Enova does not specify what information it believes is protected under Exemption 4, nor does it explain why that information is protected. It has therefore failed to establish "good cause" to keep any portions of the petition and accompanying declaration confidential under Exemption 4—a showing that must be made "no later than the time the petition is filed." 12 C.F.R. § 1080.6(g). I accordingly deny its request to keep portions of its submissions confidential under Exemption 4.

In my discretion, though, before publishing this Decision and Order and Enova's petition and declaration, I will give Enova an opportunity to supplement its confidentiality request to identify what information it believes is protected by Exemption 4, and to articulate why. Accordingly, within ten calendar days of notification to Enova of this Decision and Order, Enova may submit a detailed statement that (1) identifies with particularity those portions of the petition and declaration 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 Enova seeks to keep confidential on any ground other than Exemption 4. In substantiating the claim that identified portions of the petition and declaration are protected by Exemption 4, Enova must submit a sworn declaration establishing that the identified information would customarily be kept private. If Enova does not submit a detailed statement as described in this paragraph within ten calendar days after receiving notice of this order, Enova will be considered to have no objection to disclosure of the petition without redactions other than those the Bureau has identified, and this Decision and Order, as well as the petition and declaration, will be published. If Enova makes a supplemental submission, I will issue a supplemental order on Enova's request for confidentiality, and notify Enova of that decision, after receiving Enova's detailed statement. In that event, the petition, declaration, 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 Enova is notified of the decision on its supplemental request for confidentiality.

B. Exemption 7(A)

Exemption 7(A) authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). For Exemption 7(A) to apply, (1) a law enforcement proceeding must be pending or prospective; and (2) release of the information about that investigation must reasonably be expected to cause some articulable harm to the proceeding. *See Campbell v. HHS*, 682 F.2d 256, 259 (D.C. Cir. 1982).

As explained above, Enova has failed to show why this exemption should apply. Moreover, Exemption 7(A) "is a discretionary privilege that belongs to the Bureau, not to any regulated entity or outside party." *In re Bank of America Corp.,* 2019-MISC-Bank of America Corp.-0001, at 4-5 (Sept. 4, 2019). Exemption 7 protects the needs of "law enforcement agencies" like the Bureau "to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it [comes] time to present their case." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). Exemption 7 is intended to protect the Bureau's and public's interest in effective law enforcement, not the interests of regulated entities.

Nevertheless, considering those interests, I have determined that certain information in Enova's petition is protected under Exemption 7(A). Disclosing certain information in the petition could interfere with other investigations and law enforcement proceedings by revealing to other entities the focus and scope of the Bureau's law enforcement efforts. *See Swan v. SEC*, 96 F.3d 498, 500 (D.C. Cir. 1996) ("The records could reveal much about the focus and scope of the Commission's investigation, and are thus precisely the sort of information exemption 7(A) allows an agency to keep secret."). Additionally, disclosure of certain information in the petition could provide subjects of other Bureau investigations with notice of what types of information the Bureau may request, and from what time periods, providing an opportunity "to suppress or fabricate evidence." *In re Bank of America Corp,* 2019-MISC-Bank of America Corp.-0001, at 5; *see also Juarez v. Dep't of Justice,* 518 F.3d 54, 58 (D.C. Cir. 2008) (authorizing withholding documents where disclosure "could lead to destruction of evidence").

Accordingly, I order that certain portions of Enova's petition be redacted under Exemption 7(A) as indicated in the redacted petition attached to this Order.

C. Exemption 8

As explained above, Enova has failed to demonstrate that Exemption 8 should apply. Nevertheless, I have also determined that certain aspects of Enova's petition should be protected under Exemption 8.

Exemption 8 protects matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." 5 U.S.C. § 552(b)(8). Exemption 8 serves two legislative purposes: "(1) to ensure the security of financial institutions by eliminating the risk that disclosure of . . . frank evaluations of the investigated banks . . . might undermine public confidence and cause unwarranted runs on banks; and (2) to safeguard the relationship

between the banks and their supervising agencies . . . ." *McKinley v. FDIC*, 744 F. Supp. 2d 128, 142-43 (D.D.C. 2010) (internal citations omitted). Charged with maintaining the stability of the entire financial system, financial regulators require free disclosure from the institutions they supervise. As courts have recognized, the supervisory relationship is characterized by "adjustment, not adjudication," and issues that arise are often rectified through supervisory dialogue and without the need for formal enforcement. *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992) (considering common-law bank examination privilege). Exemption 8, like the related common law bank examination privilege, is designed to encourage this dialogue. *Id.*

Certain information in Enova's petition is covered by Exemption 8 because it relates to examination reports prepared by the Bureau, including descriptions of supervisory dialogue. If disclosed, this information could compromise the supervisory relationship between Enova and the Bureau, as well as the Bureau's relationship with other similarly situated entities.

Accordingly, I order that parts of Enova's petition and attached declaration be redacted under Exemption 8 as indicated in the redacted petition attached to this Order.

CONCLUSION

For the foregoing reasons, the petition to modify or set aside the CID is denied. Enova is directed to comply in full with the CID within 10 calendar days of this Order. Enova 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. The request for confidential treatment of portions of the petition and declaration is granted in part and denied in part. Nonetheless, Enova may submit within 10 days of the date of this Order a supplemental statement, consistent with the terms of this Order, explaining why additional information in its petition and attached declaration should be kept confidential under Exemption 4.

David K. Uejio

David Uejio, Acting Director

September 20, 2021