

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Joseph J. Simons, Chairman
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of

CIVIL INVESTIGATIVE DEMAND TO BEAM
FINANCIAL, INC. DATED MAY 21, 2020

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)
) File No. 182-3177
) REDACTED PUBLIC
) VERSION
)
)

ORDER DENYING IN PART AND GRANTING IN PART PETITION
TO QUASH OR MODIFY CIVIL INVESTIGATIVE DEMAND

By PHILLIPS, Commissioner:

Beam Financial, Inc. (“Beam”) petitions to quash or modify a civil investigative demand issued on May 21, 2020, in connection with the Commission’s investigation into Beam’s business practices. Specifically, Beam seeks to quash the CID on the grounds that the Commission’s leadership structure is unconstitutional. Alternatively, claiming undue burden, Beam asks us to quash the CID to the extent it is duplicative of a Commission request for information two years ago and to extend the CID return date until four months from now.

For the reasons stated below, the Commission denies the petition with respect to Beam’s arguments that the CID should be quashed in whole or in part. With respect to Beam’s requested time extension, the Commission grants the petition in part and will modify the CID return date accordingly.

I. Background

Beam is a San Francisco-based company that offers mobile, high-interest, FDIC-insured bank accounts. Petition (“Pet.”) at 1. Beam launched a mobile banking app to the public in September 2019. Prior to the official launch of its app, Beam had released a “beta” version of the app.

On July 6, 2018, Commission staff sent Beam a letter (the “access letter”) requesting voluntary production of information and documents in connection with the beta version of the app. Pet. Exhibit (“Exh.”) B. The focus of that inquiry was whether consumers were receiving the advertised interest rate returns on their deposits. The access letter sought production by August 3, 2018, but staff and Beam subsequently agreed to a rolling production, which Beam

completed in early September 2018. Staff determined that no further action was warranted at that time. At the request of Beam's counsel, staff destroyed Beam's responses to the access letter.

On May 21, 2020, the Commission issued a CID to Beam in support of an investigation into whether Beam has engaged in deceptive or unfair practices related to its financial products or services, including the accessibility of consumer funds, the advertised rates of return and interest, and the functionality of the company's mobile apps. Pet. Exh. A.¹ Unlike the 2018 access letter, which sought information about the beta version of the app, the CID is focused on the app officially released in September 2019 and seeks information from October 1, 2019, to the present. The CID return date is June 22, 2020.

The CID was delivered to Beam's San Francisco office on May 26, 2020. When staff received no reply from Beam, it sent the CID to Beam's counsel on June 16, 2020.² In response, Beam's counsel claimed that the COVID-19 pandemic has created substantial logistical difficulties for the company, [REDACTED], impeding Beam's ability to comply with the CID. *See* Pet. Exh. C. Beam proposed to resubmit the material that it previously produced in response to the 2018 access letter and, by August 1, to respond in part to three interrogatories addressing a topic that staff identified as a particular concern: that consumers have reportedly been unable to withdraw, or easily to withdraw, their funds deposited with Beam. Beam proposed that all other responses to the CID specifications be deferred until December 15, 2020. *Id.* Staff found unacceptable an almost six-month deferral of substantive responses on thirty-three of the thirty-six specifications in the CID. But staff offered to modify the production schedule to address Beam's claims of hardship, proposing that the parties develop a schedule for a rolling production. Staff also asked Beam to address the extent to which the 2018 materials would satisfy the CID requests, and whether Beam's proposed near-term response would sufficiently address concerns about customers' access to their deposited funds. *See* E-mail from Gregory Madden to Erik Kosa and Allen Denson (July 6, 2020). Rather than engage with staff on these issues, Beam filed this petition to quash on July 6, 2020.

II. Analysis

Beam raises two objections to the CID. *See* Pet. at 4. First, it asserts that the Supreme Court's recent decision in *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2184 (2020), renders the FTC's leadership structure unconstitutional and, by extension, invalidates the CID. Second, Beam argues that the CID deadlines for compliance are unreasonable in light of

¹ The CID was issued under Section 20 of the Federal Trade Commission Act, 15 U.S.C. § 57b-1, and was authorized by an August 1, 2016, Commission Resolution permitting the use of compulsory process in agency investigations into possible FTC Act violations in connection with Internet-related goods or services. *See* Pet. Exh. A (third-to-last page).

