

BEFORE THE BUREAU OF CONSUMER FINANCIAL PROTECTION

In the Matter of:

Fair Collections and Outsourcing, Inc. and
Fair Collections and Outsourcing of New England, Inc.

PETITION FOR ORDER SETTING ASIDE CIVIL INVESTIGATIVE DEMAND

Fair Collections and Outsourcing, Inc. (“FCO”) and Fair Collections and Outsourcing of New England, Inc. (“FCONE”), by and through counsel, Ronald S. Canter, Esquire and John H. Bedard, Jr., Esquire, pursuant to 12 U.S.C. § 5560(2)(f) and 12 C.F.R. § 1080.6(e) petitions the Director to set aside the Civil Investigative Demand (“CID”) dated November 27, 2018 served on FCO and FCONE and as grounds states as follows:

I. THE CIVIL INVESTIGATIVE DEMAND SHOULD BE SET ASIDE BECAUSE THE BUREAU IS UNCONSTITUTIONALLY STRUCTURED AS AN INDEPENDENT AGENCY THAT EXERCISES SUBSTANTIAL EXECUTIVE POWER HEADED BY A SINGLE DIRECTOR

The Bureau was created by Title X of the Dodd-Frank Act as a single director, stand alone Federal agency. This structure violates the separate of powers doctrine embodied in the United States Constitution. For this reason, the Bureau “lacks authority to bring (an) enforcement action”. *Consumer Financial Protection Bureau v. RD Legal Funding, LLC*, 332 F.3d 729 (S.D.N.Y. 2018) (dismissing enforcement action by Bureau because it is unconstitutionally structured and lacks authority to bring actions under the Consumer Financial Protection Act). Given this Constitutional infirmity, the Bureau has no authority to issue the CID and for this reason alone, this petition should be granted.

II. THE CIVIL INVESTIGATIVE DEMAND FAILS TO PROVIDE A NOTIFICATION OF PURPOSE AS REQUIRED BY LAW

Even if the Director rejects the constitutional challenge set out in Part I, *supra*, the CID's notification of purpose does not comply with law. The notification of purpose provides that:

The purpose of this investigation is to determine whether debt collectors or other unnamed persons have engaged in, or are engaging in, unlawful acts or practices in connection with the collection and reporting of consumer debts in violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 – 1692p, the Fair Credit Reporting Act, 15 U.S.C. § 1681, et. seq., the duties of furnishers of information to consumer reporting agencies, 13 C.F.R. § 1022.40, et. seq., or any other Federal consumer financial law. 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 Bureau's authority to issue this CID is found at 12 U.S.C. § 5562(c). This provision requires that in "each Civil Investigative Demand (the Bureau) shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." (emphasis added). The Bureau has adopted regulations addressing its issuance of Civil Investigative Demands which appear at 12 C.F.R. § 1060, et seq. Specifically, 12 C.F.R. §1060.6(e) establishes the procedure for a party to file a petition to set aside a Civil Investigative Demand.

The CID served on FCO and FCONE ¹ is legally deficient because it fails to provide a statement as to the nature of the conduct constituting the alleged violation and also does not state the provision of law applicable to such violation. Instead, the notification contains a generic statement that the purpose is to determine whether "debt collectors or other unnamed persons have engaged in, or are engaging in, unlawful acts or practices in connection with" a number

¹ Hereinafter FCO and FCONE will be referred to collectively as "FCO".

of Federal laws and regulations. The notification concludes with a nonspecific reference to “other Federal consumer financial law.”

A notification of purpose contained in a CID that does not inform a party of the nature of the conduct constituting an alleged violation of law and does not disclose the particular provision of law applicable to such violation fails to comply with Federal law. *See, Consumer Financial Protection Bureau v. Source for Public Data, L.P.*, 903 F.3d 456, 458 (5th Cir. 2018) and *Consumer Financial Protection Bureau v. Accrediting Council for Independent Colleges and Schools*, 854 F.3d 683 (D.C. Cir. 2017) (internal citation omitted) (denying enforcement of Civil Investigative Demand “where there is ‘too much indefiniteness or breadth in the items requested’”). The notification of purpose in this case suffers from the same defect as the one in the *Accrediting Council* case where the Circuit Court of Appeals determined that a CID that only provides notice of perceived “unlawful acts and practices” but offers no explanation as to the nature of any conduct constituting an alleged violation nor provides any reference to a specific legal provision applicable to the purported violation does not comply with Federal law. The Court explained that where “the Notification of Purpose gives no description whatsoever of the conduct the CFPB is interested in investigating, we need not and properly cannot accurately determine whether the inquiry is within the authority of the agency and whether the information sought is reasonably relevant.” *Id.*, at 691.

