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IN RE SELLING SOURCE, LLC))
2015-MISC-Selling Source, LLC-0001))
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DECISION AND ORDER ON PETITION BY SELLING SOURCE, LLC, AND TIM MADSEN TO MODIFY OR SET ASIDE CIVIL INVESTIGATIVE DEMAND

Selling Source, LLC, and Tim Madsen, a Selling Source employee who received a civil investigative demand (CID) seeking his oral testimony, have petitioned the U.S. Consumer Financial Protection Bureau for an order to set aside or modify the CID. For the reasons set forth below, the petition is denied.

FACTUAL BACKGROUND

On May 21, 2015, the Bureau issued a CID to Tim Madsen, the president of PartnerWeekly, LLC, a wholly-owned subsidiary of Selling Source. PartnerWeekly secures loan applications and then sells them to small-dollar lenders. The CID sought Madsen’s oral testimony on June 17, 2015, in Las Vegas, Nevada, where the company is located. The Bureau sent this CID to counsel for Selling Source, who also represents Madsen.

On May 27, 2015, Bureau Enforcement counsel met by telephone with Selling Source’s counsel to discuss the CID. During the call, Selling Source’s counsel asserted that Petitioners were entitled to a more precise description of the practices or alleged violations of law that Bureau staff were investigating, but nonetheless indicated that Madsen would comply. Selling Source’s counsel explained that the June 17 hearing date was not feasible, but offered to make the witness available for the hearing in San Francisco on a different date instead. On June 10, 2015, Selling Source and Madsen filed this petition to set aside the CID.

LEGAL DETERMINATION

Petitioners raise a number of objections to the CID, none of which warrants setting aside or modifying the CID.

First, Petitioners contend that the CID’s Notification of Purpose is insufficiently specific and thus 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 provision of law applicable to such violation,” 12 U.S.C. § 5562(c)(2); *see also* 12 C.F.R. § 1080.5. Petition at 2-3. This requirement, however, does not demand a detailed narrative, and it is “well settled that the boundaries of an [agency] investigation may be drawn ‘quite generally.’” *FTC v. O’Connell Assocs., Inc.*, 828 F. Supp. 165, 171 (E.D.N.Y. 1993) (quoting *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992)). The CID’s Notification of Purpose identifies what conduct the Bureau is investigating – namely, “whether

lead generators or other unnamed persons have engaged or are engaging in unlawful acts and practices in connection with the marketing, selling, or collection of payday loans.” It also identifies the relevant provisions of law: “Sections 1031 and 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5531, 5536, the Equal Credit Opportunity Act, 15 U.S.C. § 1691, Regulation B, 12 C.F.R. Part 1002, the Fair Credit Reporting Act, 15 U.S.C. § 1681m(a), Regulation V, 12 C.F.R. Part 1022, the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809, Regulation P, 12 C.F.R. Part 1016, the Truth in Lending Act, 15 U.S.C. § 1601 et seq., Regulation Z, 12 C.F.R. Part 1026, or any other Federal consumer financial law.” The Bureau has previously found that notifications functionally equivalent to the one in this CID satisfied the requirements of the statute and regulations. *See, e.g., In Re CheckSmart Financial Company*, 2014-MISC-Checksmart Financial Company-001, at 2 (Jan. 22, 2014);¹ *In Re Aspire Financial Inc.*, 2013-MISC-Aspire Financial-001, at 2 (Apr. 16, 2013);² *In re PHH Corp.*, 2012-MISC-PHH Corp-001, at 5-6 (Sept. 20, 2012).³ Accordingly, the Notification of Purpose here adequately informed Petitioners of the conduct of interest to the Bureau and the potentially applicable provisions of law.

Second, Petitioners contend that the CID’s Notification of Purpose is “misleading” because it states that the Bureau is investigating whether “lead generators or other unnamed persons” have violated the law, whereas Petitioners speculate that the Bureau’s investigation is in fact “entirely focused on Selling Source.” Petition at 3. Petitioners, however, cite no authority for the proposition that a CID must be set aside if it suggests that the agency’s investigation may commence as potentially involving various parties but later narrow to a more limited set of parties. Nor would that make any sense, particularly given that in the natural course of any investigation, the scope of the agency’s inquiry will change as the agency gathers and analyzes more evidence. Thus, even if Petitioners’ ungrounded speculation about the actual scope of the Bureau’s investigation were correct (which the Bureau neither confirms nor denies), that would provide no basis to set aside the CID.

Third, Petitioners contend that the investigation relates to a “potential enforcement proceeding that is not within the CFPB’s authority.” Petition at 3. In particular, Petitioners contend that Selling Source could not violate sections 1031 or 1036 of the Consumer Financial Protection Act, 12 U.S.C. §§ 5531, 5536, because it is neither a “covered person” nor a “service provider” – the categories of persons and entities that those provisions prohibit from “engag[ing] in any unfair, deceptive, or abusive act or practice,” 12 U.S.C. § 5536(a)(1)(B); *see also id.* § 5531(a). Petition at 3-9. Selling Source also contends that there is a “serious question” whether the Bureau could assert a claim that Selling Source violated section 1036(a)(3), 12 U.S.C. § 5536(a)(3), by “knowingly or recklessly provid[ing] substantial assistance to a covered person or service provider in violation of the provisions of section [1031].” Petition at 11. As an initial matter, Petitioners have waived this objection by not raising it with Bureau Enforcement counsel during the meet-and-confer process. The Bureau’s Rules Relating to Investigations

¹ Available at http://files.consumerfinance.gov/f/201401_cfpb_order_checkssmart.pdf.

² Available at http://files.consumerfinance.gov/f/201304_CFPB_MISC-Aspire-Financial-0001Order.pdf.

³ Available at http://files.consumerfinance.gov/f/201209_cfpb_setaside_phhcorp_0001.pdf.

provide that, in considering a petition to modify or set aside a CID, the Bureau “will consider only issues raised during the meet and confer process.” 12 C.F.R. § 1080.6(c)(3). Petitioners’ failure to raise this objection during that process is, by itself, a sufficient basis to reject it. See *CheckSmart, supra*, at 2.

In any event, this objection also fails on the merits. This objection is essentially a substantive defense to claims that the Bureau has yet to assert. As the Bureau has previously explained, such fact-based arguments about whether an entity is subject to or complied with a law’s substantive provisions are not defenses to the enforcement of a CID. See *In Re Next Generation Debt Settlement, Inc.*, 2012-MISC-Next Generation Debt Settlement-0001, at 2 (Oct. 5, 2012);⁴ see also *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1076 (9th Cir. 2001) (noting that Supreme Court has “consistently reaffirmed” the principle that “fact-based claim[s] regarding coverage or compliance with the law” will not preclude enforcement of an administrative subpoena). This is because the responses to a CID may be highly relevant to determining the merits of the agency’s potential claims and the parties’ defenses. Indeed, “[i]f parties under investigation could contest substantive issues in an [administrative subpoena] 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).

Finally, Petitioners contend that it is “improper” for the Bureau to use CIDs to investigate because, they speculate, the Bureau has already decided to initiate an enforcement action against Selling Source and thus should sue and obtain evidence through discovery instead. Petition at 11. But even if Petitioners’ speculation about the Bureau’s intentions were correct (which the Bureau again will neither confirm nor deny), this objection fails. The statute permits the Bureau to issue CIDs “before *the institution* of any proceedings under the Federal consumer financial law.” 12 U.S.C. § 5562(c)(1) (emphasis added). No proceedings have yet been instituted.

CONCLUSION

The petition by Selling Source and Madsen to modify or set aside the CID is denied. Selling Source and Madsen are directed to meet and confer with Bureau Enforcement counsel within 10 days of service of this order to decide upon the date on which Madsen’s hearing will take place.



Richard Cordray, Director

August 6, 2015

⁴ Available at http://files.consumerfinance.gov/f/201210_cfpb_2012-MISC-Next-Generation-Debt-Settlement-0001-Order.pdf.