² Rule 2.10 of our Rules of Practice provides that a petition to quash is due "within 20 days after service of the Commission compulsory process." 16 C.F.R. § 2.10(a)(1). Staff took the position that service was accomplished on May 26, but offered to extend the deadline for a petition to quash to July 6, 2020, to accommodate discussions with Beam's counsel.

the effects of the COVID-19 pandemic on Beam and its 2018 productions. We address each of these arguments in turn.

A. The Supreme Court Has Not Overturned Its Precedent Upholding the FTC’s Constitutionality.

Beam claims that the FTC lacks authority to issue or enforce the CID because the agency’s leadership structure—specifically, the for-cause removal protections afforded FTC Commissioners³—is unconstitutional. Pet. at 4-6. The Supreme Court upheld the constitutionality of the FTC’s for-cause removal provisions in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935). Beam argues, however, that under the Court’s recent decision in *Seila Law*, any agency that exercises “quintessentially executive power” (like the present-day FTC, Beam says) must be directly accountable to the President, making for-cause limitations on the President’s removal power constitutionally impermissible.

The Court’s holding in *Seila Law*, however, is narrower than Beam asserts. *Seila Law* involved a challenge to the for-cause removal protections for the Director of the Consumer Financial Protection Bureau (“CFPB”), which, unlike the multi-member Federal Trade Commission, is led by a single official. The Court described the question it faced as whether Congress could restrict the President’s power to remove the head of “an independent agency that wields significant executive power *and is run by a single individual.*” *Seila Law*, 140 S. Ct. at 2192 (emphasis added). The Court held that the CFPB’s single-director structure violated constitutional principles of separation of powers; Congress could not restrict the President’s authority to remove the Director of the agency at will. *Id.*

In *Seila Law*, the Court expressly declined the petitioner’s invitation to overturn *Humphrey’s Executor*, its precedent sustaining the constitutionality of the FTC’s for-cause removal provisions. *Id.*⁴ It also declined to extend that precedent “to the novel context of an independent agency led by a single Director.” *Id.*; *see id.* at 2211 (“While we have previously upheld limits on the President’s removal authority in certain contexts, we decline to do so when it comes to principal officers who, acting alone, wield significant executive power.”). The Court distinguished *Humphrey’s Executor* in substantial part on the ground that the CFPB is a single-director agency, whereas the FTC is a bipartisan, multimember body. The Court found that the CFPB’s single-director structure “forecloses certain indirect methods of Presidential control.” *Id.* at 2204. A single agency head with a five-year term means some Presidents “may *never* appoint” a CFPB Director, nor will the President “have the opportunity to appoint any other leaders . . . who can serve as a check on the Director’s authority and help bring the agency in line with the President’s preferred policies.” *Id.* And because the CFPB’s budget is supplied by the Federal Reserve Board, rather than through the appropriations process, “no . . . opportunity exists for the

³ See 15 U.S.C. § 41 (Commissioners “shall be appointed for terms of seven years,” which expire on a staggered basis, and “may be removed by the President” only “for inefficiency, neglect of duty, or malfeasance in office”).

⁴ See Brief for the Petitioner at 31-34, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (No. 19-7), available at https://www.supremecourt.gov/DocketPDF/19/19-7/124949/20191209155012780_Seila%20Law%20brief%20for%20petitioner.pdf.

President to influence the CFPB Director,” by “recommend[ing] or veto[ing] spending bills that affect the operation of” the agency. *Id.* In short, the CFPB’s structure violated the Constitution “by vesting significant governmental power in the hands of a single individual accountable to no one.” *Id.* at 2203. None of this characterizes the FTC, with its multi-member and bipartisan leadership, staggered terms, presidentially-designated Chairman, and congressionally appropriated funding. All these attributes give the FTC a degree of political and presidential accountability that the Court found was lacking in the CFPB.

Because the Supreme Court expressly refused to overrule *Humphrey’s Executor*, we decline to do so in considering this petition to quash a CID. Accordingly, we deny Beam’s request to quash the CID.

B. Beam Has Not Shown Undue Burden that Would Warrant Quashing the CID in Part and Deferring Compliance Entirely for Four Months.

1. The CID Is Not Duplicative of the FTC’s 2018 Request.

Next, Beam claims that certain of the CID specifications are duplicative of information requested in the 2018 access letter, arguing that “[i]t is unreasonable to ask the same questions twice.” Pet. 7-9. Beam asks the Commission to quash the CID “to the extent it is duplicative of the Inquiry Letter.” *Id.* at 11.

But the CID, on its face, is not duplicative of the 2018 access letter. The two seek information for different time periods and probe Beam’s conduct in connection with different versions of its mobile banking app. Thus, Beam’s assertion that it “must start from scratch to produce the same information over again” (Pet. at 8-9) rings hollow.

