

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



IN RE TMX FINANCE LLC)
)
2021-MISC-TMX FINANCE LLC-001)
)

**DECISION AND ORDER ON PETITION BY TMX FINANCE LLC
TO MODIFY OR SET ASIDE CIVIL INVESTIGATIVE DEMAND**

TMX Finance LLC petitioned the Consumer Financial Protection Bureau for an order to modify or set aside a civil investigative demand. For the reasons set forth below, the petition is denied. Petitioner also requested confidential treatment of the civil investigative demand, their petition, and “any response, and any communications ... that may reveal the existence of the inquiry.” That request is also denied.

FACTUAL BACKGROUND

On February 5, 2021, the Bureau issued a civil investigative demand (CID) to TMX Finance LLC (“TMX”), seeking documents, various data, written reports, and responses to interrogatories. In its entirety, the CID’s Notification of Purpose stated:

The purpose of this investigation is to determine whether consumer-lending companies or title-loan companies, in connection with the extension of credit, servicing of loans, processing of payments, or collection of debt, have made false or misleading representations or omissions to consumers, improperly contacted consumers or third parties, failed to provide disclosures to consumers, or extended credit to covered servicemembers or their dependents on prohibited terms or without the required disclosures in a manner that: (1) is unfair, deceptive, or abusive in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. §§ 5531, 5536; (2) violates Regulation Z, 12 C.F.R. pt. 1026, principally subpt. C, implementing the Truth in Lending Act, 15 U.S.C. § 1601 et seq.; (3) violates the consent order that was entered in File No. 2016-CFPB-0022 on September 26, 2016, which is an order prescribed by the Bureau under §§ 1053 and 1055 of the CFPA, 12 U.S.C. §§ 5563, 5565, and thereby violated § 1036(a)(1)(A) of the CFPA, 12 U.S.C. § 5536(a)(1)(A); or (4) violates the Military Lending Act, 10 U.S.C. § 987, or its implementing regulation, 32 C.F.R. Part 232. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

TMX took part in a meet-and-confer with Enforcement staff on February 12 at which it discussed the issue raised in this petition. *See* 12 C.F.R. § 1080.6(c). TMX timely filed this

petition to modify or set aside the CID on February 25. *See* 12 U.S.C. § 5562(f); 12 C.F.R. § 1080.6(e).

LEGAL DETERMINATION

I. Petition to Modify or Set Aside the CID

TMX argues that the CID is invalid because, in its view, the Notification of Purpose fails to provide TMX with fair notice of the nature of the Bureau's investigation. As a consequence, TMX argues it cannot weigh the relevance of the requests. TMX's arguments are not well-founded: the Notification provides ample information concerning the nature of the Bureau's investigation under the law. TMX's petition is therefore denied.

Bureau CIDs 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. They do so in a "Notification of Purpose." 12 C.F.R. § 1080.5. A Notification of Purpose cannot use such "broad language" that it is impossible for a reviewing court to apply the three-pronged test in *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950), which evaluates whether (1) the inquiry is within the authority of the agency, (2) the demand is not too indefinite, and (3) the information sought is reasonably relevant. *See Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs.*, 854 F.3d 683, 691 (D.C. Cir. 2017) ("ACICS").

