

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



IN RE AMY PLUMMER,
2019-MISC-Amy Plummer-0001

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**DECISION AND ORDER ON PETITION BY AMY PLUMMER
TO SET ASIDE CIVIL INVESTIGATIVE DEMAND**

Amy Plummer has petitioned the Consumer Financial Protection Bureau for an order to set aside a civil investigative demand (CID) that the Bureau issued to her. For the reasons set forth below, the Petition is denied.

FACTUAL BACKGROUND

On February 21, 2019, the Bureau issued a CID to Amy Plummer, a former employee of Upstate Law Group, LLC, seeking oral testimony. Plummer worked for Upstate Law Group in an administrative support position and was not herself an attorney.

As explained in the CID, the Bureau seeks Plummer's testimony as part of an investigation into suspected unfair, deceptive, or abusive acts or practices in connection with transactions in which persons purport to acquire the rights to veterans' military pensions or other benefits in exchange for lump-sum payments. The CID required Plummer to provide oral testimony on February 28, 2019. It stated that the Deputy Assistant Director of the Bureau's Office of Enforcement had waived the meet-and-confer requirement in 12 C.F.R. § 1080.6(c), as authorized by that provision.

Plummer timely filed this Petition to Set Aside the CID on February 22, 2019.

LEGAL DETERMINATION

Plummer argues that the CID should be set aside because it exceeds the Bureau's authority over the practice of law and because it improperly seeks attorney-client privileged information and attorney work product. Because the CID was within the Bureau's statutory authority to issue, and because Plummer's blanket assertion of privilege and work-product protection is both procedurally and substantively deficient, the Petition is denied.

I. The Bureau's Authority to Issue the CID

The Consumer Financial Protection Act of 2010 (CFPA) authorizes the Bureau to issue a CID when “the Bureau has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to a violation” of the laws the Bureau is charged to enforce. 12 U.S.C. § 5562(c)(1). Plummer contends that the CID nonetheless exceeds the Bureau’s statutory authority because a different provision of the CFPA limits in certain respects the exercise of the Bureau’s authorities over the practice of law. Specifically, 12 U.S.C. § 5517(e) states that, subject to certain exceptions, “the Bureau may not exercise any supervisory or enforcement authority with respect to an activity engaged in by an attorney as part of the practice of law under the laws of a State in which the attorney is licensed to practice law.” Plummer, who was employed by Upstate Law Group in an administrative support position and was not herself an attorney, argues that Section 5517(e) bars the Bureau from seeking her testimony through a CID.

Plummer’s argument fails to account, however, for other language in Section 5517 providing that, notwithstanding Section 5517(e), a person to whom that provision would otherwise apply “may be subject to requests from, or requirements imposed by, the Bureau regarding information in order to carry out the responsibilities and functions of the Bureau and in accordance with [12 U.S.C. § 5562].” 12 U.S.C. § 5517(n)(2). Thus, even assuming *arguendo* that Section 5517(e) would otherwise apply to Plummer, a non-attorney, Section 5517(n) makes clear that she would remain subject to CIDs, such as this one, that the Bureau issues in the course of carrying out its responsibilities to enforce the federal consumer financial laws.¹ Plummer’s Petition does not acknowledge this provision or explain why the practice-of-law exclusion would nevertheless require setting aside this CID.

II. Whether the Information Sought Is Protected

Plummer also contends that the CID—which does not itself request any specific information but instead directs Plummer to provide oral testimony at a specified time and location—must be set aside because it seeks information protected by the attorney-client privilege and the attorney work-product doctrine. In effect, Plummer seems to suggest that merely appearing for the scheduled investigational hearing would itself violate these protections.

¹ Even where the practice-of-law exclusion may be relevant, its application often turns on highly fact-bound questions—for example, whether a consumer financial product or service is offered or provided “exclusively within the scope of [an] attorney-client relationship” under relevant state law. *See* 12 U.S.C. § 5517(e)(2). It would frequently be premature to attempt to resolve these kinds of factual issues on a petition to modify or set aside a CID, when Bureau investigators are still seeking to gather these and other potentially relevant facts. *Cf., e.g., SEC v. Savage*, 513 F.2d 188, 189 (7th Cir. 1975) (rejecting the view that, to enforce a subpoena, an agency must “answer at the outset of its investigation the possibly doubtful questions of fact and law that the investigation is designed and authorized to illuminate”). And even if that were an appropriate inquiry at this point, the Petition here provides no specific facts in support of its argument.

