cfpb Consumer Financial Protection Bureau
1700 G Street NW, Washington, DC 20552

IN RE SYNCHRONY FINANCIAL

2017-MISC-Synchrony Financial-0001

DECISION AND ORDER ON PETITION BY SYNCHRONY FINANCIAL TO MODIFY OR SET ASIDE CIVIL INVESTIGATIVE DEMAND

Synchrony Financial has petitioned the U.S. Consumer Financial Protection Bureau for an order to set aside or modify a civil investigative demand (CID) issued to it. For the reasons set forth below, the petition is granted in part and denied in part.

FACTUAL BACKGROUND

On May 9, 2017, the Bureau issued a CID to Synchrony Financial seeking information about its products and operations. The CID's "Notification of Purpose" stated that the CID had been issued:

> to determine whether banks or other persons have engaged or are engaging in unlawful acts and practices in connection with the marketing and servicing of deferred-interest credit cards in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010, §§ 5531, 5536; The Truth in Lending Act, 15 U.S.C. § 1601 et seq., and its implementing Regulation Z; any prior orders issued by the Bureau; or any other Federal consumer financial law.

The Notification of Purpose further advised that a purpose of the investigation was "also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest." The CID posed 17 interrogatories, six requests for written reports, thirteen requests for documents, and noticed ten topics for oral testimony.

Pursuant to the Bureau's rules, Synchrony was required to meet and confer with a Bureau investigator within 10 days of its receipt of the CID. 12 C.F.R. § 1080.6(c). Synchrony and its counsel did so on May 23, 2017. Synchrony filed its Petition to Modify or Set Aside the CID (Petition) on June 6, 2017 and on June 7, 2017 submitted a letter requesting various specific modifications to the Bureau Enforcement team that issued the CID. Then on July 5, 2017, Synchrony submitted a "Supplemental Brief." On July 14, 2017, the Enforcement team issued a modification to the CID making numerous changes in response to Synchrony's concerns about the CID and providing a staggered production schedule. On August 8, 2017 the Enforcement team further modified the CID by withdrawing all requests related to Synchrony's CareCredit program.

LEGAL DETERMINATION

Synchrony raises four categories of arguments as to why the CID should be set aside or modified. As set forth below, I modify the CID's Notification of Purpose. None of Synchrony's arguments warrants setting aside or otherwise modifying the CID.

A. Compliance with 12 U.S.C. § 5562(c)(2)

Synchrony contends that the CID's Notification of Purpose fails to comply with the requirement, imposed by statute and the Bureau's regulations, that a CID state "the nature of the conduct constituting the alleged violation which is under investigation and the provisions of law applicable such violation." Pet. at 4-5 (citing 12 U.S.C. § 5562(c)(2); 12 C.F.R. § 1080.5). Synchrony relies primarily on *CFPB v. Accrediting Council for Independent Colleges and Schools*, 854 F.3d 683 (D.C. Cir. 2017) (*ACICS*), where the court concluded that a Bureau CID concerning "accrediting for-profit colleges" failed to give adequate notice of the conduct at issue or the relevant provisions of law. With respect to the conduct at issue, the court concluded that no connection appeared on the "face of the Notification of Purpose" between the accreditation of for-profit colleges and activity over which the Bureau has authority. *Id.* at 691. And, the court concluded, the CID gave "no description whatsoever of the conduct the CFPB [was] interested in investigating." *Id.* The court also held that the description of the applicable provision of law was "similarly inadequate" because, "especially considering the Bureau's failure to adequately state" the conduct under investigation, the statutory citations told "ACICS nothing about the statutory basis for the Bureau's investigation." *Id.*

Synchrony first argues that the Notification of Purpose here "does not adequately describe the nature of the conduct constituting the alleged violation which is under investigation" because, like the Notification of Purpose in *ACICS*, it refers to "unlawful acts and practices." Pet. at 5 (quotation omitted). But unlike the Notification of Purpose in the CID issued to ACICS, the Notification of Purpose here seeks information about "unlawful acts and practices" in connection with activity that the Bureau clearly has authority over, namely "the marketing and servicing of deferred-interest credit cards." Unlike ACICS, Synchrony is easily able to understand what activity the Bureau is investigating. Furthermore, the Notification of Purpose at issue here is functionally equivalent to one that the ACICS court described as "inform[ing] [the party] of the investigation's purpose," *ACICS*, 854 F.3d at 690 (citing *FTC v. Invention Submission*, 965 F.2d 1086, 1087-88 (D.C. Cir. 1992)).