The Consumer Financial Protection Act (CFPA) authorizes the Bureau to take enforcement action against an "unfair, deceptive, or abusive act or practice" committed in "connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." 12 U.S.C. § 5531(a). It is also within the Bureau's authority to prevent violations of the Truth In Lending Act, 15 U.S.C. § 1601 et seq., and the Military Lending Act, 10 U.S.C. § 987. Here, the Bureau informed Petitioner that it is investigating conduct in connection with the "extension of credit, servicing of loans, processing of payments, or collection of debt" as potential violations of §§ 1031 and 1036 of the CPFA, 12 U.S.C. §§ 5531, 5536, TILA, the Military Lending Act, and regulations implementing those statutes, as well as a prior Consent Order to which TMX is still subject. The Bureau also notified TMX it was investigating whether someone "made false or misleading representations or omissions to consumers, improperly contacted consumers or third parties, failed to provide disclosures to consumers, or extended credit to covered servicemembers or their dependents on prohibited terms or without the required disclosures." With that notification, the Bureau satisfied its burden under 12 U.S.C. § 5562 and *Morton Salt*. *See Consumer Fin. Prot. Bureau v. Heartland Campus Solutions, ECSI*, 747 Fed. App'x 44, 48 (3d Cir. 2018) (finding that since "the precise character of possible violations cannot be known during the investigative phase ... the CFPB is not required to be any more specific"); *see also ACICS*, 854 F.3d at 690 ("the CFPB may define the boundary of its investigation 'quite generally'" (quoting *Fed. Trade Comm'n v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992))). Indeed, the Notification here is more detailed and specific than others that courts of appeal have upheld. *See Consumer Fin. Prot. Bureau v. Seila Law LLC*, 923 F.3d 680, 685 (9th Cir. 2019) (approving notification of purpose that arguably was worded more broadly than the one here), *vacated on other grounds*, 140 S. Ct. 2183 (2020), *readopted on remand in relevant part*, 984 F.3d 715, 720 (9th Cir. 2020); *Heartland*, 747 F. App'x 44 (same); *see also Invention Submission*, 965 F.2d at 1088 (enforcing FTC CID that described an investigation into "unfair or deceptive acts or practices ... including but not limited to false or misleading representations made in connection with" seemingly all aspects of the CID recipient's business).

Petitioner’s contrary arguments are without merit. TMX takes issue with the activities identified as under investigation because, it argues, they constitute “the entirety of the Company’s business.” Pet. at 7. Even if that were the case, that alone would not serve as a basis for invalidating an investigative subpoena. *See Heartland*, 747 Fed. App’x at 48 (“Nothing prohibits the CFPB from investigating the totality of [a company’s] business activities, and courts have previously enforced administrative subpoenas regarding conduct that is coextensive with the recipient’s business activity.”). Similarly, TMX’s complaint about the purported “vagueness of the description of the subjects of the investigation” and its request to know “whether all of the potential violations applied to the Company or only a portion,” Pet. at 8, are not supported by the law. The Bureau is not required to identify the subject of law enforcement investigations in its demands. *See id.*, 747 F. App’x at 48, n.3 (recognizing that “CIDs can be served on both the target of the CFPB’s inquiry and nonparties who may have relevant information,” and rejecting view that the Bureau must disclose “to nonparties the specific type of [illegal] conduct under investigation” or other information “that may inadvertently harm” the subject of the investigation).

Nor is the Notification of Purpose here “substantively similar” to the one at issue in *ACICS*, as TMX argues. *See* Pet. at 2. The Notification in *ACICS* stated only that it sought to determine if “unlawful acts and practices” had been committed “in connection with accrediting for-profit colleges,” and cited as authority only §§ 1031 and 1036 of the CFPA “or any other Federal consumer financial protection law.” *ACICS*, 854 F.3d at 686. The court held in *ACICS* that, since the Bureau only stated conduct over which it lacked direct authority, the term “unlawful acts and practices” failed to establish a link between that conduct and the potential violation. *Id.* at 691. The CID at issue here is far more specific and identifies the precise conduct under investigation while expressly noting the conduct was committed “in connection with the extension of credit, servicing of loans, processing of payments, or collection of debt” – activities subject to both the statutory and regulatory provisions enforced by the Bureau, as well as the Consent Order, all of which were identified in the Notification of Purpose. And where the Notification of Purpose in *ACICS* appealed generally to “any other Federal consumer financial protection law,” the Bureau here identifies the specific statutes, regulations, and the Consent Order with TMX, and further specifies the nature of the potentially illegal conduct under investigation.

Because the Notification of Purpose more than satisfies the statutory requirements, TMX’s petition to modify or set aside is denied.

