

Bureau of Consumer Financial Protection
1700 G Street NW
Washington, D.C. 20552



IN RE WALL & ASSOCIATES, INC.)
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2017-MISC-Wall & Associates, Inc.-0002)
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**DECISION AND ORDER ON PETITION BY WALL &
ASSOCIATES, INC. TO SET ASIDE OR MODIFY CIVIL INVESTIGATIVE DEMAND**

Wall & Associates, Inc. (W&A) petitioned the Consumer Financial Protection Bureau (Bureau or CFPB) 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 the CID’s notification of purpose is modified as described in this Order. The Petition is otherwise denied.

FACTUAL BACKGROUND

On September 26, 2017, the Bureau served a CID on W&A seeking information about its products, services, and operations. The CID’s notification of purpose stated that the CID had been issued:

to determine whether providers of tax debt relief products or services are offering or providing financial advisory services to consumers on individual financial matters. The purpose of this investigation is also to determine whether any person, in connection with the marketing, sale, or provision of such tax debt relief products and services to consumers, has engaged in unfair, deceptive, or abusive acts or practices in violation of Sections 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531 and 5536. The investigation also seeks to determine whether Bureau action to obtain legal or equitable relief would be within the Bureau’s authority and in the public interest.

The CID included five interrogatories, four requests for written reports, four requests for documents, and a demand for oral testimony from a corporate representative on four topics.

Pursuant to the Bureau’s rules, W&A was required to meet and confer with a Bureau investigator within 10 days of its receipt of the CID. *See* 12 C.F.R. § 1080.6(c). W&A did so, and then timely filed its Petition to Set Aside or Modify the CID.

LEGAL DETERMINATION

W&A makes a number of overlapping arguments for setting aside or modifying the CID. W&A argues principally that: (1) the Bureau lacks statutory authority to investigate its business; (2) the Bureau's investigation should be initially limited to investigating whether W&A's business is within the Bureau's enforcement authority; and (3) the CID's notification of purpose does not comply with the statute authorizing Bureau CIDs. These arguments do not warrant setting aside or modifying the CID. Nevertheless, I grant the petition in part and exercise my discretion to modify this CID's notification of purpose so that it describes in greater detail the conduct the Bureau is investigating, consistent with the recently announced policy of the Bureau's Office of Enforcement. The Petition is otherwise denied.

W&A's principal argument is that it is not subject to the enforcement authority of the Bureau and that the CID is therefore invalid. W&A argues that it is not a "covered person" subject to the Bureau's statutory enforcement authority, because it does not provide any "financial product or service" as that term is defined in the Consumer Financial Protection Act (CFPA). Pet. at 6-14. W&A denies that it provides "financial advisory services," which are expressly defined to constitute a "financial product or service" under the CFPA, *see* 12 U.S.C. § 5481(15)(A)(viii), though it admits that it "advises clients about tax issues" and "has on rare occasions communicated with third parties about its clients' overall financial circumstances, which may include indebtedness its clients have...." Pet. at 3 (citing Exhibit A, ¶¶ 6 and 7).

W&A misunderstands the scope of the Bureau's investigatory authority. The Bureau is authorized to issue CIDs to "any person" who may have information "relevant to a violation." 12 U.S.C. § 5562(c)(1). W&A's assertions do not go to the limits of the Bureau's investigative authority, but rather are fact-based arguments about whether it is subject to substantive provisions of the CFPA. Under settled law, the recipient of a CID¹ cannot challenge an agency investigation by preemptively contesting the facts that the agency might find, at least where the investigation is not patently outside the agency's authority. *FTC v. Ken Roberts Co.*, 276 F.3d 583, 584 (D.C. Cir. 2001) ("Unless it is patently clear that an agency lacks the jurisdiction that it seeks to assert, an investigative subpoena will be enforced."). 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 *United States v. Powell*, 379 U.S. 48, 57-58 (1964)); *see also SEC v. Savage*, 513 F.2d 188, 189 (7th Cir. 1975) (SEC not required to establish that company's contracts were "securities" subject to agency's jurisdiction before subpoena would be enforced); *CFPB v. Harbor Portfolio Advisors, LLC*, 2017 WL 631914, at *3 (E.D. Mich. Feb. 16, 2017) ("Whether Respondents' transactions *actually* involve 'credit' is not at issue, and it would be premature for the Court to decide that question at this stage.").

¹ The courts "have treated CIDs as a form of administrative subpoena." *See CFPB v. Accrediting Council for Indep. Colleges & Sch.*, 854 F.3d 683, 688 (D.C. Cir. 2017).

The Bureau is not required to accept as true W&A's factual assertions concerning the limits or scope of its business conduct, and may investigate whether it has enforcement authority over W&A. See *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1052–53 (2d Cir. 1973) (“The [SEC] must be free without undue interference or delay to conduct an investigation which will adequately develop a factual basis for a determination as to whether particular activities come within the Commission’s regulatory authority.”); *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 699 (7th Cir. 2002) (“[A]ny agency with subpoena powers . . . is entitled to obtain the facts necessary to determine whether it can proceed to the enforcement stage.”). And W&A has not shown that the investigation is “patently outside” the Bureau’s enforcement authority, particularly where—as here—it admits that it has at times provided services to clients related to their overall indebtedness, conduct that would appear to be within the Bureau’s authority.

