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

IN RE ACTIVE NETWORK, LLC.

2020-MISC-ACTIVE Network, LLC-0001

DECISION AND ORDER ON PETITION BY ACTIVE NETWORK, LLC TO SET ASIDE CIVIL INVESTIGATIVE DEMAND

ACTIVE Network, LLC (ACTIVE) petitioned for an order to set aside a civil investigative demand (CID) from the Bureau's Office of Enforcement. For the reasons set forth below, the Petition is denied.

FACTUAL BACKGROUND

On July 20, 2020, the Bureau issued ACTIVE a civil investigative demand (CID) seeking information related to ACTIVE's payment processing activities and the company's ACTIVE Advantage membership product. The CID's notification of purpose explained:

> The purpose of this investigation is to determine whether ACTIVE Network, LLC or associated persons: (1) is a covered person that offers or provides payment processing services; (2) has, in connection with offering or providing payment processing services, made false or misleading representations to consumers or improperly imposed charges on consumers in a manner that is unfair, deceptive, or abusive in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536; or (3) has failed to follow the requirements for written authorization by consumers for preauthorized transfers in a manner that violates Regulation E, 12 C.F.R. § 1005.10(b), implementing the Electronic Fund Transfer Act, 15 U.S.C. § 1693 et seq. 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 CID included one interrogatory, one written report, and ten requests for documents and tangible things. The CID also identified nine topics for an investigational hearing of an appropriate company official. ACTIVE conferred with Enforcement counsel about responding to the CID on July 31, 2020. ACTIVE filed a timely petition to set aside the CID on August 10, 2020.

The July 2020 CID is the second that the Bureau has issued to ACTIVE. In February 2019, the Bureau issued its first CID; ACTIVE petitioned to set aside that CID as well. In an order dated July 29, 2019, I granted ACTIVE's petition in part (by modifying the first CID's notification of purpose), but otherwise directed ACTIVE to comply in full with the CID.

LEGAL DETERMINATION

In its current petition, ACTIVE principally claims that the July 2020 CID should be set aside because ACTIVE is not a covered person under the Consumer Financial Protection Act (CFPA) and is therefore not subject to the CFPA's prohibition on unfair, deceptive, and abusive acts and practices. ACTIVE also challenges the information sought in the CID, claiming: (1) that much of the information sought by the CID is not relevant to the Bureau's investigation into whether ACTIVE has complied with the Electronic Fund Transfer Act (EFTA); (2) the CID's requests would be unduly burdensome if the Bureau lacked authority to conduct the investigation; and (3) the CID's requests are overly broad because they seek information concerning conduct that (ACTIVE says) is outside the relevant statutes of limitations.

After reviewing ACTIVE's submission, I find the Bureau's investigation is not patently outside of its authority. I find further that the CID's requests are relevant to the purposes of the investigation and ACTIVE has not demonstrated that these requests are unduly burdensome or overly broad. Accordingly, I deny ACTIVE's petition in its entirety.

I. The Bureau's Authority to Conduct the Investigation

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). The recipient of a CID[1] cannot challenge an agency investigation by preemptively contesting the facts that the agency might find, at least where the investigation is not patently outside the agency's authority. *FTC v. Ken Roberts Co.*, 276 F.3d 583, 584 (D.C. Cir. 2001) ("Unless it is patently clear that an agency lacks the jurisdiction that it seeks to assert, an investigative subpoena will be enforced."). 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's CID to ACTIVE explains that the purpose of the Bureau's investigation is to determine whether ACTIVE Network, LLC or associated persons: (1) is a covered person that offers or provides payment processing services; (2) has, in connection with offering or providing payment processing services, made false or misleading representations to consumers or improperly imposed charges on consumers in a manner that is unfair, deceptive, or abusive in violation of the CFPA; or (3) has failed to follow the requirements for written authorization by

[1] The courts "have treated CIDs as a form of administrative subpoena." *See CFPB v. Accrediting Council for Indep. Colleges & Sch.*, 854 F.3d 683, 688 (D.C. Cir. 2017).

consumers for preauthorized transfers in a manner that violates 12 C.F.R. § 1005.10(b), which implements EFTA. The Petition argues that the Bureau lacks the authority to investigate whether ACTIVE has made false or misleading representations to consumers or improperly imposed charges, because ACTIVE is not a covered person who offers or provides payment processing services. I disagree.

