
IN RE NEXUS SERVICES, INC. AND LIBRE BY NEXUS, INC.

2017-MISC-Nexus Services, Inc. and Libre by Nexus, Inc.-0001

DECISION AND ORDER ON PETITION BY NEXUS SERVICES AND LIBRE BY NEXUS TO SET ASIDE OR MODIFY CIVIL INVESTIGATIVE DEMAND

Nexus Services and Libre by Nexus (collectively, Nexus)¹ have petitioned the U.S. Consumer Financial Protection Bureau (CFPB or Bureau) for an order to set aside or modify a civil investigative demand (CID) issued to them and have requested confidential treatment of materials related to the Petition. For the reasons set forth below, the Petition is denied as is the request for confidential treatment.

FACTUAL BACKGROUND

On August 22, 2017, the Bureau issued a CID to Nexus seeking information about its products and operations. The CID’s “Notification of Purpose” stated that the CID had been issued:

to determine whether persons who provide products or services related to bonds posted on behalf of detainees are extending credit or offering to extend credit. The purpose of this investigation is also to determine whether such persons, in connection with marketing or selling those products or services to consumers or enforcing their terms and conditions, have engaged or are engaging in unfair, deceptive, or abusive acts and practices in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536.

It further stated that another purpose of the investigation is to determine whether Bureau action to obtain legal or equitable relief would be in the public interest. The CID included eight interrogatories, four requests for written reports, nine requests for documents, and four topics for hearing.

Pursuant to the Bureau’s rules, Nexus was required to meet and confer with a Bureau investigator within 10 days of its receipt of the CID. *See* 12 C.F.R. § 1080.6(c). Nexus and its

¹ Libre by Nexus, Inc. is a subsidiary of Nexus Services, Inc. and all of Nexus’s immigration bond services are provided by Libre. Given this, and that the two legal entities are represented by the same counsel and that there are no separate legal issues raised by either entity with respect to the CID, this Decision and Order refers to the two entities collectively as “Nexus” and uses singular verb forms for convenience.

counsel did so on August 30, 2017. Nexus then filed its Petition to Set Aside or Modify the CID on September 8, 2017.

LEGAL DETERMINATION

Nexus argues that, for three different reasons, the CID should be set aside. In the alternative, Nexus argues that the CID should be modified to reduce the burden of responding to it. These arguments do not warrant setting aside or modifying the CID. Nexus also requests confidential treatment for its Petition, the CID, and this Order, but it has failed to demonstrate good cause for excluding these materials from the public record.

A. Arguments for Setting Aside the CID

First, Nexus argues that the CFPB's structure is unconstitutional and that the CID is therefore invalid. *See* pet. at 5–6. But this argument is improperly raised in this administrative proceeding because “government agencies may not entertain a constitutional challenge to authorizing statutes.” *United Space All., LLC v. Solis*, 824 F. Supp. 2d 68, 97 n.10 (D.D.C. 2011) (quotation omitted); *see also Buckeye Indus., Inc. v. Sec’y of Labor*, 587 F.2d 231, 235 (5th Cir. 1979) (“No 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). For this reason, the Bureau has declined to set aside or modify CIDs in response to similar arguments in the past. *See, e.g., In re Seila Law, LLC*, 2017-MISC-Seila Law, LLC-0001, at 2 (Apr. 10, 2017)²; *In re Future Income Payments, LLC*, 2016-MISC-Future Income Payments, LLC-0001, at 2 (Jan. 5, 2017).³ Accordingly, Nexus’s constitutional objection provides no basis for setting aside or modifying any provision of the CID.

Second, Nexus argues that it is not subject to the authority of the CFPB and that the CID is therefore invalid. Nexus parses the Bureau’s statutory authority and argues that it is not a “covered person” subject to the Bureau’s authority with respect to unfair, deceptive, or abusive acts or practices. Pet. at 6–8. But the Bureau is authorized to issue CIDs to “any person” who may have information “relevant to a violation.” 12 U.S.C. § 5562(c)(1). So Nexus’s assertions do not go to the scope of the Bureau’s investigative authority but rather are fact-based arguments about whether it is subject to substantive provisions of the CFPA. As the Bureau has previously explained, such fact-based arguments about whether an entity is subject to the Bureau’s enforcement authority are not valid defenses to the enforcement of a CID. *See, e.g., In re Synchrony Financial*, 2017-MISC-Synchrony Financial-0001, at 4 (Sept. 7, 2017)⁴; *In re Future*

² Available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201704_cfpb_Decision-and-Order-on-Seila-Law-LLC-Petition.pdf.

