

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



IN RE FAIR COLLECTIONS AND OUTSOURCING,)
INC. and FAIR COLLECTIONS AND)
OUTSOURCING OF NEW ENGLAND, INC.)
)
2018-MISC-Fair Collections and Outsourcing, Inc. and)
Fair Collections and Outsourcing of New England,)
Inc. -0001)
)

**DECISION AND ORDER ON PETITION BY FAIR COLLECTIONS AND
OUTSOURCING, INC. AND FAIR COLLECTIONS AND OUTSOURCING OF NEW
ENGLAND, INC. TO SET ASIDE CIVIL INVESTIGATIVE DEMAND**

On December 10, 2018, Fair Collections and Outsourcing, Inc. and Fair Collections and Outsourcing of New England, Inc. (collectively, FCO) petitioned for an order to set aside a civil investigative demand (CID) from the Bureau’s Office of Enforcement that was issued on November 27, 2018. For the reasons set forth below, the petition is granted in part and denied in part.

FACTUAL BACKGROUND

Since March 30, 2016, the Bureau has sent FCO a series of civil investigative demands seeking information related to FCO’s debt collection and credit reporting activities. Each CID’s notification of purpose stated that the CID was issued “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, 12 C.F.R. §§ 1022.40 et seq., or any other federal consumer financial law” and “to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.”

Consistent with the Bureau’s rules, FCO conferred with Enforcement counsel about responding to the November 2018 CID on December 3, 2018. FCO filed a timely petition to set aside the November 2018 CID on December 10, 2018.

LEGAL DETERMINATION

FCO argues that the November 2018 CID should be set aside for three reasons. None warrant setting aside the CID. I believe that it is appropriate, however, to modify the CID's notification of purpose.

First, FCO contends that I should grant the Petition to set aside the CID because the Bureau's statutory structure is unconstitutional. It is doubtful that I have the authority to declare the Bureau 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 FCO's claim that the CID should be set aside on constitutional grounds.

Second, FCO argues that the CID's notification of purpose does not comply with 12 U.S.C. § 5562(c)(2), which requires Bureau CIDs to “state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.” FCO contends that the notification of purpose here suffers from the same defect identified by the D.C. Circuit in *CFPB v. Accrediting Council for Independent Colleges and Schools (ACICS)*, 854 F.3d 683 (D.C. Cir. 2017). According to FCO, the notification of purpose here is insufficient because, as in *ACICS*, the notification “gives no description whatsoever of the conduct the CFPB is interested in investigating,” thereby precluding a reviewing court from “accurately determin[ing] whether the inquiry is within the authority of the agency and whether the information sought is reasonably relevant.” Petition at 3 (quoting *ACICS*, 854 F.3d at 691).

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, 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 this CID as follows:

The purpose of this investigation is to determine whether debt collectors or associated persons, in connection with the collection and reporting of consumer debts, have: (1) made false or misleading representations in a manner that violates the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq., principally § 1692e; (2) failed to perform the duties of a furnisher of information to consumer reporting agencies, including by failing to establish reasonable policies and procedures concerning the accuracy and integrity of furnished

information or to conduct appropriate investigations of disputes, in a manner that violates the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., principally § 1681s-2, or Regulation V, 12 C.F.R. Part 1022, principally Subpart E; or (3) thereby also violated Section 1036(a)(1)(A) of the Consumer Financial Protection Act of 2010, 12 U.S.C. § 5536(a)(1)(A). The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

FCO's arguments based on the original, unmodified notification of purpose do not provide a basis for setting aside or further modifying the CID, 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, FCO claims that the CID should be set aside because (FCO says) the Bureau's overall investigation into its conduct has been fundamentally unfair. As evidence for this claim, FCO argues (1) that it did not have enough time to comply with past civil investigative demands, (2) that the Bureau's document submission standards have been too demanding, and (3) that Enforcement issued CIDs after indicating that FCO could be the subject of a public enforcement action and after discussing the possibility of settlement. (FCO also points to the alleged deficiencies with the CIDs' notifications of purpose.)

Many of FCO's complaints about the course of the Bureau's investigation have little to do with the CID that it is challenging and are not a legal basis to set aside this CID. For instance, FCO claims that Enforcement should have granted it more time to comply with prior CIDs, asserting (incorrectly) that Enforcement required "same-day" responses to prior CIDs. FCO does not claim, however, that it needs additional time to comply with the November 2018 CID. Indeed, FCO's counsel represents that FCO has preserved the materials requested by the November 2018 CID. *See* Petition at 8. Likewise, while FCO complains that the Bureau's standard document submission standards have burdened it in responding to past CIDs, FCO does not argue that complying with the November 2018 CID would be unduly burdensome. Accordingly, these arguments are rejected.

FCO's objections to the course and progress of negotiations with the Bureau are also largely unrelated to the November 2018 CID (and therefore do not provide a basis to set aside that CID). However, FCO does appear to assert that it was improper for the Bureau to issue a CID at this stage in the Bureau's investigation. Generously construed, this is a claim that the November 2018 CID was issued for an improper purpose or in bad faith. Courts will decline to enforce administrative subpoenas that are "issued for an improper purpose, such as to harass the [recipient] or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *Powell v. United States*, 379 U.S. 49, 58 (1964). FCO bears a "heavy" burden in establishing such an improper purpose or bad faith. *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 316 (1978).

FCO fails to show that the November 2018 CID was issued for an improper purpose or in bad faith. FCO bases its argument on an assumption that Enforcement has already sought

authority to assert claims against FCO, and that either authority to bring suit has been granted (and thus, FCO claims, there is no reason for additional investigation) or that such authority has *not* been granted and Enforcement is seeking additional evidence to support an enforcement action. FCO does not explain, however, why the November 2018 CID would be improper under either of these scenarios. FCO does not point to any statutory or other restriction on the Bureau's ability to issue a CID after an enforcement action is authorized but before it is filed. Nor does FCO explain why it would be improper for the Bureau to issue a CID to obtain additional evidence before authorizing an enforcement action. In any event, the narrow scope of information sought by the November 2018 CID belies any suggestion that the Bureau issued the CID to force FCO to do anything other than produce materials relevant to the Bureau's investigation. I therefore find that FCO has not met its "heavy burden" of establishing that the November 2018 CID was issued for an improper purpose or in bad faith.

CONCLUSION

For the foregoing reasons, I grant the Petition in part and deny it in part. In particular, the CID's notification of purpose is modified as discussed above. Subject to this change, FCO is directed to comply in full with the November 2018 CID within 10 days of this Order.

FCO is welcome to engage in discussions with Bureau staff about any further suggestions for modifying the CID, which may be adopted by the Assistant Director for Enforcement or Deputy Enforcement Director, as appropriate.

April 25, 2019


Kathleen L. Kraninger, Director