

**UNITED STATES OF AMERICA
BUREAU OF CONSUMER FINANCIAL PROTECTION**

In the Matter of:

Equitable Acceptance Corp.

**Petition to Set Aside or Modify
October 23, 2019 Civil Investigative Demand**

I. Introduction

On Wednesday, October 23, 2019, the Bureau of Consumer Financial Protection (“Bureau”) issued its Civil Investigative Demand (“CID”) to Equitable Acceptance Corporation (“EAC”). The CID, which was received by EAC on Monday, October 28, includes:

- 10 interrogatories (with 57 subparts);
- 1 request for written report (with 17 subparts);
- 10 requests for documents; and
- 8 topics for investigational hearing.

The return date for the written responses is November 7, eight business days after EAC received the CID. The investigational hearing date is November 14, thirteen business days after the CID was received.

During the parties’ October 31 meet and confer call,¹ Bureau counsel explained that the response time was so short because investigational hearings were scheduled for December 2019 in another, unidentified, Bureau investigation and that Bureau counsel wanted EAC’s written responses, documents, reports and testimony for review prior to those hearings. That is, the Bureau appears to have waited until the eve of investigational hearings in a matter unknown to EAC to burden EAC with a CID that requires the production of voluminous documents, detailed information, a detailed written report, and the designation and preparation of multiple witnesses for investigational hearings, all within two calendar weeks of having received the CID.

Although Bureau counsel indicated a willingness to consider a very brief extension of time (to later in November) for EAC to respond to the CID, EAC has not sought such an extension

¹ The meet and confer statement required by 12 C.F.R. § 1080.6(e)(1) appears at Appendix A.

because the burden imposed on EAC is unwarranted given the very real uncertainty as to whether the Bureau has the authority to issue the CID in the first instance. For this reason, as more fully explained herein, EAC files this petition seeking an order either: (i) setting aside the CID; or (ii) staying EAC's response deadlines until such a time as the U.S. Supreme Court issues its decision, in *Seila Law v. CFPB*,² on whether the Bureau is unconstitutionally structured and, if so, the proper remedy to address the Bureau's unconstitutional structure.

II. Relevant Background

The CID's statement of purpose explains that:

The purpose of this investigation is to determine whether providers of debt relief services or associated persons, in connection with telemarketing or otherwise offering debt relief services or consolidation loans, have: (1) made false or misleading representations to consumers or improperly induced or assisted in inducing consumers to enter into loans in a manner that is unfair, deceptive or abusive in violation of Sections 1031 and 1036 of the Consumer Financial Protection Act, 12 U.S.C. §§ 5531, 5536; or (2) made false or misleading representations to consumers, requested or received prohibited payments from consumers, failed to provide the required disclosures to consumers, or improperly maintained consumer trust accounts, in a manner that violates the Telemarketing Sales Rule, 16 C.F.R. Part 310. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.³

EAC has previously provided financing to consumers to help them purchase document preparation services from companies who assist consumers in completing the paperwork necessary to participate in the U.S. Department of Education's student loan debt relief programs.

² See, *Seila Law, LLC v. CFPB*, Case No. 19-7, writ of certiorari granted Oct. 18, 2019, available at <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-7.html>.

³ Oct. 23, 2019 CID, Notification of Purpose Pursuant to 12 C.F.R. § 1080.5.

During the October 31 meet and confer call, EAC's counsel explained to Bureau counsel that EAC has been the subject of similar investigations by the Federal Trade Commission ("FTC") and the Attorneys General of Massachusetts, Minnesota and New York. The subject matter of those investigations was similar to that of the Bureau's CID and the investigation requests were similar to those in the Bureau's October 23 CID. EAC's responses in those matters took many months, involved the production of thousands of documents, and required several days of testimony by EAC employees, including its President.

EAC eventually settled the claims being pursued by the FTC and state Attorneys General. Those settlements were concluded, in part, because EAC has exhausted its financial resources and can no longer fund investigation responses or litigation. In fact, because of EAC's demonstrated inability to pay, the FTC agreed to suspend 96% of the judgment amount.⁴ Similarly, the New York Attorney General agreed to suspend 86% of the judgment amount.⁵ In addition to the monetary relief, each of the settlements included a permanent injunction on EAC continuing to provide the financing described above. As a result of the FTC action, EAC is under a nationwide injunction that, among other things, permanently bans the company from providing financing or other assistance in connection with debt relief products and services.

