
IN RE NATIONAL ASSET ADVISORS LLC)
AND NATIONAL ASSET MORTGAGE LLC)
2016-MISC-National Asset Advisors and)
National Asset Mortgage-0001)

**DECISION AND ORDER ON PETITION BY NATIONAL ASSET
ADVISORS LLC AND NATIONAL ASSET MORTGAGE LLC
TO SET ASIDE OR MODIFY CIVIL INVESTIGATIVE DEMAND**

National Asset Advisors LLC (NAA) and National Asset Mortgage LLC (NAM), each the recipient of a civil investigative demand (CID) from the Consumer Financial Protection Bureau, have filed a combined petition for an order to set aside or modify the CIDs. For the reasons set forth below, the petition is denied.

FACTUAL BACKGROUND

On September 12, 2016 the Bureau issued CIDs to NAA and NAM (collectively, Petitioners), each of which stated in its “Notification of Purpose” that it had been issued “to determine whether investment firms or other unnamed persons have been or are engaging in unlawful acts or practices relating to the marketing, offering, servicing, or collection of loans for the purchase of residential properties, or similar products or services, in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010 [CFPA], 12 U.S.C. §§ 5531, 5536, the Truth in Lending Act [TILA], 15 U.S.C. § 1601 et seq., the Equal Credit Opportunity Act, (ECOA), 15 U.S.C. §§ 1691-1691f, any of their implementing regulations, or any other Federal consumer financial law. The investigation also seeks to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.” Each CID posed fourteen interrogatories, one request for a written report, and fourteen document requests seeking, among other information, information regarding the sale of residential properties by Harbour Portfolio Advisors LLC (Harbour). The CIDs required Petitioners to schedule a meeting (meet-and-confer) within ten days of receipt, and to produce responses to interrogatories, the written report, and requested documents by October 7, 2016.¹

The Bureau’s enforcement counsel held a meet-and-confer conference call with Petitioners’ counsel on September 21, 2016 and discussed individual requests, including the Bureau’s proposals to modify or clarify certain requests. Nevertheless, Petitioners’ counsel stated that the Bureau lacked authority to issue the CIDs, that the terms of the CIDs were

¹ The CIDs were issued shortly after the Bureau issued a CID to Harbour. Harbour filed a petition to set aside or modify the CID on September 28, 2016. This decision and order regarding NAA and NAM is issued contemporaneously with a decision and order regarding Harbour’s petition.

unclear, and that the scope of specific requests and timeframe of the CIDs imposed an undue burden. Petitioners filed their Combined Petition to Set Aside or Modify the CIDs on October 2, 2016.

LEGAL DETERMINATION

Petitioners raise four arguments in support of their Petition, none of which warrants setting aside or modifying the CIDs.

First, Petitioners argue that the Bureau lacks statutory authority to issue the CIDs because the agreements for deed (AFDs) through which Harbour sells its residential properties “do not involve extending credit or servicing loans” and therefore do not constitute credit under the CFPA, TILA, or ECOA. Pet. at 6. An AFD, Petitioners argue, “is not a credit transaction, but rather a contemporaneous exchange of payment at the beginning of each month in return for the consumer’s ability to occupy the property for that period.” *Id.* at 8. Petitioners claim that the AFDs instead “are similar to a residential lease or rent-to-own transaction, neither of which constitute ‘credit.’” *Id.* at 11. In sum, because an AFD does not involve credit, Petitioners argue, the Bureau cannot investigate Petitioners pursuant to the CFPA, ECOA, or TILA. *See id.* at 19.

Petitioners’ argument is misplaced, as it does not relate to the scope of the Bureau’s authority to issue the CIDs. Under the CFPA, the Bureau’s investigative authority to issue CIDs extends to “any person” who may have information “relevant to a violation” of federal consumer financial law, including violations of the CFPA, ECOA, or TILA. 12 U.S.C. §§ 5562(c)(1); 5481(12)(D), 12(O), (14). Petitioners’ argument does not address the scope of this investigative authority. Rather, Petitioners prematurely assert substantive defenses to claims the Bureau has not asserted. As the Bureau has previously explained, an entity’s fact-based arguments about whether it is subject to or has complied with substantive provisions of the CFPA, or any other enumerated consumer law, are not valid defenses to the enforcement of a CID. *See In re Next Generation Debt Settlement, Inc.*, 2012-MISC-Next Generation Debt Settlement-0001 (Oct. 5, 2012), at 2.² Indeed, the Supreme Court has “consistently reaffirmed” the principle that “courts should not refuse to enforce an administrative subpoena when confronted by a fact-based claim regarding coverage or compliance with the law.” *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1076 (9th Cir. 2001) (citing, *inter alia*, *United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950)). And courts have agreed with federal agencies that have reached the same conclusion in similar circumstances. *See FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001) (“[C]ourts of appeals have consistently deferred to agency determinations of their own investigative authority, and have generally refused to entertain challenges to agency authority in proceedings to enforce compulsory process.”); *SEC v. Savage*, 513 F.2d 188, 189 (7th Cir. 1975) (SEC not required to establish that company’s commodities future contracts were “securities” within the meaning of the Securities Act before subpoena would be enforced).