Here, the notification of purpose suffers from similar defects and fails to comply with law because it does not identify conduct which is alleged to violate the law and further does not identify the specific provision of law for which the conduct is alleged to have violated. FCO therefore requests that the Civil Investigative Demand be set aside.

III. ALTERNATIVELY, THE CIVIL INVESTIGATIVE DEMAND SHOULD BE SET ASIDE BECAUSE OF THE FUNDAMENTAL UNFAIRNESS THAT HAS PERMEATED THE BUREAU'S INVESTIGATION

The CID dated November 27, 2018 includes the same statement appearing on each CID served on FCO explaining the "Right to Regulatory Fairness". This disclosure professes that "the Bureau is committed to fair regulatory enforcement." However, the Bureau's conduct in its more than two and half year investigation evidences that its commitment to regulatory fairness is illusory and a mere pretense. Instead, the Bureau's onerous demands on FCO, its inflexible refusal to follow the time guidelines set out in the Federal Rules of Civil Procedure, and its duplicitous threat of pursuing an enforcement action, refusing to propose or even discuss a resolution despite demanding a "settlement offer" in writing from FCO, then threatening an enforcement action without any reply to the proposed resolution presents FCO with a Kafkaesque dilemma where they are faced with a seemingly unending administrative investigation which they are powerless to understand and are also unable to exert any control or influence over what is happening to them.

The pervasive unfairness of this process is detailed below:

A. The Bureau's Failure To Serve a Notification Of Purpose that Complies with Law

None of the eighth (8) Civil Investigative Demands or the two (2) notices of depositions served on FCO in this more than two and one-half year investigation have complied with the legal requirement that a party receiving a CID be informed of the nature of conduct under investigation and the provisions of law applicable to the alleged conduct. *See, Part II, supra.* The fact that FCO, after considering the expense of challenging the prior CIDs, elected to cooperate and furnish information despite the lack of a proper notification of purpose, did not and cannot be deemed a waiver of its right to challenge later file CIDs which similarly fail to comply with

law. FCO has now challenged the November 27, 2018 CID and, in doing so, stresses the inherently unfair nature of the Bureau's investigation which emanates from unfair and illegal process of not disclosing a notification of purpose as required by Federal law.

B. The Bureau's Enforcement Attorneys Have Imposed Unnecessarily Oppressive Time Restrictions On FCO

Throughout this investigatory process, the Enforcement Attorneys assigned to this investigation have taken an inflexible and arbitrary position refusing FCO's reasonable requests for extension of extremely short deadlines and have made demands for same-day responses which are patently unfair and unreasonable by any standard. In no instance, have the Bureau's Enforcement Attorneys provided a thirty (30) day time period for responding to CIDs, the time frame imposed for decades by the Federal Rules of Civil Procedure. The fact that the Dodd-Frank Act did not specifically incorporate the Federal Rules of Civil Procedure thirty (30) day time provision has been used as a sword by the Enforcement Attorneys who have refused reasonable requests even when the requested extensions would have still required compliance before thirty (30) days.

Every extension request was met with unnecessary resistance. First, in every case, FCO was told that the Enforcement Attorney did not have the authority to grant the request but that the request would be forwarded to the Deputy Enforcement Director. FCO has never been permitted to communicate with the Deputy Enforcement Director, a bureaucratically created burdensome barrier to effective communication and "fair" enforcement.

In the few instances where extensions were allowed, the Deputy Director unnecessarily allowed only a shorter deadline than what was requested. On at least one occasion, the Investigating Attorneys gave FCO one business day to respond to demands for documents and

interrogatories. These demands evidence a government agency lacking even a modicum of control and a complete absence of any genuine attempt at “fair” enforcement.