EAC is no longer engaged in a business that is related to the subject matter of the Bureau's investigation. EAC does not have the resources to respond to the Bureau's requests or to

⁴ See, *FTC v. EAC, et al.*, Stipulated Order for Permanent Injunction, Monetary Relief and Final Judgment as to Equitable Acceptance Corporation, Case No. 8:19-cv-1728JVS-JDE, pending in U.S. District Court for the Central District of California (Sep. 12, 2019) at 11, § VI; see also, *FTC and State of Minnesota v. EAC, et al.*, Stipulated Order for Permanent Injunction, Monetary Relief and Final Judgment as to Equitable Acceptance Corporation, Case No. 2:19-cv-07849-JDFW-E, pending in U.S. District Court for the Central District of California (Sep. 13, 2019) at 11, § VI.

⁵ See, *New York v. EAC et al.*, Stipulated Final Judgment and Order as to Equitable Acceptance Corporation, Case No. 18-cv-9812-AJN, pending in the U.S. District Court for the Southern District of New York (Aug. 12, 2019) at 13, ¶ 32.

prepare for the investigational hearings the Bureau seeks. And, notwithstanding Bureau counsel's representation that EAC is not currently a target of the Bureau's investigation, the responses sought by the Bureau impose the same types of burdens that EAC would experience if it were a target. EAC is, nonetheless, prepared to provide the Bureau with copies of those documents EAC previously produced to the FTC to assist in the Bureau's investigation of other, unidentified entities.

Given EAC's prior experience with the FTC in such an investigation, EAC also believes the Bureau's current CID is inconsistent with Bureau's undertaking that it would "avoid duplication" of the FTC's efforts.⁶ Requiring EAC to respond to the Bureau's broad CID is exactly the kind of burdensome "double-teaming" that the CFPB's MOU with the FTC was meant to avoid.

III. Argument

The CID should be set aside or the response deadlines should be stayed pending the U.S. Supreme Court's decision on: (i) whether the Bureau is unconstitutionally structured; and (ii) if so, the proper remedy to address the unconstitutional structure.

On October 18, 2019, the U.S. Supreme Court granted certiorari in a case, *Seila Law, LLC v. CFPB*, which will decide whether the Bureau is unconstitutionally structured. Importantly, in granting the petition, the Supreme Court ordered:

In addition to the question presented by the petition, the parties are directed to brief and argue the following question: If the Consumer Financial Protection Bureau is found unconstitutional on the basis of the separation of powers, can 12 U.S.C. § 5491(c)(3) be severed from the Dodd-Frank Act?⁷

⁶ *Memorandum of Understanding Between the CFPB and the FTC* at 3, 4, 7, reauthorized by Director Kraninger on Feb. 26, 2019, available at <https://www.ftc.gov/news-events/press-releases/2019/02/ftc-cfpb-reauthorize-memorandum-understanding>.

⁷ *Seila Law, Supreme Court docket* (emphasis added), available at <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-7.html>.

In its response brief to the Supreme Court, the Bureau supported the petitioner and informed the Court that it agrees with the petitioner, Seila Law, and with the U.S. Department of Justice that the Bureau is unconstitutionally structured.⁸ Specifically, the Bureau agrees that the for-cause removal provision at issue violates the U.S. Constitution’s separation of powers because it limits the President’s ability to remove the Bureau’s Director,⁹ providing only that: “The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.”¹⁰

Although the Bureau argues the remedy to address its own unconstitutional structure is to sever the for-cause removal provision,¹¹ it is clear from the Supreme Court’s instruction to the parties that the Supreme Court intends to consider and address that issue directly and could reach a different conclusion. Among the options available is to strike down Title X of Dodd-Frank, rendering the Bureau a nullity and the CID issued to EAC of no force or effect. This outcome is a very real possibility.

A U.S. District Court has rejected the argument that the for-cause removal provision can be severed from Dodd-Frank, holding instead that the “because the CFPB’s structure is unconstitutional, it lacks the authority to bring claims under the CFPA....”¹² In doing so, the court rejected severance of the for-cause removal provision, under the CFPA’s severability provision to cure the Bureau’s unconstitutional structure because:

⁸ *Seila Law, Brief of Respondent [CFPB] at 7*, available at Supreme Court docket <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-7.html>.

⁹ *Id.*

¹⁰ 12 U.S.C. § 5491(c)(3).

¹¹ *Seila Law, LLC, Brief of Respondent [CFPB] at 16* (“The proper remedy for the constitutional violation is to sever the provision limiting the President’s authority to remove the Bureau’s Director.”).

