

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



IN RE KERN-FULLER AND SUTTER,)

2019-MISC-Candy Kern-Fuller and)
Howard E. Sutter III-0001)

**DECISION AND ORDER ON PETITION
BY CANDY KERN-FULLER AND HOWARD E. SUTTER
TO MODIFY OR SET ASIDE CIVIL INVESTIGATIVE DEMAND**

Candy Kern-Fuller and Howard E. Sutter have petitioned the Consumer Financial Protection Bureau for an order to modify or set aside two civil investigative demands (CIDs) the Bureau issued to them. For the reasons set forth below, the Petition is granted in part and denied in part.

FACTUAL BACKGROUND

On February 12, 2019, the Bureau issued CIDs to Candy Kern-Fuller and Howard E. Sutter seeking oral testimony. Both Kern-Fuller and Sutter work as attorneys at Upstate Law Group, LLC. As explained in the CIDs' notifications of purpose:

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, in connection with offering or collecting on these products, such persons have engaged in unfair, deceptive, or abusive acts or practices in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536.

The CIDs further advise that the investigation also seeks "to determine whether Bureau action to obtain legal or equitable relief would be in the public interest." The CIDs required Sutter to provide oral testimony on February 28, 2019, and Kern-Fuller to do so on March 1. The CIDs 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.

Petitioners timely filed their Petition to Modify or Set Aside the CIDs on February 15.

LEGAL DETERMINATION

Petitioners argue that the CIDs should be modified or set aside for three reasons. None warrant setting aside or modifying the CIDs. I will exercise my discretion, however, to modify the CIDs' notifications of purpose.

First, Petitioners contend that I should grant the Petition to set aside the CIDs because the Bureau's statutory structure is unconstitutional. It is doubtful that I have the authority to declare the Bureau's organic statute unconstitutional in this administrative proceeding. *See, e.g., United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68, 97 n.10 (D.D.C. 2011) (“[G]overnment agencies may not entertain a constitutional challenge to authorizing statutes[.]” (quoting *Lepre v. Dep't of Labor*, 275 F.3d 59, 75 (D.C. Cir. 2001) (Silberman, J. concurring))); *Buckeye Indus., Inc. v. Sec'y of Labor, Occupational Safety & Health Review Comm'n*, 587 F.2d 231, 235 (5th Cir. 1979) (“[n]o administrative tribunal of the United States has the authority to declare unconstitutional the Act which it is called upon to administer”); *Robinson v. United States*, 718 F.2d 336, 338 (10th Cir. 1983) (same). In any event, the Bureau has consistently maintained that its statutory structure is constitutional under controlling Supreme Court precedent. All but two of the courts to consider the question have agreed. *See, e.g., PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). I therefore reject Petitioners' claim that the CIDs should be set aside on constitutional grounds.

Second, Petitioners argue that the CIDs should be modified or set aside because their notifications of purpose do not “state the nature of the conduct constituting the alleged violation which is under investigation,” as required of all Bureau CIDs by 12 U.S.C. § 5562(c)(2).

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 Petitioners 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 both CIDs 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.

Petitioners' arguments based on the original, unmodified notification of purpose do not provide a basis for setting aside or further modifying the CIDs, as the modified statement of purpose clearly satisfies the statutory standard. *See, e.g., 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.").

Third, Petitioners contend that because they are attorneys, the CIDs should be modified to protect attorney-client privileged information and attorney work product. Petitioners do not specify how the CIDs should be modified, nor do they identify any specific attorney-client communication or item of work product that they believe is protected. Regardless, it is unnecessary to modify the CIDs on this ground because the Bureau does not intend to seek properly privileged information and because the CFPA and the Bureau's rules already provide an orderly procedure for asserting privilege during the giving of oral testimony in response to a CID. *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).

By statute and rule, witnesses providing oral testimony in response to a CID are entitled to be accompanied, represented, and advised by counsel. 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)(I); 12 C.F.R. §§ 1080.10. This procedure ensures that witnesses have a chance to raise appropriate privilege objections while also memorializing the specific bases for the asserted protections with respect to each item of evidence sought. *See generally Clarke v. American Commerce Nat. Bank*, 974 F. 2d 127, 129 (9th Cir. 1992) ("[B]lanket assertions of the privilege are extremely disfavored. The privilege must ordinarily be raised as to each record sought to allow the court to rule with specificity." (internal citation and quotations marks omitted)); *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 Petitioners are entitled to raise appropriate privilege objections while testifying, in conformance with the procedure provided for by the CFPA and the Bureau's rules, their premature assertion of privilege provides no grounds for modifying or setting aside the CIDs themselves.

CONCLUSION

For the foregoing reasons, I grant the Petition in part and deny it in part. In particular, the CIDs' notifications of purpose are modified as set forth above. Kern-Fuller and Sutter are

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