³ Available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201703_cfpb_Decision-and-Order-on-Petition-by-Future-Income-Payments-LLC.pdf.

⁴ Available at https://www.consumerfinance.gov/documents/5560/201709_cfpb_synchrony-financial_decision-and-order-on-petition.pdf.

Income Payments, LLC, at 2. The Supreme Court has “consistently reaffirmed” the principle that “courts should not refuse to enforce an administrative subpoena when confronted by a fact-based claim regarding coverage or compliance with the law.” *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1076 (9th Cir. 2001) (citing *United States v. Powell*, 379 U.S. 48, 57–58 (1964)); see also *SEC v. Savage*, 513 F.2d 188, 189 (7th Cir. 1975) (SEC not required to establish that company’s contracts were “securities” subject to agency’s jurisdiction before subpoena would be enforced); *CFPB v. Harbor Portfolio Advisors, LLC*, 2017 WL 631914, at *3 (E.D. Mich. Feb. 16, 2017) (“Whether Respondents’ transactions *actually* involve ‘credit’ is not at issue, and it would be premature for the Court to decide that question at this stage.”). The Bureau is not required to accept Nexus’s argument and may investigate whether it has authority over Nexus. See *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1052–53 (2d Cir. 1973) (“The [SEC] must be free without undue interference or delay to conduct an investigation which will adequately develop a factual basis for a determination as to whether particular activities come within the Commission’s regulatory authority.”); *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 699 (7th Cir. 2002) (“[A]ny agency with subpoena powers . . . is entitled to obtain the facts necessary to determine whether it can proceed to the enforcement stage.”). And this ability to investigate whether the Bureau has authority over an entity is important—at least one Bureau investigation to date has revealed that a company claiming not to be a covered person actually was. See Compl., *CFPB v. Pension Funding, LLC*, No. 8:15-cv-1329 (C.D. Cal filed Aug. 20, 2015).⁵

Third, Nexus argues that the CID should be set aside as “excessively vague and overbroad” because “it is excessively burdensome to understand the nature and scope of the CID.” Pet. at 8–9. This argument, too, fails. As Nexus itself correctly notes, a CID must “state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.” 12 U.S.C. § 5562(c)(2); see also *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992) (explaining that “the boundary” of an investigation “may be defined quite generally”). Here, the CID both identifies the nature of the conduct under investigation (“marketing or selling” “products or services related to bonds posted on behalf of detainees”) and the applicable provisions of law (“unfair, deceptive, or abusive acts and practices in violation of §§ 1031 and 1036 of the [CFPA]”). Nexus purports to not understand what “persons” or “services” the CID refers to. See pet. at 8. But the CID explains that it seeks information about Nexus and its employees and the products or services that Nexus offers. Any imprecision in the phrase “persons who provide products or services related to bonds posted on behalf of detainees” exists because there is no common name for the services that Nexus offers. Accordingly, this is not a situation in which broad notification-of-purpose language makes it impossible to determine the relevance of specific requests. See *CFPB v. Accrediting Council for Indep. Colls. & Sch.*, 854 F.3d 683, 691 (D.C. Cir. 2017). What’s more, the CID explains that one of the purposes of the investigation is to determine “whether persons who provide products or services related to bonds posted on behalf of detainees are extending credit or offering to extend credit.” Such language is not required,

⁵ Available at http://files.consumerfinance.gov/f/201508_cfpb_complaint-pension-funding-llc-pension-income.pdf.

because notification of the nature of the conduct at issue and applicable provision of law necessarily also provides notice that the Bureau’s inquiry may encompass whether it has authority under the cited provision of law to address the described conduct. But by including it, the Bureau has further explained the purposes of its inquiry.