Synchrony next argues that the Notification of Purpose "does not adequately describe the provision of law applicable to such violations," because, like the Notification of Purpose in *ACICS*, it cites the Consumer Financial Protection Act's prohibition on unfair, deceptive, or abusive acts or practices (in addition to the Truth in Lending Act and any other Federal consumer financial law). Pet. at 5 (quotation omitted). The reference to "any other Federal consumer financial law" is unnecessary here and, accordingly, I exercise my discretion to grant the petition, in part, and modify the CID to strike that clause of the Notification of Purpose. *See* 12 C.F.R. § 1080.6(e)(4); *accord ACICS*, 854 F.3d at 691. Synchrony's other arguments concerning the Notification of Purpose are misplaced. The ACICS court concluded that the citation there to

12 U.S.C. §§ 5531, 5536 was inadequate "especially considering the Bureau's failure to adequately state" the conduct under investigation. *ACICS*, 854 F.3d at 691 (citing *F.T.C. v. Carter*, 636 F.2d 781, 788 (D.C. Cir. 1980) (explaining that a citation to Section 5 would not provide adequate notice if "standing broadly alone," but that a citation to section 5 could be "defined by its relationship" to other language in the Notification of Purpose and therefore be sufficient")). Here that is not the case. The Notification of Purpose, particularly as I have modified it, tells Synchrony that the Bureau is investigating a particular activity over which it has authority and tells Synchrony what provisions of law are applicable. Again, this Notification of Purpose is strikingly similar to one that was described in *ACICS* as "inform[ing] [the party] of the investigation's purpose," *Id.* at 690 (citing *Invention Submission*, 965 F.2d at 1087-88). *ACICS* requires nothing more because as the court explained, "the CFPB may define the boundary of its investigation quite generally." *ACICS*, 854 F.3d at 690 (quotation omitted).

B. General Relevance

Synchrony next contends that because of the general breadth of the CID's Notification of Purpose and its requests, "none of the documents sought by the CFPB are reasonably relevant." Pet. at 6 (quotation omitted).[1] Synchrony's general claim is that the CFPB is improperly "cast[ing] about for potential wrongdoing," because it does not have a basis to believe that Synchrony is violating the law and the CFPB might be trying to "apply new legal standards." Pet. at 6 (quoting *ACICS*, 854 F.3d at 689). The reasons Synchrony gives for this proposition are not persuasive.

First, Synchrony argues that it is in compliance with the regulations governing deferred-interest promotions. It lists applicable regulations and explains that the CFPB has examined Synchrony on multiple occasions for compliance with particular laws and agreements. It therefore concludes that the CFPB "has no basis for investigating violations of such regulations." Pet. at 6. But a party cannot avoid compliance with a CID merely by assuring an agency that it is complying with the law. Even assuming Synchrony's characterization of prior CFPB examinations is correct, "[p]ursuant to their 'power of inquisition,' agencies may use subpoenas to 'investigate merely on suspicion that the law is being violated, or even just because [they] want[] assurance that it is not." *ACICS*, 854 F.3d at 688 (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950)).

Second, Synchrony speculates that the CFPB intends to "alter . . . regulations" or "take the position that notwithstanding compliance with . . . regulations, deferred-interest promotions are inherently unfair, deceptive or abusive." Pet. at 6-7. But beyond its assurance that it is complying with the law and its opinion that the Bureau's requests are "sweeping" and "stretch far beyond the investigation of any particular existing regulation," Pet. at 6, Synchrony offers no evidence for this speculation.

[1] In a footnote, Synchrony asserts that its ability "to make relevance arguments is constrained by the CID's violation of 12 U.S.C. § 5562(c)(2) and 12 C.F.R. § 1080.5." Pet. at 6 n.5. I have modified the Notification of Purpose to remove its reference to "any other Federal consumer financial law," and so Synchrony has sufficient notice of what conduct is at issue and what provisions of law apply.

