

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



IN RE FEDCHEX RECOVERY, LLC,)
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2019-MISC-FedChex Recovery LLC-0001)
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**DECISION AND ORDER ON PETITION BY FEDCHEX RECOVERY, LLC
TO SET ASIDE OR MODIFY CIVIL INVESTIGATIVE DEMAND**

FedChex Recovery, LLC has petitioned the Consumer Financial Protection Bureau for an order to set aside or modify a civil investigative demand (CID) issued to it by the Bureau. For the reasons set forth below, the Petition is denied.

FACTUAL BACKGROUND

The Bureau sent a CID to FedChex, a debt collector, on November 20, 2019, via U.S. mail. As explained in the CID, the purpose of the Bureau's investigation is

to determine whether debt collectors, furnishers, or associated persons, in connection with regularly collecting or attempting to collect consumer debt and furnishing consumer information to consumer-reporting agencies, have: (1) disregarded warnings that debts were the result of identity theft or otherwise disputed by consumers, in a manner that was unfair, deceptive, or abusive, in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536; (2) ignored cease-and-desist requests and engaged in other prohibited communications with consumers or third parties, or failed to provide required notices, or made false or misleading representations in a manner that violated the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692b, 1692c, 1692e, 1692g; or (3) failed to correct and update furnished information, or failed to maintain reasonable policies and procedures in a manner that violated the Fair Credit Reporting Act, 15 U.S.C. § 1681s-2, or Regulation V, 12 C.F.R. § 1022.42. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

After meeting and conferring with Enforcement staff about the CID on December 5, 2019, FedChex filed this Petition to set aside or modify the CID on December 12, 2019.¹

LEGAL DETERMINATION

FedChex makes four arguments why the CID should be set aside or modified. First, it contends that because the statutory provision governing removal of the Bureau's Director violates the constitutional separation of powers, *see* 12 U.S.C. § 5491(c)(3), the CID should be set aside, or at least be modified so that the response deadline is stayed until the Supreme Court addresses this issue in *Seila Law LLC v. CFPB*, No. 19-7 (U.S. cert. granted Oct. 18, 2019). Second, FedChex argues that the CID must be set aside because it seeks privileged information. Third, FedChex claims that the CID fails to satisfy the requirement in 12 U.S.C. § 5562(c)(2) that it describe the nature of the conduct under investigation and the applicable provisions of law. Fourth, FedChex argues that the CFPA's statute of limitations requires that the CID be limited to seek information solely about the three years prior to when it was issued.

For the reasons set forth below, the Petition is denied.

1. The administrative process for petitioning to modify or set aside CIDs is not the proper forum for raising and adjudicating challenges to the constitutionality of provisions of the Bureau's statute. FedChex contends that I should set aside the CID because the removal restriction in Section 5491(c)(3) is unconstitutional and thus renders the CID invalid. Pet. at 3–4. In the alternative, FedChex asks that I defer the deadlines in the CID until after the Supreme Court has decided the constitutionality of the removal restriction in *Seila Law*. *Id.* at 7–8. The Bureau, however, has consistently taken the position that the administrative process set out in the Bureau's statute and regulations for petitioning to modify or set aside a CID is not the proper forum for raising and adjudicating challenges to the constitutionality of the Bureau's statute. *See, e.g., In re Equitable Acceptance Corp.*, 2019-MISC-Equitable Acceptance Corp.-0001 (Dec. 26, 2019)², at 2; *In re Kern-Fuller and Sutter*, 2019-MISC-Candy Kern-Fuller and Howard E. Sutter III-0001 (Apr. 25, 2019)³, at 2; *In re Nexus Servs., Inc.*, 2017-MISC-Nexus Services,

¹ It appears that FedChex did not timely file its Petition within 20 days of service of the CID, as required by statute and the Bureau's rules governing investigations. *See* 12 U.S.C. § 5562(f)(1); 12 C.F.R. § 1080.6(e); *see also* 12 U.S.C. § 5562(c)(8) (service of a CID may be made by "depositing a duly executed copy in the United States mails, by registered or certified mail, return receipt requested"). Nevertheless, I will exercise my discretion in this matter and under the circumstances presented here to resolve the Petition on the merits.

² Available at https://files.consumerfinance.gov/f/documents/cfpb_equitable-acceptance-corp_decision-and-order-on-petition.pdf.

³ Available at https://files.consumerfinance.gov/f/documents/cfpb_petition-to-modify_candy-kern-fuller-and-howard-e-sutter_decision-and-order.pdf.

Inc. and Libre by Nexus, Inc.-0001 (Oct. 11, 2017)⁴, at 2. In the event that the Bureau determines at a later date that it is necessary to seek a court order compelling FedChex's compliance with this CID, *see* 12 U.S.C. § 5562(e), the company can raise its constitutional objection as a defense in that proceeding in court.⁵

2. FedChex's blanket assertion that the CID seeks information that may be subject to the attorney-client privilege is not a basis for setting aside the CID. FedChex next claims that the CID must be set aside because it seeks information protected by the attorney-client privilege. Pet. at 5–6. FedChex does not ask me to modify the CID to avoid seeking privileged information—it asks only that the CID be quashed in its entirety.