B. Requested Modifications

In its Petition, Nexus also contends that several of the CID requests are “overly broad and unduly burdensome.” Pet. at 9. Specifically, Nexus objects to Written Reports 1 and 2, which request information about Nexus’s current and former employees, and to Interrogatory 6, Written Report 4, and Document Requests 3, 4, and 7, which request information about Nexus’s current and former clients, as well as their agreements with Nexus, payment histories, and communications. *See id.* at 9–10.

First, Nexus argues that these requests seek information that is not relevant to the purpose of the investigation, and that the requests could be modified to be more “tailored to the Notification of Purpose” by, for example, requesting “an example of the contract or contracts used by Respondents with Program Participants, or a random sampling of Program participant contracts and payment information.” *Id.* at 11.

As explained above, the purpose of this investigation is “to determine whether persons who provide products or services related to bonds posted on behalf of detainees are extending credit or offering to extend credit”⁶ and if so whether such persons have committed unfair, deceptive, or abusive acts or practices in connection with the marketing or selling of the products or services. Both of these inquiries can be fact intensive and require understanding how a company actually operates. For example, understanding whether a company is extending credit can require understanding the specifics of the company’s agreements and communications with consumers. *See, e.g.,* Compl., *CFPB v. Pension Funding, LLC*. Likewise, determining whether an entity is engaged in unfair, deceptive, or abusive acts or practices requires understanding its business practices and, where these practices vary, can require understanding the practices and representations of different employees of the company. As such, the CID’s requests for basic information about Nexus’s employees and clients are highly relevant to the purpose of the investigation. Nexus’s proposed alternatives of providing sample contracts or a random sampling of client data would, by contrast, not provide sufficient information for the Bureau to form an adequate picture of Nexus’s activities.

Second, Nexus contends that the requests are unduly burdensome. In part this contention is based on the already-rejected argument that the information sought is irrelevant to the Bureau’s investigation. But the contention is also based on Nexus’s assertion that it stores client

⁶ Again, such language is not required because notification of the nature of the conduct at issue and the applicable provisions of law necessarily also provides notice that the Bureau’s inquiry may encompass whether it has authority under the cited provisions of law to address the described conduct. Here the Bureau included the language to give further detail about the nature of its inquiry.

files in two separate and incompatible computer programs. Nexus states that, because responding to the requests concerning its clients would require an employee to manually review paper and computer files for every client, it would require approximately 8,000 person-hours of work to respond to these requests. Nexus further contends that producing the employee information would require another 60 person-hours of work. *See* pet. at 12–13.

“[C]ourts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.” *FTC v. Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1977) (en banc). Determining whether a party has carried its burden of showing that a request is unduly burdensome or unreasonably broad necessarily requires considering the scope of the agency’s inquiry and the size and scope of the party’s operations. *See id.* (dismissing burden objections in part because “the breadth complained of is in large part attributable to the magnitude of the producers’ business operations.”). Nexus operates at least 22 offices nationwide⁷ and has generated at least 15,000 client files. *See* pet. at 12. Even assuming Nexus’s time estimates are accurate, they do not demonstrate that responding to the request would unduly disrupt or seriously hinder Nexus’s normal operations.

Moreover, by Nexus’s own admission, the burden it alleges is largely due to the method in which it has chosen to store its files. Because of its file storage methods, Nexus claims that responding to the requests will take 20 minutes per client file. Pet. at 12–13. In civil discovery, “[c]ourts have been loath[] to reward (and possibly encourage) poor record keeping by shielding companies with inefficient recording methods from discovery.” *Bridgell v. Saint Gobain Abrasives, Inc.*, 233 F.R.D. 57, 61 (D. Mass. 2005) (“[I]t is St. Gobain’s own record keeping policies which have contributed significantly to the burden imposed on it.”). For the same reason, Nexus’s argument is unavailing here.⁸

C. Request for Confidentiality

Finally, Nexus requests confidential treatment of the CID, its Petition, and the Bureau’s response to the Petition. Nexus argues that publicizing the CID or Petition “could only cause harm to Respondents” and that it would be unfair to disclose a potential investigation because the Bureau is unconstitutional and lacks authority over Nexus. Pet. at 15.