The CFPA makes it unlawful for covered persons and service providers to engage in unfair, deceptive, or abusive acts or practices in connection with consumer financial products or services. 12 U.S.C. §§ 5531, 5536. ACTIVE contends that it is not a covered person because it does not offer or provide payment processing services. As relevant here, a "covered person" is one "that engages in offering or providing a consumer financial product or service." 12 U.S.C. § 5481(6)(A). A "consumer financial product or service" is a "financial product or service" that is offered or provided for use by consumers primarily for personal, family, or household purposes. *Id.* § 5481(5)(A). One of the categories of financial products or services set forth in the CFPA involves payment processing services. This category includes:

> providing payments or other financial data processing products or services to a consumer by any technological means, including processing or storing financial or banking data for any payment instrument, or through any payments systems or network used for processing payments data, including payments made through an online banking system or mobile telecommunications network....

Id. § 5481(15)(A)(vii). The statute then provides an exception to this broad category that ACTIVE claims is relevant here:

> [A] person shall not be deemed to be a covered person with respect to financial data processing solely because the person— (I) is a merchant, retailer, or seller of any nonfinancial good or service who engages in financial data processing by transmitting or storing payments data about a consumer exclusively for purpose of initiating payments instructions by the consumer to pay such person for the purchase of, or to complete a commercial transaction for, such nonfinancial good or service sold directly by such person to the consumer[.]

Id. § 5481(15)(A)(vii).

According to the Petition, ACTIVE's conduct is covered by this exception because ACTIVE is a merchant, retailer, or seller of nonfinancial goods or services (including, as most relevant here, event registrations) whose only payment processing activities are for the purpose of initiating payment instructions for the direct sale of those goods and services to consumers. To support this claim, ACTIVE's Petition says that it "operates a website focused on selling registrations for a variety of athletic and other recreational activities," and that "[t]o sell the registrations, ACTIVE contracts with various event owners, who agree to honor the registrations ACTIVE sells." Petition at 4. ACTIVE further explains that its "contractual arrangement with consumers and event organizers . . . makes it clear ACTIVE is accepting payments for the event

registrations that ACTIVE sells directly to consumers." *Id.* at 10. ACTIVE's position, "[p]ut simply," is that "ACTIVE is an event registration reseller." *Id.*

ACTIVE's website, however, appears to tell a different story. There, ACTIVE seems to disclaim any role as a seller or reseller of event registration services. For instance, the terms of use that ACTIVE provides consumers in connection with its event registration services say:

> Parties other than Active provide services, or sell products or access to their Events on the Site. You may order services or merchandise through the Site from other parties not affiliated with Active ("Seller"). All matters concerning the merchandise and services desired from a Seller, including but not limited to purchase terms, payment terms, warranties, guarantees, maintenance and delivery, are solely between you and Seller. Active makes no warranties or representations whatsoever with regard to any goods or services provided by Sellers. You will not consider Active, nor will Active be construed as, a party to such transactions, whether or not Active may have received some form of revenue or other remuneration in connection with the transaction.

Terms of Use, ACTIVE Network, https://www.activenetwork.com/information/terms-of-use?clckmp=activecom_global_footer_termsofuse (cited in Petition at 4, nn.3-5) (emphasis omitted).

It is not clear how ACTIVE can be a "seller" or "reseller" of event registrations directly to consumers (as the Petition claims) if ACTIVE is not a party to the transactions in which consumers buy the registrations (as the terms of use assert).[2]

ACTIVE's position that it is a "seller" or "reseller" of event registrations and does not provide payment processing services that consumers use to purchase goods and services from third parties is in similar tension with what it tells consumers wondering why their account