Fundamentally, both of Synchrony's relevance arguments erroneously raise substantive compliance with the law as a defense to complying with a CID. Anticipating this problem, Synchrony attempts to cast aspersion on the Bureau's "oft-stated view that 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."[2] Pet. at 7. But the case Synchrony cites involved a vastly different situation, where a court refused to enforce an administrative subpoena that sought to investigate "other wrongdoing, as yet unknown" without citing a statutory basis. Pet. at 7 (citing *In re Sealed Case (Administrative Subpoena)*, 42 F.3d 1412, 1419 (D.C. Cir. 1994)). In any event, the Supreme Court has "consistently reaffirmed" the principle that "fact-based claim[s] regarding . . . compliance with the law" are an insufficient reason to refuse to enforce an administrative subpoena. *E.E.O.C. v. Karuk Tribe Housing Authority*, 260 F.3d 1071, 1076 (9th Cir. 2001) (citing *United States v. Powell*, 379 U.S. 48, 57–58 (1964); *Morton Salt Co.*, 338 U.S. at 652–53; and *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 216 (1946)). "Indeed, the agency could not fulfill its investigative responsibilities, if . . . it first had to make a finding of liability." *In re Sealed Case*, 42 F.3d at 1416.

C. Relevance of Particular Categories of Documents

Synchrony also argues that the CID seeks three categories of documents that are irrelevant. Some of these relevance arguments are moot in light of the Enforcement team's modifications to the CID and the rest are unpersuasive.

First, Synchrony objects to the fact that the CID seeks information going back to 2013, contending that such documents are "outside the three-year limitations period in 12 U.S.C. § 5564(g)(1)." Pet. at 7. But as Synchrony's petition recognizes, the Bureau's decisions have repeatedly rejected such arguments because the test for relevance is not whether information is itself actionable but rather "whether such information is relevant to conduct for which liability can be lawfully imposed." *See, e.g.*, *In Re National Asset Advisors, LLC and National Asset Mortgage LLC*, 2016-MISC-National Asset Advisors and National Asset Mortgage-0001 (Nov. 1, 2016), at 4.[3] In response to this principle, Synchrony cites the *ACICS* court's discussion of agencies' jurisdictional limits, *ACICS*, 854 F.3d at 689, but this citation, which has nothing to do with statutes of limitations, is inapposite. Moreover, Synchrony's argument appears to be premised on a misunderstanding of the statute of limitations in 12 U.S.C § 5546(g)(1), which provides that with certain exceptions "no action may be brought under [Title X of the Dodd-Frank Act] more than 3 years after the date of discovery of the violation to which an action relates." Since this statute of limitations begins to run on the date of discovery of a violation, it is not possible to make blanket statements that conduct that occurred in a particular year is

[2] It bears noting that here the question is not whether Synchrony is subject to the Bureau's enforcement authority. It clearly is. Rather, Synchrony's argument is that it is in compliance with all applicable laws, but that is a proper focus of the Bureau's investigation.

[3] *Available at* https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Decision_and_Order_on_Petition_by_National_Asset_Advisors_LLC_and_Nation....pdf.

outside of the statute of limitations. If the violation has not yet been discovered, then the statute of limitations has not yet begun to run.

Second, Synchrony objects to requests for information about its CareCredit program. This argument is now moot because, since Synchrony filed its petition to set aside the CID, the Enforcement team has withdrawn the CID requests relating to the CareCredit program.