The Bureau’s regulations governing investigations provide that a petition to modify or set aside a CID and the Bureau’s order in response are “part of the public records of the Bureau unless the Bureau determines otherwise for good cause shown.” 12 C.F.R. § 1080.6(g). As the Bureau has explained, a petitioner bears the burden of demonstrating good cause that its petition should not be made public. *See In re Great Plains Lending LLC*, 2012-MISC-Great Plains

⁷ *See* Libre by Nexus, <https://www.librebynexus.com/> (last visited Oct. 10, 2017).

⁸ Enforcement Staff have represented that when they conferred with Nexus representatives, they offered to allow Nexus to produce the underlying client files instead of the reports that it claimed were too burdensome to generate, but Nexus declined this option. Of course, as noted below, Nexus is welcome to engage in further discussions with Enforcement Staff about appropriate modifications to the CID.

Lending-0001 (Sept. 12, 2013), at 2⁹; *see also* *Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37, 40 n.4 (D.D.C. 1997) (“In ‘reverse-FOIA’ cases, the party seeking to prevent a disclosure the government itself is otherwise willing to make assumes that burden”). This standard mirrors that of the Federal Trade Commission, *see* 16 C.F.R. § 4.9(c)(1), and is consistent with the “general policy favoring disclosure of administrative agency proceedings,” *FCC v. Schreiber*, 381 U.S. 279, 293 (1965) (affirming agency authority to promulgate a rule generally requiring public disclosure of investigative information).

In determining whether a petitioner has shown “good cause” under 12 C.F.R. § 1080.6(g) to prevent public disclosure of petitions and responsive orders, the Bureau generally looks to the standards for withholding material from public disclosure established by the Freedom of Information Act (FOIA) amendments to the Administrative Procedure Act. *See In re Heartland Campus Solutions, ECSI*, 2017-MISC-Heartland Campus Solutions, ECSI-0001, at 9 (Sept. 8, 2017).¹⁰ Accordingly, the Bureau will publicly disclose a petition to modify or set aside a CID unless either the petitioner has made a factual showing that the information in the petition falls within one of the FOIA exemptions or the Bureau determines that there exists other good cause to withhold all or a portion of the petition from public disclosure and the withheld information is not otherwise required by law to be made public.

Here, Nexus makes no effort to identify any material that would be protected by FOIA. Instead, it argues that it would “unfair” to publicize the investigation because it claims that the Bureau is unconstitutional and lacks authority over Nexus. As explained above, I have rejected both of these arguments in the context of Nexus’s petition to set aside or modify the CID. In any event, Nexus makes no attempt to explain why or how either issue bears on the transparency values underlying the policy in favor of public disclosure. Furthermore, the Bureau has previously rejected similar arguments for confidentiality. *See In re Future Income Payments, LLC*, at 5 (rejecting argument that it would be inappropriate to make public the fact of a CID public while the Bureau’s constitutionality is subject to ongoing litigation). Accordingly, Nexus has not shown good cause for non-public treatment of the CID, its Petition, or this Decision and Order.

CONCLUSION

For the foregoing reasons, Nexus’s Petition to Set Aside or Modify the CID and its request for confidential treatment are denied. Nexus is directed to produce all responsive documents, items, and information within its possession, custody, or control that are covered by the CID within 10 calendar days of this Decision and Order. The company is welcome to engage in discussions with Enforcement Staff about any further suggestions for modifying the CID or

⁹ Available at http://files.consumerfinance.gov/f/201309_cfpb_decision-on-confidentiality_greatplainslending-0001.pdf.

¹⁰ Available at https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201709_cfpb_heartland-campus-solutions_decision-and-order-on-petition.pdf.

staggering production, which may be adopted by the Assistant Director for Enforcement or Deputy Enforcement Director as appropriate.

This Decision and Order and the accompanying Petition will be published on the Bureau's website no fewer than five business days after service of the Decision and Order on the Petitioner.


Richard Cordray, Director

October 11, 2017