Beam faults staff for “not articulat[ing] . . . why the Inquiry Letter materials are stale or otherwise insufficient for purposes of the investigation.” *Id.* It is Beam, however, who bears the burden of substantiating its claim of unreasonableness. *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (*en banc*) (“The burden of showing that the request is unreasonable is on the subpoenaed party.”). And it is Beam, not staff, who has the most information about its operations and documents and thus is in a position to explain whether, and how, its 2018 production suffices to answer the CID’s inquiries about its current activities. The Petition provides no such explanation, nor did Beam offer any such explanation to staff during the meet-and-confer process, despite staff’s invitations to do so.

Thus, we deny the request to quash the CID in part.

2. Beam Has Not Substantiated its Claims of Undue Burden.

Finally, Beam argues that the CID’s compliance deadlines are unduly burdensome in light of the [REDACTED] the company is experiencing due to the COVID-19 pandemic. The Petition identifies several factors complicating Beam’s task of responding to the CID: [REDACTED]

[REDACTED] . Pet. at 3, 9-10.

The standard for assessing the burden imposed by agency investigative process is well established. Agency process is not unduly burdensome unless compliance “threatens to unduly disrupt or seriously hinder” the normal operations of the recipient’s business. *Texaco*, 555 F.2d at 882; *see also EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 479 (4th Cir. 1986). This test is “not easily met” because “[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest.” *Texaco*, 555 F.2d at 882. Moreover, the recipient of process must make “a record . . . of the measure of [its] grievance rather than ask [the court] to assume it.” *United States v. Morton Salt Co.*, 338 U.S. 632, 654 (1950). Beam has not made such a showing.

We do not doubt that the COVID-19 pandemic has created complications for Beam’s task of complying with the CID. But Beam fails to show that present circumstances preclude it from making any meaningful response to the CID until mid-December. For instance, Beam claims that [REDACTED] Pet. at 9. But that argument is premised on “[c]omplying with the current CID deadlines.” *Id.* Beam fails to acknowledge the possibility of a rolling production (as FTC staff proposed) and thus provides no explanation as to why [REDACTED] renders infeasible incremental progress toward compliance with the CID in the near term.

Nor are we persuaded by Beam’s argument that [REDACTED] require deferring CID compliance entirely until the end of the year. While [REDACTED] unquestionably imposes complications, complications of this nature are rarely insurmountable in the year 2020. If there are reasons why this is not the case for Beam, the Petition does not present them.

Beam also points to [REDACTED], which it attributes to the COVID-19 pandemic, as another factor supporting its claim of undue burden. But other than a general assertion that [REDACTED] (Pet. at 3), Beam does not support its argument that [REDACTED] leave no room for a response to the CID. Beam does not contend, for example, that [REDACTED]. And, here again, Beam fails to address the possibility of incremental progress toward compliance through a rolling production. Absent a concrete showing by Beam that [REDACTED] to make any efforts toward compliance with the CID at present, we decline to put on hold entirely the Commission’s investigation into business practices that may be causing ongoing consumer injury.

Despite Beam’s failure to carry its burden, we will grant a modest extension of the CID return date to facilitate Beam’s compliance. Beam has now been in possession of the CID for two months and therefore has had an opportunity to study and develop a plan for responding. From the outset, Commission staff offered to work with Beam to develop a schedule for a rolling production that would accommodate Beam’s concerns while still providing the Commission the information it needs. If Beam doubts its ability to comply in full with the CID by the deadline as hereby extended, it may wish to take staff up on that offer.

III. CONCLUSION

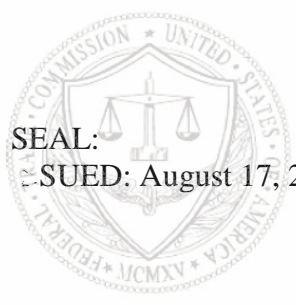
For the foregoing reasons, **IT IS HEREBY ORDERED THAT** Beam Financial, Inc.'s Petition to Quash or Modify Civil Investigative Demand be, and hereby is, **DENIED IN PART AND GRANTED IN PART.**

IT IS FURTHER ORDERED THAT Beam Financial, Inc., shall comply in full with the Commission's Civil Investigative Demand no later than 15 days from the date of this order, subject to any modifications as to scope or timing that Commission staff may determine.

By the Commission, Commissioner Slaughter and Commissioner Wilson not participating.



April J. Tabor
Secretary



SEAL:

SUED: August 17, 2020