[2] ACTIVE's website likewise disclaims any responsibility in the event that a consumer who purchases one of the registrations that ACTIVE "sells" needs to cancel the registration or seek a refund. *See* Cancel Registration, ACTIVE Network Support, http://activesupport.force.com/usersupport/articles/en_US/Article/Cancel-Your-Registration ("Active.com is not authorized to cancel a registration nor authorize a refund for an event unless you purchased a duplicate registration in error."); Registered to Wrong Event, ACTIVE Network Support, http://activesupport.force.com/usersupport/articles/en_US/Article/Registered-to-Wrong-Event ("We apologize, but unfortunately Active.com is not authorized to give refunds on behalf of our Event Director's events, to transfer a paid registration to another event, nor to transfer your paid registration fees to cover the registration cost of an alternate event. If you were registered to an event in error, you will need to contact that event directly to inquire about their cancellation and refund policy prior to re-registering for the desired event."); Terms of Use, ACTIVE Network https://www.activenetwork.com/information/terms-of-use?clckmp=activecom_global_footer_termsofuse ("To the extent that an Event is cancelled or does not meet your expectations for any reason, you must contact the Event organizer and your sole and exclusive remedy with respect to the Event is with the Event organizer and not with Active.").

statements have a charge from ACTIVE. Instead of telling such consumers that there is a charge from ACTIVE because ACTIVE sold them an event registration, ACTIVE says that the charge is there because the consumer "registered/paid for an event/activity managed by an organization using an ACTIVE Network system" and clarifies that "[t]he ACTIVE Network is a software provider that processes activity registrations and online payments for organizations in multiple markets." ACT Charge on Bank Statement, ACTIVE Network Support, http://activesupport.force.com/usersupport/articles/en_US/Article/ACT-Charge-on-Bank-Statement.

Because the Bureau's investigation is still ongoing, I do not need to resolve whether ACTIVE is, in fact, a covered person subject to the CFPA's prohibitions on unfair, deceptive, and abusive acts and practices. Instead, the question before me is whether ACTIVE has shown that the Bureau's authority to enforce those prohibitions against ACTIVE is patently lacking. The Petition falls well short of clearing that high bar.[3]

II. Relevance and Burden

In the Petition, ACTIVE challenges the information sought by the CID in three ways; none supports setting aside the CID.

1. The Petition, at 17-19, says that much of the information that the CID seeks is not related to the Bureau's investigation into potential violations of EFTA and Regulation E. This is true. It is also irrelevant because the Bureau's investigation is not limited to potential violations of EFTA and Regulation E. The Bureau's investigation also concerns whether ACTIVE or associated parties (1) are covered persons engaged in offering or providing payment processing services, and (2) violated the CFPA's prohibition on unfair, deceptive, and abusive acts and practices in connection with those payment processing services by making false or misleading representations to consumers or improperly imposing charges on consumers. The Bureau is further seeking to determine whether Bureau action to obtain legal or equitable relief would be in the public interest. The Petition does not provide any basis to conclude that the CID's requests are not sufficiently related to one or more of these purposes.

2. ACTIVE's Petition, at 19-20, says that because ACTIVE has demonstrated (according to ACTIVE) that it is not subject to the CFPA, it would be unduly burdensome for ACTIVE to be required to provide additional information to the Bureau concerning its business. This objection is misplaced for two independent reasons.

First, as explained above, ACTIVE has not demonstrated that the CFPA is patently inapplicable to its conduct. The Bureau's investigation into the CFPA's application is ongoing. Indeed, much of the material sought by the CID is relevant to ACTIVE's contention that it only offers or provides payment processing services to consumers as a seller or reseller of event registrations or other non-financial goods and services. *See, e.g.*, Petition, Exhibit A (Requests for Documents 2, 3, 4, 5, 6, 7; Topics for Investigational Hearing 1, 2, 3, 4). That the CID seeks information relevant both to whether the CFPA applies and whether it may have been violated is entirely appropriate. It has long been settled that an administrative subpoena may seek information to determine both whether an entity is subject to a law and, if so, whether the entity is violating that law. *See Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 210 (1946) (affirming enforcement of administrative subpoenas whose purpose "was to determine two

[3] The Petition does not challenge the Bureau's authority to investigate whether ACTIVE has complied with EFTA.

issues, whether petitioners were subject to the Act and, if so, whether they were violating it"). And, as the Supreme Court held in *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 508-09 (1943), an agency is not required to investigate and conclusively determine whether a party's conduct is subject to a law that the agency enforces before investigating whether that conduct would violate the law. The Court made clear that an agency in that situation would have discretion to investigate whether the party's conduct would violate the statute before determining whether the statute applied, noting that the agency could find this approach "advisable" because if the agency found no violation "the issue of coverage would be academic." *Id.* at 509.