¹² *CFPB v. RD Legal Funding, LLC*, 332 F.Supp.3d 729, 745 (S.D.N.Y. 2018).

[T]he presumption of severability is rebutted here. A severability clause “does not give the court power to amend” a statute. Nor is it a license to cut out the “heart” of a statute. Because section 5491(c)(3) is at the heart of Title X, I would strike Title X in its entirety.¹³

Under this line of reasoning, the independence of the Director from Presidential oversight, except for-cause, was so integral to Congress’ creation of the Bureau that “Congress would not have enacted Title X in its current form absent for-cause removal protection” for the Director.¹⁴ Because the CFPB would not function, as Congress intended, without the for-cause removal provision, the invalid provision cannot be severed.¹⁵ Courts cannot re-write, for Congress, a law that Congress itself would never have passed. And the CFPB’s boilerplate severability clause provides an insufficient basis for doing so. As one judge on the U.S. Court of Appeals for the D.C. Circuit explained:

Appearing in the mega Dodd-Frank legislation 574 pages before section 5491(c)(3) [the for-cause removal provision] ... section 5302 [the severability clause] provides in relevant part that “[i]f any provision of this Act ... is held to be unconstitutional, the remainder of this Act ... shall not be affected thereby.” The clause says nothing specific about Title X, let alone the CFPB’s independence, let alone for-cause removal, let alone the massive transfer of power inherent in deleting section 5491(c)(3), let alone whether Congress would have endorsed that transfer of power even while subjecting the CFPB to the politics of Presidential control. Instead, as one of Dodd-Frank’s architects said decades earlier of a materially identical clause: “This is just boilerplate severability.”¹⁶

That this outcome is a real possibility is demonstrated by the fact that, in response to the filing and granting of the petition for writ of certiorari, a federal court of appeals has stayed a pending case to await the Supreme Court’s determination of the Bureau’s fate. The Ninth

¹³ *Id.*, 332 F.Supp.3d at 784 (adopting Section II of Judge Henderson dissenting opinion in the D.C. Circuit Court of Appeals’ decision in *PHH Corp. v. CFPB*, 881 F.3d 75, 163-164 (D.C. Cir. 2018)).

¹⁴ *PHH Corp.*, 881 F.3d at 160 (J. Henderson dissenting).

¹⁵ *Id.*

¹⁶ *Id.*, 881 F.3d at 163 (J. Henderson dissenting) (emphasis added) (citing the statement of Rep. Frank, 134 Cong. Rec. 12280 (1988)).

Circuit Court of Appeals ordered: “We withdraw submission of this appeal and stay all further proceedings pending the United States Supreme Court’s decision in [*Seila Law*]....”¹⁷

Similarly, the Bureau has filed a motion in the Second Circuit Court of Appeals to adjourn oral argument on the CFPB’s appeal from a district court’s decision holding the CFPB’s structure is unconstitutional and striking all of Title X of the Dodd-Frank Act.¹⁸ The Bureau seeks to adjourn oral argument until after the Supreme Court issues a decision, noting that *Seila Law* “may obviate the need for this Court to resolve some or all of the remaining issues in this case.”¹⁹ The Bureau explained that “an adjournment ... pending a decision by the Supreme Court in *Seila Law* will conserve judicial resources and aid this Court’s consideration of this appeal.”²⁰

The Bureau should, for similar reasons, withdraw or stay the CID issued to EAC pending a decision by the Supreme Court in *Seila Law*. The Bureau recognizes that the pendency of the *Seila Law* appeal impacts the Bureau’s ability to proceed with its enforcement function. The Bureau has written letters concerning its status to:

- The Second Circuit Court of Appeals, concerning the *CFPB v. RD Legal Funding, LLC* matter (Case No. 18-2743);²¹
- The Fifth Circuit Court of Appeals, concerning the *CFPB v. All American Check Cashing, Inc.* matter (Case No. 18-60302);²²

¹⁷ *CFPB v. Cashcall, Inc.*, 2019 U.S. App. LEXIS 31720 *2 (9th Cir. 2019) (emphasis added).

¹⁸ *CFPB and New York v. RD Legal Funding, LLC et al.*, Case Nos. 18-3156, *Affirmation in Support of Motion to Adjourn Oral Argument* (filed Oct. 22, 2019).

¹⁹ *Id.* ¶ 6.

²⁰ *Id.* ¶ 9.

²¹ Sep. 18, 2019 letter from the CFPB to the Second Circuit Court of Appeals, available at https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2019/09/RD-Legal-letter_of_9-18-2019.pdf.