On March 26, 2021, TMX filed a “supplement” to its petition, raising for the first time various factual and legal objections to the CID. The Bureau’s rules do not provide for such a supplement, however: “any petition” shall be filed “within 20 calendar days after service” of the CID, and any such petition must “set forth *all factual and legal objections....*” 12 C.F.R. § 1080.6(e) (emphasis added). In addition, the rules state that the Bureau will consider “only issues raised during the meet and confer process.” 12 C.F.R. § 1080.6(c)(3). TMX failed to raise these issues either during the meet-and-confer or in its timely petition. Therefore, the arguments presented in Petitioner’s purported supplement are waived.¹

¹ Relatedly, in its initial petition filing, TMX sought to reserve its objections “to all or certain interrogatories and requests” on relevance “or other grounds.” Pet. at 5. Petitioner’s supplement repeats this reservation. Supp. at 8. As stated above, all factual and legal objections must be raised in a timely petition and must have been raised during the meet-and-confer process. Consequently, any arguments

If Petitioner needed additional time to file its petition, it had the burden of demonstrating that an extension was necessary. *See* 12 C.F.R. § 1080.6 (e)(2) (“The Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement are authorized to rule upon requests for extensions of time within which to file such petitions....”). Petitioner did not request an extension. The Bureau’s rules also note that “[r]equests for extensions of time are disfavored.” *Id.* Consistent with this general policy, and since Petitioner has offered no justification for extending or, in this case, ignoring, the twenty-day window for filing a petition, I decline to grant TMX additional time absent any request to do so. In developing these procedural rules, the Bureau determined that it had a “significant interest in promoting an efficient process for seeking materials through CIDs. By disfavoring extensions, the Bureau means to prompt recipients to decide within 20 days whether they intend to comply with the CID.” *Rules Relating to Investigations*, 77 Fed. Reg. 39,101, 39,104 (Jun. 29, 2012). In response to public comments, the Bureau added the meet-and-confer process to its CID procedure in order to “improve the efficiency of investigations.” *Id.* TMX has chosen not to avail itself of the opportunity to raise these issues during meet-and-confer or in its timely petition; nor has it requested additional time to consider the matter further. Through its purported reservations, Pet. at 5 *and* Supp. at 8, Petitioner envisions a process in which it may raise objections *ad infinitum*, a process which would unnecessarily delay Bureau investigations and undermine the public and Bureau’s interests in an efficient law enforcement investigation.

In any event, none of the new arguments raised are a valid basis for modifying or setting aside the CID. Petitioner argues that: (A) the Bureau’s investigation, to the extent it concerns the charging of fees for non-file insurance (NFI) is time-barred, based on its interpretation of when the statute of limitations began to run; (B), the Bureau released and discharged TMX from claims arising from NFI because they were known to the Bureau before the effective date of the Consent Order; and (C), the CFPA does not grant the Bureau authority to regulate the business of insurance. Supp. at 3. These are substantive defenses which are premature at the investigative stage, even if they could be raised in defense against the potential legal claims contemplated by the CID. “If parties under investigation could contest substantive issues in an enforcement proceeding, when the agency lacks the information to establish its case, administrative investigations would be foreclosed or at least substantially delayed.” *Fed. Trade Comm’n v. Texaco, Inc.*, 555 F.2d 862, 879 (D.C. Cir. 1977) (en banc) (“*Texaco*”); *see also Equal Emp. Oppty. Comm’n v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1076 (9th Cir. 2001) (“courts should not refuse to enforce an administrative subpoena when confronted by a fact-based claim regarding coverage or compliance with the law.”) (citing, *inter alia*, *Morton Salt Co.*, 338 U.S. at 652-53). Accordingly, even if these arguments had been preserved, they would not provide a basis for setting aside or modifying the CID.