Third, Synchrony objects to Written Reports 2, 3, 5, and 6, arguing that these requests are not sufficiently targeted to specific transactions. Since Synchrony filed its petition, the Enforcement team has withdrawn the requests for Written Reports 5 and 6, which relate to the CareCredit program. The objection as it relates to these two reports is therefore moot. Written Reports 2 and 3 seek financial information about programs offering deferred-interest promotions and information about the promotions. Synchrony contends that this information could only be relevant if the CFPB had reason to believe that a particular retailer had lied to consumers about deferred-interest promotions, and then only information about that retailer would be relevant. Pet. at 8. This is simply incorrect. An agency may investigate "to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the [agency's] judgment, the facts thus discovered should justify doing so." *Okla. Press Publ'g Co.*, 327 U.S. at 201. Again, "[f]act-based claim[s] regarding coverage or compliance with the law" are an insufficient reason to refuse to enforce an administrative subpoena. *Karuk Tribe Housing Authority*, 260 F.3d at 1076. Synchrony also speculates that the information sought in the Reports will be used to bring a "broadside attack on deferred interest promotions" that would be "illegal." Pet. at 8. Synchrony gives no reason to think that this is the case. But in any event, this too is a fact-based argument about the legality of a party's conduct that is not a valid argument for setting aside a 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." *FTC v. Texaco, Inc.*, 555 F.2d 862, 879 (D.C. Cir. 1977).

D. Burden

Finally, Synchrony contends that the CID is "unduly burdensome or unreasonably broad." Pet. at 9. It raises a general objection and also three arguments about specific aspects of the CID. Some of these arguments are moot in light of the Enforcement team's modifications to the CID and none of the rest is persuasive.

"[C]ourts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business." *Texaco*, 555 F.2d at 882. 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. *Id.* (dismissing burden objections in part because "the breadth complained of is in large part attributable to the magnitude of the producers' business operations."). Here, Synchrony's arguments must be considered in light of the fact that Synchrony is "the largest provider of private label credit cards in the United States based on purchase volume and receivables." Synchrony Financial, Annual Report (Form 10-K),

at 7 (Feb. 23, 2017). In 2016, it financed $125.5 billion of purchase volume, had $2.3 billion in net earnings, and employed over 15,000 people full time. *Id.* at 7, 25. And here the Bureau is investigating sales platforms that had over 61 million open accounts last year. *Id.* at 8.

Synchrony's general claim is that it has already produced voluminous data and documents to the CFPB in the course of other investigations, examinations, and market monitoring activity, and that it should therefore not be asked to produce more information for this investigation. Pet. at 9-10. As part of this argument, Synchrony further asserts that the CID is burdensome because it requires Synchrony "to reproduce the exact same information" it has already produced to other Bureau offices. *Id.* at 10. These arguments are unavailing. As an initial matter, Synchrony has failed to demonstrate that any of the information requested in this CID is duplicative of information that the Bureau already possesses. In any event, even if Synchrony has produced data to the Bureau in other contexts, that fact would not render the CID unduly burdensome in the context of this investigation. Assuming *arguendo* that some of the documents and data requested in the CID had been produced in some form to other offices of the Bureau in the past, Synchrony has not established the Bureau's CID is unduly burdensome given the unique needs of an Enforcement investigation. The CID requests documents and data together with important contextual information (i.e., documents' operative dates, custodians, metadata) that is not typically provided to the Bureau in other contexts. The case Synchrony cites to support its argument is inapposite, as it states only the obvious proposition that potentially duplicative documents already produced in the *same* investigation can be relevant to whether a CID is unduly burdensome. *See In re Civil Investigative Demand*, No. 5:16-mc-3, 2016 WL 4275853, at *7-8 (W.D. Va. Aug. 12, 2016) (considering the burden of a CID in the context of the ongoing investigation of which it was a part).

On July 5, 2017, while this Petition was pending, Synchrony filed a purported "Supplemental Brief," drawing attention to an Order it received from the Bureau on June 28, 2017. The Order, issued pursuant to the Bureau's market monitoring authority, requires Synchrony to file information for purposes of the Bureau's biennial report on the credit card market. Preliminarily, it is unclear whether a "Supplemental Brief" is appropriate under the statute and regulation governing petitions to set aside Bureau CIDs. *See* 12 U.S.C. § 5562(f); 12 C.F.R. § 1080.6(e). Without deciding whether a "Supplemental Brief" to a petition to set aside a CID is permitted, I have considered the contents of Synchrony's submission and it does not alter my conclusion about Synchrony's general burden argument. Again, Synchrony identifies no duplicate requests for information and no principle of law that would prevent the Bureau from requesting information for purposes of an investigation while simultaneously requesting similar information to comply with its statutory mandate to produce reports on the credit-card market. *See* 15 U.S.C. 1616(a). What is more, Enforcement's modification to the CID provides for a staggered production schedule designed to accommodate Synchrony's concerns about the time it will take to respond to particular requests and the fact that it also will be responding to the Order.