As FedChex is aware, the Bureau's rules governing investigations set out a process—consistent with procedures generally applicable to discovery in civil litigation—by which CID recipients may assert privilege claims by providing a schedule of the items withheld and the specific grounds for claiming that each item is privileged. *See* 12 C.F.R. § 1080.8(a). This procedure ensures that CID recipients have a chance to raise appropriate privilege objections while also memorializing the bases for the asserted protections for each item of evidence sought. The rules further provide that a CID recipient withholding information on the basis of an asserted privilege “shall comply with [the above requirements] in lieu of filing a petition for an order modifying or setting aside a civil investigative demand.” *Id.* § 1080.8(b).

FedChex did not provide a privilege log documenting the materials it believes are privileged prior to filing its Petition (or at any time thereafter). Its argument with respect to privilege is thus procedurally improper.⁶ Nor, even now, has the company sought to explain with any specificity the bases for its assertions of privilege. FedChex simply offers the blanket claim that the Bureau “seeks extensive information and communication regarding the attorney client relationship between FedChex and [a law firm].” Pet. at 5. As in civil litigation, such “[b]lanket assertions are extremely disfavored.” *United States v. Martin*, 278 F.3d 988, 1000 (9th Cir. 2002). Instead, “[a] party claiming the privilege must identify specific communications and the grounds supporting the privilege as to each piece of evidence over which privilege is asserted.” *Id.* Because FedChex has not properly asserted any privilege over the information sought, it has not shown that the CID should be set aside on these grounds.

⁴ Available at https://files.consumerfinance.gov/f/documents/cfpb_petition-to-modify_nexus_decision-and-order.pdf.

⁵ The Bureau has in its ongoing litigation adopted the view that the removal restriction is unconstitutional but that its invalidity does not affect the remainder of the Bureau's statute, including the provisions authorizing the Bureau to issue and enforce CIDs. *See* Br. of Resp't, *Seila Law*, 2019 WL 4528136 (U.S.).

⁶ FedChex acknowledges that “12 CFR 1080.8(a) provides a process to address privileged information” but claims without explanation that “those regulations are flawed.” Pet. at 6. To the contrary, the rule's requirements are necessary to document the bases for any assertions of privilege and reflect ordinary discovery practice in civil litigation. *See, e.g., United States v. Martin*, 278 F.3d 988, 1000 (9th Cir. 2002).

3. The CID states the nature of the conduct under investigation and the applicable provisions of law. FedChex also argues that the CID should be set aside because it does not “state the nature of the conduct constituting the alleged violation which is under investigation and the provisions of law applicable to such violation,” as required of all Bureau CIDs by 12 U.S.C. § 5562(c)(2). Pet. at 6–7. But the CID sets forth in detail both the conduct under investigation and applicable laws, and it thus clearly satisfies the statutory standard. If anything, this CID provides even more detail about the Bureau’s investigation than have other CIDs that have been approved by courts of appeals. See *CFPB v. Seila Law LLC*, 923 F.3d 680, 685 (9th Cir. 2019); *CFPB v. Heartland Campus Sols., ECSI*, 747 F. App’x 44, 47–50 (3d Cir. 2018). Although FedChex complains that the CID does not “state the target of the investigation,” Pet. at 7, the statute by its terms does not require the Bureau to identify the subjects of its ongoing and confidential law-enforcement investigations. See *Heartland*, 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).

4. The CID seeks information relevant to potentially actionable violations of law. Finally, FedChex asks that I modify the CID to seek information only from the period beginning three years prior to when the CID was issued, arguing that the Bureau is barred from seeking earlier material by the statute of limitations in 12 U.S.C. § 5564(g)(1). Pet. at 8. As an initial matter, FedChex appears to misread that limitations provision, which begins running not from the occurrence of a violation but from the date of discovery of the violation. More to the point, in conducting an investigation of potential violations of federal consumer financial law, the Bureau is not limited to gathering information only from the time period in which conduct may be actionable. Instead, what matters is whether the information is relevant to conduct for which liability can be lawfully imposed. See, e.g., *CFPB v. Future Income Payments, LLC*, 252 F. Supp. 3d 961, 969 (C.D. Cal. 2017), *order vacated in part on other grounds*, 2018 WL 7502720 (C.D. Cal. Dec. 18, 2018); *CFPB v. Harbour Portfolio Advisors, LLC*, No. 16-14183, 2017 WL 631914, at *5 (E.D. Mich. Feb. 16, 2017). Even assuming that the CID sought information regarding conduct outside of the statute of limitations, such information may be essential to the Bureau’s ability to develop a complete understanding of the relevant facts about violations that would be actionable.

CONCLUSION

For the foregoing reasons, the petition to set aside or modify the CID is denied. FedChex is directed to comply in full with the CID within 10 days of this Order. FedChex is welcome to engage in discussions with Bureau staff about any further suggestions for modifying the CID, which may be adopted, as appropriate, by the Assistant Director or Deputy Assistant Director of the Office of Enforcement.


Kathleen L. Kraninger, Director

January 26 2020