² Available at http://www.consumerfinance.gov/f/201210_cfpb_2012-MISC-Next-Generation-Debt-Settlement-0001-Order.pdf.

In the rare cases in which courts have evaluated an agency's investigative authority, they generally have enforced the CID so long as there was "some plausible ground for jurisdiction, or to phrase it another way, unless jurisdiction [was] plainly lacking." *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1077 (9th Cir. 2001) (quotations and citations omitted); *accord EEOC v. Randstad*, 685 F.3d 433, 442 (4th Cir. 2012); *see also Gov't of Territory of Guam v. Sea-Land Serv., Inc.*, 958 F.2d 1150, 1155 (D.C. Cir. 1992) (explaining that an agency can determine the scope of its authority unless there is a "patent lack of jurisdiction"). Here, the Bureau has plausible grounds to believe that Petitioners may be subject to the Bureau's authority and may have information relevant to a possible violation of federal consumer financial law. The CFPA, ECOA, and TILA include in their respective definitions of credit the right to defer payment of a debt. 12 U.S.C. § 5481(7); 15 U.S.C. § 1691a(d); 15 U.S.C. § 1602(f). The Bureau has reason to believe that Petitioners market and service AFD transactions on behalf of Harbour. The AFD transactions appear to include a promissory note that defers payment of a debt. Specifically, under the AFD transactions, it appears that the consumer promises and is obligated to pay a principal sum (the purchase price) plus interest through deferred monthly payments. The transactions therefore may involve the right to defer the payment of debt and thus may constitute credit under the CFPA, ECOA, or TILA. Petitioners' argument as to whether the Bureau should ultimately reach that conclusion is premature where, as here, the Bureau's authority is not plainly lacking.

Second, Petitioners argue that they lacked fair notice that their business activities were subject to federal regulation because the CFPA, ECOA, and TILA "do not define 'credit' or 'consumer financial product or service' to include land-installment contracts or AFDs." Pet. at 16. As a threshold matter, the Bureau's investigative authority, as noted above, extends to "any person" who may have information relevant to a violation of federal consumer financial law. 12 U.S.C. § 5562(c)(1). Thus, whether Petitioners had fair notice regarding the application of any federal consumer financial law to their conduct is not relevant in determining whether they might have information relevant to a possible violation.³ Moreover, as also noted above, a determination as to whether any person is subject to the CFPA, ECOA, or TILA (or had fair notice regarding the scope of these statutes) is not relevant at this stage, as such questions should wait "until any enforcement action is brought." *See United States v. Constr. Prod. Research, Inc.*, 73 F.3d 464, 470 (2d Cir. 1996).⁴

³ Petitioners also mistakenly claim that the Notification of Purpose "states that the CFPB has authority under the CFPA, TILA, and ECOA to issue the CIDs along with 'any other federal statute'" and therefore provides insufficient notice to Petitioners regarding the source of the Bureau's authority. Pet. at 17. The Notification of Purpose makes no such statement regarding the source of the Bureau's CID authority. As noted above, the Bureau's CID authority flows from § 1052(c)(1) of the CFPA, which grants the Bureau authority to issue CIDs to "any person" who may have information "relevant to a violation" of federal consumer financial law.