Contrary to the suggestion in the Petition, at 20, courts applying *Oklahoma Press* and *Endicott Johnson*, have consistently confirmed that an agency is not required to investigate and resolve fact-bound challenges to the application of a statute to a course of conduct before it can investigate whether that conduct would violate the statute. *See, e.g.*, *Newmark & Co. v. Wirtz*, 330 F.2d 576, 578 (2d Cir. 1964) ("Although it might well save time and expense for all concerned if the Administrator first examined such records as were relevant to coverage and then proceeded beyond that only if convinced that appellant were covered, the *Oklahoma Press* decision makes it plain that the course of the investigation is for the Administrator to determine."); *Fed. Mar. Comm'n v. Port of Seattle*, 521 F.2d 431, 433 (9th Cir. 1975) (relying on *Oklahoma Press* and *Endicott Johnson* to reverse district court order that permitted administrative discovery for "only those facts necessary to determine the Commission's jurisdiction to investigate the Port's consolidation services, and refused to let the Commission inquire into the 'details' of the consolidation practices"); *CSG Workforce Partners, LLC v. Watson*, 512 F. App'x 830, 836-37 (10th Cir. 2013) ("*Endicott Johnson* and the *Oklahoma Press* cases stand for the proposition that FLSA coverage is generally not an appropriate defense in a DOL subpoena enforcement action, even if the subpoena is not limited to information relevant to coverage but also demands data relevant to possible FLSA violations."). This rule applies with full force even where the recipient of the subpoena claims that the relevant statute is wholly inapplicable to its conduct. *See, e.g.*, *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1052, 1055 (2d Cir. 1973) (holding that even though subpoena recipients raised "serious questions about whether their activities [were] subject to regulation by the SEC," the SEC was "entitled simultaneously to conduct a full inquiry into both potential coverage and potential violations." (citations omitted)).

Second, an administrative subpoena is unduly burdensome as a matter of law only where "compliance threatens to unduly disrupt or seriously hinder normal operations of a business." *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (en banc); *accord, e.g.*, *NLRB v. Am. Med. Response, Inc.*, 438 F.3d 188, 193 n.4 (2d Cir. 2006) ("[C]ourts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business." (internal quotations omitted)). ACTIVE has not asserted—much less provided evidence showing—that responding to the CID would "threaten[] to unduly disrupt or seriously hinder normal operations." *Texaco*, 555 F.2d at 882; *accord EEOC v. Randstad*, 685 F.3d 433, 452 (4th Cir. 2012) (concluding that evidence "was insufficient as a matter of law" to establish undue burden where company did not show "that gathering the

requested information would threaten or seriously disrupt [the company's] business operations" (internal quotations omitted)).

3. In the Petition, at 20-23, ACTIVE says that the CID is overbroad because it seeks information that (ACTIVE believes) is outside the relevant statutes of limitations. The Petition misses the mark for two independent reasons.

First, the Bureau can properly seek information regarding conduct outside the applicable limitations period. Conduct outside a limitations period can bear on conduct within the limitations period. *See, e.g.*, *CFPB v. Future Income Payments, LLC*, 252 F. Supp. 3d 961, 969 (C.D. Cal. 2017) ("[E]ven assuming that the only actionable conduct occurred within the past three years, the CFPB may properly demand information for an additional two years because this information is reasonably relevant to conduct occurring within the statute of limitations period."), *vacated in irrelevant part*, No. 17-55721 (9th Cir. Oct. 18, 2018); *CFPB v. Harbour Portfolio Advisors*, LLC, No. 16-14183, 2017 WL 631914, *5 (E.D. Mich. Feb. 16, 2017) (similar). Indeed, ACTIVE's arguments otherwise recognize the relevance of information about conduct that (in ACTIVE's view) predates the limitations period. For instance, ACTIVE argues, at 21, that further investigation is unwarranted because ACTIVE has, since 2011, adjusted its practices in response to inquiries from other regulators, but it objects to CID requests seeking information related to these assertions, *see, e.g.*, Petition, Exhibit A (Requests for Documents 9, 10; Topic for Investigational Hearing 8).