W&A next argues that even if the Bureau is permitted to conduct *some* investigation, the CID should be limited to information immediately relevant to determining whether the Bureau has enforcement authority over W&A. Pet. at 23-25. W&A cites no legal authority for this argument and ignores the longstanding line of decisions approving simultaneous agency investigations of jurisdictional facts and possible violations. “Although it might well save time and expense for all concerned if the [agency] first examined such records as were relevant to coverage and then proceeded beyond that only if convinced that appellant were covered, the [Supreme Court’s] *Oklahoma Press* decision makes it plain that the course of the investigation is for the [agency] to determine.” *Newmark & Co. v. Wirtz*, 330 F.2d 576, 578 (2d Cir. 1964) (citing *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946)); accord *Savage*, 513 F.2d at 189; *Brigadoon Scotch*, 480 F.2d at 1052–53.

Finally, W&A argues that, even assuming that the Bureau may have authority to conduct this investigation, the notification of purpose set out on the face of the CID is inadequate. Pet. at 25-31. As W&A correctly notes, a CID must “state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.” Pet. at 26 (citing 12 U.S.C. § 5562(c)(2)).² On April 23, 2019, the Bureau issued a statement advising the public that the Office of Enforcement has changed its practices so that notifications of purpose contained in its CIDs provide the recipients of CIDs with even more

² W&A also makes an extended related argument premised on a prior CID that requested much of the same information in connection with possible violations of both the unfair, deceptive, and abusive acts or practices prohibition in Sections 1031 and 1036 of the CFPA, 12 U.S.C. §§ 5531 and 5536(a)(1)(B), and the Telemarketing Sales Rule, 16 C.F.R. Part 310. The prior CID was served on July 6, 2017 and, after a prior Petition to Set Aside or Modify from W&A, was withdrawn on September 26, 2017. W&A acknowledges that the revised notification of purpose no longer relies on the Telemarketing Sales Rule. Pet. at 1, 5. W&A nevertheless contends that the CID that is the subject of this Petition improperly still seeks information concerning possible violations of the Telemarketing Sales Rule. Pet. at 14-23, 30-31. Whether this CID seeks information that could theoretically also pertain to compliance with the Telemarketing Sales Rule is beside the point. The appropriate consideration is whether this CID seeks information relevant to the possible violations of the CFPA set out in the CID’s notification of purpose, and it does.

information regarding the focus of Bureau investigations. Consistent with this approach, and in order to provide W&A with a better understanding of the nature of the Bureau's investigation, I am exercising the discretion afforded by section 1052(f)(1) of the CFPA and 12 C.F.R. § 1080.6(e)(4), to modify the notification of purpose contained in this CID as follows:

The purpose of this investigation is to determine whether providers of tax debt relief products or services are offering or providing financial advisory services to consumers on individual financial matters. The purpose of this investigation is also to determine whether these persons or associated persons, in connection with the marketing, sale, or provision of such tax debt relief products and services to consumers, have made false or misleading representations to consumers regarding the products and services provided or the results of these products and services in a manner that is unfair, deceptive, or abusive in violation of Sections 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531 and 5536. The investigation also seeks to determine whether Bureau action to obtain legal or equitable relief would be within the Bureau's authority and in the public interest.

W&A's arguments based on the original, unmodified notification of purpose do not provide a basis for setting aside or further modifying the CID, as the modified statement of purpose clearly satisfies the statutory standards. *See, e.g., CFPB v. Heartland Campus Sols., ECSI*, 747 F. App'x 44, 48 n.3 (3d Cir. 2018) ("Congress required [the Bureau] to identify only the type of conduct that may violate the law and the law being violated.").

W&A additionally argues that the notification of purpose is insufficient because it does not identify the particular persons who engaged in the conduct, does not state whether W&A itself is under investigation, and purportedly does not identify the statute allegedly violated. Pet. at 29-31. However, nothing in the CFPA provides that the notification must identify whether W&A itself is under investigation, nor that it must specify the particular persons who allegedly engaged in the conduct. The statute does not require that the Bureau specify whether the entity or person receiving the CID is under investigation. To the contrary, the Bureau is specifically authorized by the CFPA to obtain information and records under a CID from "*any person* [who] may be in possession, custody, or control of any documentary material or tangible things, or may have any information *relevant to a violation,....*" § 5562(c)(1) (emphasis added).

CONCLUSION

For the foregoing reasons, the Petition to Set Aside or Modify the CID is granted in part and the notification of purpose is modified as set forth above. The Petition is otherwise denied. W&A is directed to produce all responsive documents, items, and information within its possession, custody, or control that are covered by the CID within 45 calendar days of this Decision and Order. W&A is welcome to engage in discussions with Office of Enforcement staff about any further suggestions for modifying the CID or staggering production, which may be adopted by the Assistant Director for Enforcement or Deputy Enforcement Director as appropriate.

May 21, 2019


Kathleen L. Kraninger, Director