Petitioner also raises in its supplement, for the first time, objections to four specific requests on the basis that they are overly or unfairly burdensome. Supp. at 8. Just as Petitioner’s other arguments were waived by failing to include them in a timely filed petition, *see* 12 C.F.R. § 1080.6(e), so too are these specific objections. But the conclusory allegations of burdensomeness Petitioner offers here could not justify modifying or setting aside a CID even if it had timely raised them. For example, Petitioner notes that one request involves “more than 1 million pages of information” or that another “includes areas where TMX Finance does not conduct any business....” Supp. at 8. In order to demonstrate burdensomeness sufficient to justify modifying or setting aside a CID, Petitioner must show that compliance would “unduly

TMX seeks to raise which were not already raised during meet-and-confer or in a timely petition are waived.

disrupt or seriously hinder normal operation of a business.” *Texaco*, 555 F.2d 882. As we have stated previously, “[a] subpoena is not unduly burdensome merely because it requires the production of a large number of documents.” *In re UniRush LLC*, 2015-MISC-UNIRUSH-0001 (Dec. 12, 2015), at 3 (quoting *Nat’l Lab. Rel. Bd. v. Carolina Food Processors, Inc.*, 81 F. 3d 507, 513 (4th Cir. 1996)). Nor is the “mere suggestion” by a petitioner of “possible damage to their business activities ... sufficient to block an authorized inquiry into relevant matters.” *Sec. & Exch. Comm’n v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1056 (2d. Cir. 1973). But Petitioner’s brief statements do not even allege disruption or hindrance of its business operations, or provide any evidentiary basis for its allegations; therefore, Petitioner falls short of making the necessary showing, even if its objections were timely. If Petitioner has any outstanding issues or concerns, it should discuss those further with the Office of Enforcement as it seeks to comply with the CID and this Decision and Order.

II. Request for Confidential Treatment

TMX requests confidential treatment of the petition, the CID, “any response, and any communications, including this request, that may reveal the existence of the inquiry.” Request at 2. The CID is attached to the Petition as Exhibit A. Petitioner’s request for confidential treatment is denied.

Petitions to modify or set aside a CID 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). The Bureau retains discretion to withhold portions of a Petition from public disclosure when there is good cause and when the Bureau is not otherwise required by law to disclose the withheld information. The petitioner bears the burden of demonstrating good cause. *See In re Great Plains Lending, LLC*, 2013-MISC-Great Plains Lending-001 (Sept. 26, 2013). This is consistent with a “general policy favoring disclosure of administrative agency proceedings.” *Fed. Comms. Comm’n v. Scheiber*, 381 U.S. 279, 293 (1965). Moreover, an “agency’s discretion in regard to procedural rules includes discretion in such matters as publicity and disclosure.” *Fed. Trade Comm’n v. Anderson*, 631 F.2d 741, 746 (D. C. Cir. 1979) (citing *Schreiber*, 381 U.S. at 291-94).

When determining whether the petitioner has shown good cause, the Bureau looks to the standards for withholding material from public disclosure established by the Freedom of Information Act (“FOIA”). *See In re Heartland Campus Sols., ECSI*, 2017-MISC-Heartland Campus Solutions, ESCI-001 (Sept. 8, 2017), at 9. The Bureau uses FOIA as a guidepost because it is a “comprehensive, practical, and widely-used statutory framework,” and doing so allows the Bureau to avoid potential inconsistencies that may arise from applying a different standard to materials in the petition context than would be applied to those same materials when requested pursuant to FOIA. *Id.*; *see also In re Firstsource Advantage*, 2017-MISC-Firstsource Advantage, LLC-001 (July 23, 2018).

TMX argues that all materials that “may reveal the existence of the inquiry” fall within the ambit of Exemption 8 of FOIA, which permits the Bureau to withhold from public disclosure matters that are “contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.” 5 U.S.C. § 552(b)(8). In other words, TMX seeks to apply Exemption 8 not to any supervisory information contained in the petition materials, but to the petition materials themselves, as a matter “related to” compliance reports made pursuant to the 2016 Consent Order.