⁴ The two cases Petitioners cite in support of their argument merely illustrate this point, as neither addresses an agency's investigative authority. *See* Pet. at 16 (citing *Christopher v.*

Third, Petitioners argue that the CIDs are overbroad and unduly burdensome. The Bureau has repeatedly stated that in making such claims a petitioner must “*prove[]* the inquiry is unreasonable because it is overbroad or unduly burdensome.” *In re Great Plains Lending, LLC*, 2013-MISC-Great Plains Lending-0001 (Sept. 26, 2013), at 8 (citing *FDIC v. Garner*, 126 F.3d 1138, 1143 (9th Cir. 1997) (emphasis added)); *In re Assurant, Inc.*, 2015-MISC-Assurant-0001 (Apr. 25, 2016), at 5.⁵ Accordingly, a petitioner “must undertake a good-faith effort to show ‘the exact nature and extent of the hardship’ imposed, and state specifically how compliance will harm its business.” *In re Great Plains Lending, LLC*, at 8 (quoting *In re PHH Corp.*, 2012-MISC-PHH Corp-0001 (Sept. 20, 2012), at 6).⁶

None of Petitioners’ arguments demonstrates that the CIDs are overbroad or unduly burdensome. Petitioners claim that the seven-year timeframe of the CIDs “exceeds the applicable period for which the CFPB could hold NAA/NAM liable.” Pet. at 17. The Bureau has repeatedly rejected similar objections of overbreadth regarding the applicable time periods of CIDs. The issue regarding information requested during such periods “is not whether all such information is itself actionable; rather, the issue is whether such information is relevant to conduct for which liability can be lawfully imposed.” *In re PHH Corp.*, at 7. Here, such information is essential to the Bureau’s ability to develop a complete understanding of the practices and operations of Petitioners and of Harbour, which may date back as far back as 2010.

Petitioners’ claims of undue burden are similarly unavailing. Petitioners make only generalized assertions about the burden of the CIDs, stating that “every document produced must be reviewed for responsiveness and privilege” and that they lack sufficient staff to comply with the timeframe of the CIDs. Pet. at 18, 20. Petitioners offer no specific information about the volume of data, the cost of production, or any possible technical limitations that may impair their ability to comply with the CIDs. Petitioners’ generalized assertions fail to show the “exact nature and extent of the hardship” on Petitioners and cannot establish that the CIDs are unduly burdensome. See *In re Great Plains Lending, LLC*, at 8.

SmithKline Beecham Corp., 132 S. Ct. 2156 (2012) and *FCC v. Fox TV Stations, Inc.*, 132 S. Ct. 2307 (2012)). *SmithKline* concerned a suit between private parties, and *Fox* addressed a merits-based determination by the FCC. See *SmithKline*, 132 S. Ct. at 2164; *Fox*, 132 S. Ct. at 2314-15. Neither case supports a deviation from the “general proposition [that] agencies should remain free to determine, in the first instance, the scope of their own jurisdiction when issuing investigative subpoenas.” *Ken Roberts Co.*, 276 F.3d at 586 (discussing *Endicott Johnson Corp.*, 317 U.S. 501 (1943)).

⁵ Available at http://files.consumerfinance.gov/f/201309_cfpb_decision-on-petition_great-plains-lending-to-set-aside-civil-investigative-demands.pdf; http://files.consumerfinance.gov/f/documents/201604_cfpb_decision-and-order-on-petition-by-assurant-inc-to-modify-or-set-aside.pdf.

⁶ Available at http://www.consumerfinance.gov/f/201209_cfpb_setaside_phhcorp_0001.pdf.

Petitioners also argue that the CIDs are unclear and duplicative. First, Petitioners argue that the CIDs are unclear because they use terms such as “loan” and “underwriting” that are “wholly inconsistent with how NAA/NAM actually conducts business.” Pet. at 18-19. Rather than cooperate with the Bureau in clarifying any purported uncertainties, Petitioners refused offers by the Bureau to define or modify these terms and instead simply repeat their substantive argument that AFDs are “not loans.” Pet. at 18. Second, Petitioners claim that the CIDs are duplicative because they seek similar information from NAA and NAM. Pet. at 19. Petitioners argue that the Bureau “should first collect documents and information from Harbour.” *Id.* Petitioners offer no authority to support this claim. The investigative authority conferred under 12 U.S.C. § 5562(c)(1) does not require the Bureau to limit its investigations by issuing its CIDs in piecemeal. Petitioners are required to make a good-faith effort to comply with the terms of the CIDs and, as separate legal entities, to respond regardless if Petitioners believe other entities may possess similar information.

CONCLUSION

For the foregoing reasons, Petitioners’ combined petition to set aside or modify the CIDs is denied. Within 10 calendar days of this Decision and Order, Petitioners are directed to produce all responsive documents, items, and information within their respective possession, custody, or control that are covered by the respective CIDs issued to them. Petitioners are welcome to engage in further discussions with the Bureau’s enforcement team about any further suggestions for modifying the CIDs, which may be adopted by the Assistant Director for Enforcement or his Deputy as appropriate.


Richard Cordray, Director

November 1, 2016