C. The Bureau Has Demanded That FCO Produce Documents Pursuant To Its Inflexible And Oppressive Document Submission Standards

Compliance with the Bureau’s document submission standards requires a level of technological expertise beyond FCO’s technology department. For this reason, its counsel was required to interview and retain an outside third party vendor to convert the company’s documents into data meeting the Bureau’s submission standards. FCO had to pay tens of thousands of dollars the outside third party vendor and was required to pay continuing monthly fees for data storage approaching \$1,000.00 per month. Nearly two years after the investigation began, FCO sought the Bureau’s consent discontinue the data storage and monthly payment obligation to the vendor (made to keep data available for review) yet the Bureau refused the request. Further, during the document submission, FCO was forced to purchase additional computer hardware and software to copy, download, and produce data required by the Bureau. The Bureau’s inflexible document submission standards are unfair, oppressive, and disproportional to the Bureau’s need to have data in sophisticated formats and FCO’s ability to produce records in the Bureau’s demanded format.

D. The Bureau’s Conduct In Vacillating Between Threaten Enforcement Action, Soliciting and Then Not Responding To FCO’s Suggested Resolution Of The Investigation, Reflect Oppressive And Unfair Conduct

In May, 2018, the Bureau’s Enforcement Attorneys advised FCO of an intent to recommend an enforcement action. At this time, there was no mention of any intent to include FCO’s President, Michael Sobota, in the contemplated filing. In response, FCO asked for an opportunity to discuss a possible resolution of the claim. More than 2 years after the investigation began, adding Mr. Sobota as a respondent the Bureau’s notice of intent served no

purpose other than to retaliate against FCO for exercising its rights to object the Bureau's oppressive and unlawful demands. The Bureau steadfastly refused to propose any resolution but instead demanded that FCO make a written settlement "offer." Enforcement attorneys demanded the offer within days and FCO responded by providing a written proposal for resolution on June 8, 2018. Unbeknownst to FCO, Enforcement Attorneys had no authority to propose a resolution, make a counter proposal, or even discuss resolution of the investigation at the time of their compulsory demands for a written offer from FCO.

Six (6) months have now passed since the offer and the Bureau has not made any response, either rejecting the offer, making a counteroffer, or suggesting some other form of dispute resolution. Instead, the Bureau issued additional CIDs on July 23, 2018, which demanded a ten (10) day response time, and the current CID subject to this petition on November 27, 2018.

The Bureau provided a second notice of a recommended enforcement action and sent a second "NORA" letter on September 21, 2018. This letter for the first time identifies Mr. Sobota as a target of the investigation, a tactic that provides compelling evidence of the Bureau's unfair, retaliatory and oppressive conduct. FCO responded to the NORA letter on October 22, 2018 and stated its willingness to discuss a possible resolution of the claim. Instead of engaging in a constructive dialogue, the Bureau issued another CID on November 27, 2018.

This history reflects a repeated and callous disregard for the Bureau's purported to fair regulatory enforcement. The issuance of the November 27, 2018 CID itself manifests the fundamental unfairness that has premediated the Bureau's investigation. If, in fact, a recommendation has been made for legal action, it is reasonable to infer that the recommendation has been rejected and that the Bureau's Enforcement Attorneys believe that

further investigation will provide factual evidence to justify any recommended enforcement action. Or, on the other hand, if an enforcement action has been approved, the latest CID begs the question of why further investigation is being pursued given the presumed judgment has been made that there are sufficient facts to justify an enforcement action.

This history, taken as a whole, manifests the unfairness of this enforcement action and provides a compelling reason why CID should be set aside.

STATEMENT IN CONFORMITY WITH 12 C.F.R. § 1080(e)

Undersigned counsel hereby represent that they conferred with counsel for the Bureau in a good faith effort to resolve by agreement the issues raised by this petition and were unable to reach agreement. A one hour telephone conference took place on December 3, 2018 in which the CID was discussed. The Bureau's attorneys refused to permit a recording of the call to memorize what was discussed and, without any plausible basis, refused to confirm that the meet and confer obligation had been satisfied. FCO represented that the information requested in the CID was being preserved and has been preserved so as to satisfy any concern that the data would not be available at a later time.

Further, on December 4, 2018, FCO sent a written request for modification of the CID which was rejected by the Deputy Enforcement Director on December 6, 2018.

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