Exemption 8 serves two legislative purposes: “(1) to ensure the security of financial institutions by eliminating the risk that disclosure of ... frank evaluations of the investigated banks...might undermine public confidence and cause unwarranted runs on banks; and (2) to safeguard the relationship between the banks and their supervising agencies....” *McKinley v. Fed. Deposit Ins. Corp.*, 744 F. Supp. 2d 128, 142-43 (D.D.C. 2010) (internal citations omitted). Charged with maintaining the stability of the entire financial system, financial regulators require forthright and uninhibited disclosure from the institutions they supervise. As courts have recognized, the supervisory relationship is characterized by “adjustment, not adjudication,” and issues that arise are often rectified through supervisory dialogue and without the need for formal enforcement. *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992) (considering common-law bank examination privilege). Exemption 8, like the related common law bank examination privilege is designed to encourage this dialogue. *Id.*

The purposes served by Exemption 8 would not be served by granting Petitioner’s request for confidentiality here. The Consent Order, and the reports to the Bureau required by that Consent Order, do not arise from the Bureau’s supervisory activity or a supervisory relationship; rather, they arose from a law enforcement matter. In 2016, the Bureau initiated an enforcement action against TMX for “luring customers into costly loan renewals by presenting them with misleading information about the deals’ terms and costs.”² To resolve that enforcement action, the Bureau ordered TMX to pay a \$9 million fine and enter into the extant Consent Order. *Id.* Pursuant to the Consent Order, TMX submits compliance reports to ensure that TMX does not resume practices that violate consumer financial protection law. Those reports are submitted to the Bureau’s Office of Enforcement, and while these reports, themselves, may be exempt from disclosure under the FOIA, *see, e.g.*, 5 U.S.C. § 552(b)(7), no such reports are at issue here, and the petition itself is not subject to Exemption 8.

Moreover, TMX is not sharing any confidential information with the Bureau as part of the petition process. In fact, all of the information contained in the petition materials about the Consent Order is already publicly available on the Bureau’s website.³ Because Exemption 8 does not apply to the materials at issue in this Petition, I find that TMX has failed to show good cause to treat the information as non-public, or to depart from the Bureau’s general policy in favor of disclosure.

TMX’s request to treat all subsequent communication as confidential is also denied because Section 1080.6(g) covers “petitions and the Director’s orders” only, not subsequent communications. Moreover, Section 1080.6(g) requires the petitioner to show good cause “no later than the time the petition is filed.” TMX also requests to be given advance notice of a denial of its request for confidential treatment, or if “the Bureau finds issue with the proposed redactions,” relying on 12 C.F.R. § 1070.46(b). By its terms, that provision only applies when the Bureau chooses to release “confidential information.” *Id.* Here, the information is not entitled to confidential treatment. However, consistent with its general practice, the Bureau will provide advance notice of its denial of the request for confidential treatment before this Decision or any of the materials are publicly posted. *See In re Great Plains Lending*, 2012-MISC-Great Plains Lending-001 (Sept. 12, 2013), at 11, n.15. While I deny the request for confidential treatment of the entire petition and related communications, I find that confidential treatment of some law enforcement-sensitive information is appropriate and consistent with FOIA

² <https://www.consumerfinance.gov/about-us/newsroom/cfpb-fines-titlemax-parent-company-9-million-luring-consumers-more-costly-loans/>

³ https://files.consumerfinance.gov/f/documents/092016_cfpb_TitleMaxConsentOrder.pdf

Exemption 7(E). That information will, accordingly, be redacted from materials made public pursuant to the Bureau's rules.

CONCLUSION

For the foregoing reasons, the petition to modify or set aside the CID is denied. The request for confidential treatment of the petition and exhibits is denied, though the Bureau will of its own accord redact certain law enforcement sensitive information. TMX is directed to comply in full with the CID within 10 days of this Decision and Order, though the Assistant Director or a Deputy Assistant Director of the Office of Enforcement may extend that deadline for good cause.



David Uejio, Acting Director

April 26, 2021