That premature blanket assertion of attorney-client privilege and work-product protection is both procedurally improper and lacking merit.

The CFPA as well as the Bureau's rules governing investigations provide a means for witnesses giving oral testimony in response to a CID to raise appropriate privilege objections. Such witnesses are entitled to be accompanied, represented, and advised by counsel during the taking of testimony. 12 U.S.C. § 5562(c)(13)(D)(i); 12 C.F.R. § 1080.9(b). During such testimony, counsel or the witness "may object on the record to any question, in whole or in part, and such person shall briefly state for the record the reason for the objection." 12 U.S.C. § 5562(c)(13)(D)(iii); *accord* 12 C.F.R. § 1080.9(b)(1)-(2). Objections may properly be made "when it is claimed that [the witness] is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege." 12 U.S.C. § 5562(c)(13)(D)(iii); *accord* 12 C.F.R. § 1080.9(b)(2). The Bureau may as appropriate take steps to challenge assertions of privilege by petitioning a federal district court for an order to enforce the CID and compel testimony. 12 U.S.C. § 5562(c)(13)(D)(iv)(1); 12 C.F.R. § 1080.10.

Both the CFPA and the Bureau's rules thus set forth an orderly procedure for asserting privilege in the giving of oral testimony under a CID that Plummer has not attempted to follow here. *Cf.* 12 C.F.R. § 1080.8(b) (person withholding material based on assertion of privilege should follow specific procedures set out in rule rather than raising privilege objections in petition to set aside the CID). Rather than participating in the hearing, "object[ing] on the record to any question" that purportedly calls for privileged information, and "briefly stat[ing] for the record the reason for the objection," 12 U.S.C. § 5562(c)(13)(D)(iii), Plummer simply offers the blanket claim that the CID "seeks information that the CFPB is not entitled to obtain due to it being attorney-client privileged information" and "attorney work product," Petition at 3. In addition to being procedurally deficient, that approach dooms Plummer's assertions of attorney-client privilege and work-product protection on the merits.

A party seeking to assert either protection bears the burden of showing that the protection applies. *See, e.g., In re Grand Jury Proceedings*, 616 F.3d 1172, 1183, 1185 (10th Cir. 2010). Plummer cannot do so because she has not identified any specific communication or item of work product that she claims is protected, nor has she offered any specific grounds supporting those protections as to each such piece of evidence. *See United States v. Martin*, 278 F.3d 988, 1000 (9th Cir. 2002) (party asserting privilege must take these steps). Indeed, it is unlikely Plummer could do so given that she has improperly raised her blanket claim before Bureau investigators have posed a single question on the record. For this reason among others, such "[b]lanket assertions are extremely disfavored." *Id.*; *see also In re Grand Jury Proceedings*, 616 F.3d 1172, 1183 ("The party must bear the burden [of establishing privilege] as to specific questions or documents, not by making a blanket claim."); *United States v. Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974) (rejecting blanket claim of privilege asserted in response to agency subpoena; "[a witness] must normally raise the privilege as to each record sought and each question asked so that at the enforcement hearing the court can rule with specificity").

Although Plummer is entitled to raise appropriate privilege objections while testifying, in conformance with the procedure provided for by the CFPA and the Bureau's rules, her premature assertion of privilege provides no grounds for setting aside the CID itself.

III. Modification of the Notification of Purpose

Plummer 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 recent practice 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 persons that purport to acquire the rights to veterans' military pensions or other benefits in exchange for lump-sums are offering to extend credit or extending credit. The purpose of this investigation is also to determine whether such persons, in connection with offering or collecting on these products, have made false or misleading representations to consumers or have failed to disclose to consumers the applicable interest rate on the credit offer, in a manner that is unfair, deceptive, or abusive in violation of Sections 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

CONCLUSION

For the foregoing reasons, the Petition to Set Aside the CID is denied and the CID's notification of purpose is modified as set forth above. Plummer is directed to provide oral testimony at a time and location to be specified by Enforcement staff, or at another mutually agreeable time and location arranged with Enforcement staff.

April 25, 2019


Kathleen L. Kraninger, Director