Second, under 12 U.S.C. § 5564(g)(1), the statute of limitations for claims brought under the CFPA is three years "after the date of discovery of the violation to which an action relates." The Petition appears to suggest, at 20-22, that even though section 5564(g)(1) says that the three-year statute of limitations runs from the date of discovery of the violation, the limitations period actually runs from the date of the violation itself because (ACTIVE believes) that would be a better policy. But whether a statute of limitations runs from the date that a violation occurs or from the date of its discovery is a decision that is entrusted to Congress. *See Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019) (explaining that it is up to Congress whether to have a statute of limitations run from the date of discovery and that the courts "simply enforce the value judgments made by Congress"). The Petition fares no better in relying on the five-year statute of limitations provided by 28 U.S.C. § 2462 (which, if applicable, would only be relevant to certain kinds of relief) or the one-year statute of limitations provided by 15 U.S.C. § 1693m(g) (which applies to actions brought under the section of EFTA authorizing private enforcement of the Act).[4]

III. Confidentiality

The Bureau's regulations governing investigations provide that a CID petition and the Bureau's order in response thereto are "part of the public records of the Bureau unless the

[4] ACTIVE's claim, at 17 n.19, that the Bureau cannot investigate conduct that predates the Senate confirmation of the Bureau's first Director, Richard Cordray, is likewise unavailing. ACTIVE's theory that it did not become a covered person until July 2013 is inconsistent with the terms of the CFPA. The definition of covered person became effective on July 21, 2010 and the prohibition on unfair, deceptive, or abusive acts or practices by covered persons took effect on July 21, 2011. *See* 12 U.S.C. § 5301 note (setting the general effective date of the Dodd-Frank Act that is applicable to 12 U.S.C. § 5481's definition of covered person); *id.* § 5531 note (providing

Bureau determines otherwise for good cause shown." 12 C.F.R. § 1080.6(g). ACTIVE requests confidential treatment of materials that are referred to in the Petition but which were not attached to it. I therefore deny the request for confidential treatment as moot since those materials will not be made public in connection with the Petition. Separately, I have determined that there is good cause to redact portions of the CID that may disclose nonpublic activities of another regulator or regulators.

CONCLUSION

For the foregoing reasons, I deny the Petition. ACTIVE is directed to comply with the CID dated July 20, 2020 within 30 days of this Decision and Order. ACTIVE 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 of Enforcement or the Deputy Assistant Directors of the Office of Enforcement, *see* 12 C.F.R. 1080.6(d).

9/28, 2020

Kathleen L. Kraninger, Director

that subtitle C of the CFPA, which includes 12 U.S.C. §§ 5531, 5536's prohibitions on unfair, deceptive, or abusive acts and practices would take effect on the designated transfer date); 75 Fed. Reg. 57252, 57252 (Sept. 20, 2010) (establishing July 21, 2011 as designated transfer date). The Joint Response by the Inspectors General of the Department of the Treasury and Board of Governors of the Federal Reserve System, 7 (Jan. 10, 2011), on which ACTIVE relies, at 17 n.19 is not to the contrary. That statement does not say that without a Senate-confirmed Director, the "*CFPB* will not have authority to ... prohibit unfair, deceptive, or abusive acts or practices," as the Petition mistakenly suggests, *see* Petition at 17 n.19 (emphasis added) (citations omitted). Instead the Joint Response says that "if there is no Senate-confirmed Director by the designated transfer date, in general, the *Secretary [of the Treasury]* is not permitted to exercise the Bureau's authority to" take such actions. Joint Response at 7 (emphasis added). This assessment about the Secretary of the Treasury's ability to exercise the authority that Congress gave the Bureau is not relevant here.