UNITED STATES OF AMERICA
CONSUMER FINANCIAL PROTECTION BUREAU

IN THE MATTER OF ASPIRE FINANCIAL, INC.	)

ASPIRE FINANCIAL, INC.'S PETITION TO MODIFY OR SET ASIDE CIVIL INVESTIGATIVE DEMAND

The Consumer Financial Protection Bureau (the "CFPB" or the "Bureau") has commenced a nonpublic investigation "to determine whether mortgage lenders have engaged or are engaging in unlawful practices in the advertising, marketing, or provision of mortgage and reverse-mortgage products in violation of Sections 1031 and 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 23 U.S.C. §§ 5531, 5536; the Mortgage Acts and Practices Advertising Rule, Regulation N, 12 C.F.R. Part 1014; the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601 et seq., Regulation X, 12 C.F.R. § 1024; or any other Federal consumer financial law," and whether Bureau action is warranted (hereinafter, the "Investigation").

On January 25, 2013, the Bureau issued a Civil Investigative Demand ("CID") to Aspire Financial, Inc. ("Aspire" or the "Company"), in connection with the Investigation, a copy of which was emailed to an underwriting manager in the late afternoon hours of Friday January 25, 2013. Contrary to the requirement set forth in Section 1052(c)(2) of the Dodd- