



Consumer Financial
Protection Bureau

1700 G Street, N.W., Washington, DC 20552

IN THE MATTER OF WESTGATE RESORTS, LTD.)
 2015-MISC-WESTGATE RESORTS, LTD-0001)

**DECISION AND ORDER ON PETITION BY WESTGATE RESORTS, LTD.,
TO MODIFY OR SET ASIDE CIVIL INVESTIGATIVE DEMAND**

Westgate Resorts, Ltd., received a civil investigative demand (CID) from the Consumer Financial Protection Bureau’s Office of Enforcement, and has petitioned for an order to set aside or modify that CID. Westgate’s petition is denied for the reasons set forth below.

FACTUAL BACKGROUND

The Bureau issued its CID to Westgate on September 29, 2015. The CID’s “Notification of Purpose” advised Westgate that the Bureau was investigating “to determine whether persons involved in the sale and financing of timeshares have engaged in, or are engaging in, acts or practices in violation of Sections 1031 and 1036 of the [Consumer Financial Protection Act], 12 U.S.C. §§ 5531 and 5536, the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, et seq., the Electronic Funds Transfer Act, 15 U.S.C. § 1693 et seq., the Fair Credit Billing Act (FCBA), 15 U.S.C. § 1666 et seq., their implementing regulations, or any other Federal consumer financial law.” The CID also sought “to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.” The CID included 27 interrogatories and nine requests for documents.

The Bureau’s enforcement staff held a meet-and-confer conference call with counsel for Westgate on October 8, 2015, to discuss the CID. As a result, the Bureau narrowed the scope of several interrogatories and one document request. The Bureau also held portions of one interrogatory and one document request in abeyance. Westgate has partially complied with the CID. However, as to Document Request 9 (which, as modified, requested certain consumer complaints that related to the offering or sale of timeshares), Westgate withheld those consumer complaints that it deemed to be unrelated to its financing of timeshares. Westgate also failed to comply in full with Interrogatory 25. That interrogatory, as modified, requested the identities of anyone who worked for Westgate, on or after September 1, 2012, unless that person worked solely as a “greeter.” Westgate provided the identities of those employees who processed mortgage applications, but withheld the identities of its sales employees who engaged in the offering and sales of the timeshare properties.

Westgate served its Petition to Modify or Set Aside the CID on October 19, 2015.

LEGAL DETERMINATION

Westgate served its Petition prior to the completion of the meet-and-confer process. Because that process narrowed the scope of the CID, and because Westgate has partially complied, some of the arguments raised in the Petition are no longer relevant. However, there are five arguments that relate to Westgate's failure to comply in full with Document Request 9 and Interrogatory 25. None of those arguments merits modifying or setting aside Westgate's obligations under those provisions.

First, Westgate argues that the Bureau is unconstitutional and thus has no authority to investigate its conduct. *See* Petition at 6-11. Two district courts have rejected challenges to the Bureau's constitutionality that are similar to the arguments raised by Westgate. *See CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082 (C.D. Cal. 2014); *CFPB v. ITT Educ. Servs., Inc.*, No. 1:14-cv-00292-SEB-TAB, 2015 WL 1013508 (S.D. Ind. Mar. 6, 2015). However, Westgate's constitutional challenge is not properly raised in an administrative proceeding challenging compulsory process because "government agencies may not entertain a constitutional challenge to authorizing statutes." *United Space All., LLC v. Solis*, 824 F. Supp. 2d 68, 97 n.10 (D.D.C. 2011) (quoting *Lepre v. Dep't of Labor*, 275 F.3d 59, 75 (D.C. Cir. 2001) (Silberman, J. concurring)); *see Buckeye Indus., Inc. v. Sec'y of Labor, Occupational Safety & Health Review Comm'n*, 587 F.2d 231, 235 (5th Cir. 1979) ("[n]o administrative tribunal of the United States has the authority to declare unconstitutional the Act which it is called upon to administer"); *Robinson v. United States*, 718 F.2d 336, 338 (10th Cir. 1983) (same). Accordingly, Westgate's constitutional arguments provide no basis for modifying or setting aside any provision of the CID.

Second, Westgate contends that the CID's Notification of Purpose fails to advise it "of the nature of the conduct constituting the alleged violation that is under investigation," citing both the Bureau's regulations and the CFPA. Petition at 11-14. The Notification of Purpose in Westgate's CID explains that the Bureau seeks to determine whether "persons involved in the sale and financing of timeshares have engaged in, or are engaging in, acts or practices" that violate the CFPA, the Fair Debt Collection Practices Act, the Electronic Funds Transfer Act, the Fair Credit Billing Act, the regulations that implement those laws, or any other federal consumer financial law. The Bureau need not provide a detailed narrative when it issues a CID. Rather, a CID need only 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; *see also* 12 C.F.R. § 1080.5. The Notification of Purpose in Westgate's CID fulfills this requirement. The Bureau is not required to go further in specifying the provisions it may be investigating, as it is "well settled that the boundaries of an [agency] investigation may be drawn 'quite generally,' in large part because at the investigative stage of a proceeding, the [agency] need only have a 'suspicion that the law is being violated in some way.'" *FTC v. O'Connell Associates, Inc.*, 828 F. Supp. 165, 171 (E.D.N.Y. 1993) (emphasis added by the court) (quoting *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992)). Where, as here, the Notification of Purpose in a CID identifies the conduct under investigation and the relevant provisions of law, the CID satisfies statutory and regulatory requirements. *See In re Accrediting Council for Indep.*

Colleges and Schools, 2015-MISC-ACICS-0001, at 3 (Oct. 8, 2015) (and other orders cited therein).¹

Third, Westgate complains that the material it has withheld is not relevant. *See* Petition at 15, 17. The crucial issue with respect to relevance is whether the material sought by the agency's compulsory process is reasonably relevant to the purpose of the investigation. *See United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950). This "test is satisfied if the documents sought are 'not plainly irrelevant' to the investigative purpose." *FTC v. Carter*, 636 F.2d 781, 788 (D.C. Cir. 1980). The information withheld by Westgate is not plainly irrelevant to the Bureau's investigation. The information relates to Westgate's sales of timeshares. Although Westgate argues that its marketing and sales activities occur prior to its financing of timeshares, Westgate has not shown that the sales process is completely separate from the financing of the timeshares. To the contrary, Westgate concedes that its sales of timeshares "are coupled with consumer financial products or services." Petition at 24. And consumer complaints that the Bureau has obtained suggest that sales representatives made statements directly relating to financing. Thus, Westgate's arguments about relevance do not justify modifying or setting aside the CID provisions with which it has failed to comply.

Fourth, Westgate argues that the CID is overbroad: it contends that the Bureau's enforcement authority and investigative authority are coextensive, and that it cannot be required to disclose information that, in its view, involves matters outside the Bureau's enforcement authority. *See* Petition at 22; *see also id.* at 16, 17, 24-25. In particular, it claims that its marketing and sale of timeshares are outside the Bureau's enforcement authority pursuant to §§ 1027(a), (b) of the CFPA, 12 U.S.C. §§ 5517(a), (b), *see* Petition at 22, and that, as a result, it cannot be required to disclose information about those activities. But this argument ignores that the CFPA authorizes the Bureau to issue CIDs to "any person" who may have information "relevant to a violation." 12 U.S.C. § 5562(c)(1). As the Bureau has previously explained, an entity's fact-based arguments about whether its conduct is subject to the substantive provisions of the CFPA are not a defense to the enforcement of a CID. *See In re Accrediting Council for Indep. Colleges and Schools*, at 2. Courts have agreed with federal agencies that have reached the same conclusion in similar circumstances. *See SEC v. Savage*, 513 F.2d 188, 189 (7th Cir. 1975) (SEC not required to establish that company's commodity future contracts were "securities" within the meaning of the Securities Act before subpoena would be enforced); *Casey v. FTC*, 578 F.2d 793, 797-98 (9th Cir. 1978) (provision of the FTC Act authorizing the FTC to subpoena "witnesses" extends the FTC's subpoena power to those who are exempt from its enforcement authority). Moreover, although section 1027 of the CFPA imposes limits on the Bureau's enforcement authority, section 1027(n)(2) provides that even those who are excluded from the Bureau's enforcement authority by, *inter alia*, sections 1027(a) and (b) "may be subject to requests from, or requirements imposed by, the Bureau regarding information in order to carry out the responsibilities and functions of the Bureau in accordance with section ... 1052 [which

¹ Available at http://www.consumerfinance.gov/f/201510_cfpb_decision-on-petition-by-selling-ACICS-to-set-aside-civil-investigative.pdf.

authorizes issuance of CIDs].” 12 U.S.C. § 5517(n)(2). Thus, the limits imposed by sections 1027(a), (b) do not justify Westgate’s failure to comply.

Finally, Westgate claims that it would be “unduly burdensome” for it to supply the material that it withheld. Petition at 33. Yet a party served with a CID must expect some burden, and it is only when the burden is undue that it justifies a petition to set aside or modify the CID. *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1997) (*en banc*). Westgate bears the burden of demonstrating that supplying the material it has withheld would cause it an undue burden, and it can only meet that burden if it shows that complying would “unduly disrupt” or “seriously hinder” the normal operations of its business. *Id.*; see *In re PHH Corp.*, 2012-MISC-PHH Corp-0001, at 6-7 (September 20, 2012).² Westgate has not made such a showing. Much of Westgate’s argument about burden is based on its belief that the CID is overbroad. See, e.g., Petition at 1, 20. As explained above, that argument is meritless. Westgate’s only “showing” related to burden is its general statement that “[c]ompliance with the CID will be very expensive and disrupt Westgate’s normal business operations,” and that this will preclude “many of its management team, officers, and employees ... from working on their day-to-day activities.” Petition at 20. But this sort of general statement is not enough. Instead, Westgate would have to demonstrate that supplying the information it has withheld would unduly hinder its day-to-day operations. Westgate would also have to support this showing with evidence, such as sworn declarations, yet Westgate has made no such showing.

CONCLUSION

For the foregoing reasons, Westgate’s Petition to Modify or Set Aside the Civil Investigative Demand is denied. Within 21 calendar days of this Decision and Order, Westgate is directed to produce all the documents, items, and information that it has withheld in response to Interrogatory 25 and Document Request 9.


Richard Cordray, Director

March 11, 2016

² Available at http://www.consumerfinance.gov/f/201209_cfpb_setaside_phhcorp_0001.pdf.