Synchrony's first specific burden objection is to Written Reports 2, 3, 5, and 6. As stated above, the Enforcement team has withdrawn the requests for Written Reports 5 and 6, so the argument is moot with respect to those two reports. As initially framed, Written Reports 2 and 3 sought information, broken down by retailer, about products offered through Synchrony's Retail

Card and Payment Solutions Sales Platforms. Synchrony contends that this request is unduly burdensome because more than 60,000 different retailers participated in the Payment Solutions platform in the relevant time period. Pet. at 10-11. The Enforcement team has subsequently modified Written Reports 2 and 3 to request the data broken down by program rather than retailer. This change and the elimination of two of the Reports from the request should mean that it will take substantially less time to complete than the "400-650" hours that Synchrony predicted prior to the modifications. *See* Pet. at 11. In any event, even assuming these estimates are accurate, 400-650 hours spent on putting together written reports is not unreasonable in light of Synchrony's vast operations. With respect to Written Report 3, Synchrony also objected that it does not have some of the data requested and would have to make assumptions in order to produce estimates. Lyons Decl. ¶ 10. In its modification the Enforcement team altered Written Report 3 so that it no longer requires certain information that Synchrony lacks and allows for estimates in other places. Given these modifications, Synchrony's objection that some of the requested data is unavailable is now moot.

Synchrony's second specific burden objection concerns Written Report 4, which seeks information on consumer complaints about deferred-interest promotions. Synchrony argues that this Report is excessively burdensome because it will require a manual review of numerous complaints. This is because the reason codes Synchrony uses to categorize complaints do not correspond to the categories of complaints described in the CID. Furthermore, Synchrony's complaint classification does not note whether a complaint was about a deferred-interest promotion. Pet. at 11-12. In response, the Enforcement team modified Written Report 4 so that it uses Synchrony's own reason codes to describe the consumer complaints sought. Furthermore, the Enforcement team modified the Report so that rather than identifying whether a complaint was specifically about a deferred-interest promotion, Synchrony only has to identify complaints from any consumer who used a deferred-interest promotion in the two years prior to making a complaint. Given these concessions to Synchrony's methods of tracking complaints, this Written Report does not pose an undue burden.

Synchrony's third specific burden objection concerns Document Requests 3, 5, and 11, which seek documents related to the marketing of deferred-interest promotions. Synchrony contends that these Requests should be limited to documents stored in its Marketing Resource Management (MRM) system, but also explains that not all of its marketing materials are stored in MRM. Pet. at 12. The Enforcement team has modified these Document Requests to limit the number of retailers for which marketing documents are sought. It also modified the Requests so that, for categories of documents that are routinely kept within MRM, Synchrony may limit its search to documents in MRM. But for categories of documents that are not routinely kept within MRM this modification does not apply. These document requests have been further pared back by the Enforcement team's withdrawal of requests concerning the CareCredit program. These substantial modifications to the documents requested mean that the actual amount of time required to comply with these requests should be significantly less than the "thousands" of hours predicted by Synchrony prior to the Enforcement team's modifications. *See* Lally Decl. ¶ 17. In any event, requests sufficient to give Bureau investigators an accurate picture of the operations

of a large institution with many customers will necessarily require a greater absolute amount of work than analogous requests to a smaller institution.[4]

CONCLUSION

For the foregoing reasons, Synchrony's petition to set aside or modify the CID is granted in part and denied in part. Synchrony is directed to produce all responsive documents, items, and information within its possession, custody, or control that are covered by the CID, as modified by Enforcement and this Order, pursuant to the staggered production schedule in the July 14, 2017 modification to the CID. The company is welcome to engage in further discussions with the Bureau's Enforcement team about any suggestions for further modifying the CID, which may be adopted by the Assistant Director for Enforcement or his Deputy as appropriate.

Richard Cordray

Richard Cordray, Director

September 7, 2017

[4] Synchrony itself recognizes in its Petition that the burden it complains of is due to the "size and scope of Synchrony's services." Pet. at 9.