²² Sep. 18, 2019 letter from the CFPB to the Fifth Circuit Court of Appeals, available at https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2019/09/18-60302_-_Letter_filed_by_CFPB_on_9-18-19.pdf.

- The Ninth Circuit Court of Appeals, concerning the *CFPB v. Cashcall, Inc.* matter (Case Nos. 18-55407, 18-55479);²³ and
- The U.S. Senate and the House of Representatives, explaining the Bureau’s reversal of position and its agreement with the petitioner’s argument that the CFPB is unconstitutionally structured.²⁴

In those letters, the Bureau acknowledges that the scope of its authority remains uncertain and the Director explains: “I believe it is in the Bureau’s interests to obtain a final resolution on this issue as soon as possible.”²⁵

EAC similarly believes it is in the best interest of the Bureau to obtain a final and timely resolution on this issue. Like the Ninth Circuit Court of Appeals, which “withdrew” submission of the appeal and “stayed all further proceedings”²⁶ EAC also believes that CID recipients, like EAC, should not be required to spend their very limited financial and personnel resources in responding to a CID which the Bureau may not have the authority to issue. The Bureau made a similar conservation of resources argument in the Second Circuit Court of Appeals, in the *RD Legal* matter, and EAC agrees. Applying that rationale here, the Bureau should withdraw the CID or stay the response deadlines in the CID issued to EAC pending a decision by the Supreme Court in *Seila Law* to

²³ Oct. 21, 2019 letter from the CFPB to the Ninth Circuit Court of Appeals, available at <https://buckleyfirm.com/sites/default/files/Buckley%20InfoBytes%20-%20CFPB%20v.%20Cashcall%20-%20change%20in%20position%20letter%20-%202019.09.18.pdf>.

²⁴ Sep. 17, 2019 letter from the CFPB to Senate Majority Leader, Mitch McConnell, available at <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2019/09/McConnell-letter.pdf>; see also, Sep. 17, 2019 letter from the CFPB to House Speaker, Nancy Pelosi, available at <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2019/09/Pelosi-letter.pdf>.

²⁵ Sep. 17, 2019 letter from the CFPB to Senate Majority Leader, Mitch McConnell, at 2.

²⁶ *Cashcall*, 2019 U.S. App. LEXIS 31720 *2.

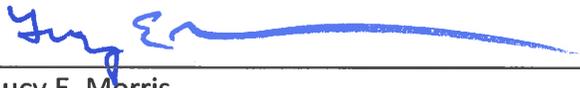
conserve EAC's very limited resources and because such a decision may obviate the need for EAC to respond at all to the CID.²⁷

IV. Conclusion

For reasons discussed above, the Bureau should withdraw the CID issued to EAC or stay the CID's responsive deadlines (*i.e.*, all further proceedings) pending the outcome of the Supreme Court's decision in *Seila Law*.

Respectfully submitted,

Dated: November 7, 2019



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²⁷ *RD Legal Funding, LLC et al.*, Case Nos. 18-3156, *Affirmation in Support of Motion to Adjourn Oral Argument* (filed Oct. 22, 2019), ¶¶ 6, 9.

²⁷ *Id.*, ¶ 9.

Appendix A
Meet and Confer Statement

Counsel for petitioner, Equitable Acceptance Corporation (“EAC”), has conferred with counsel for the Bureau, pursuant to 12 C.F.R. § 1080.6(c), in a good faith effort to resolve, by agreement, the issues raised by this petition and have been unable to reach an agreement.

On Thursday, October 31, 2019 at 10:45 am, three days after EAC received the CID on October 28, 2019, Lucy Morris and James Chareq, counsel for EAC, conferred with Mary Warren,²⁸ Bureau counsel, by phone concerning the CID. During the call, EAC’s counsel requested that the Bureau withdraw the CID issued to EAC or stay the deadlines set forth in the CID due to the pending U.S. Supreme Court case that will determine: (i) the constitutionality of the Bureau’s structure, which the Bureau concedes is unconstitutional; and (ii) the appropriate remedy, which could include the striking of Title X of Dodd-Frank which created the Bureau.

The Bureau’s counsel indicated a willingness to discuss a brief extension of time, perhaps to later in November, but would not agree to withdraw the CID or stay the response deadlines.

Because the parties were unable to reach an agreement concerning the issues described above, EAC files its petition.

Dated: November 7, 2019



Lucy E. Morris

²⁸ On the phone with the CFPB’s counsel was a paralegal and a representative of the Bureau’s IT department.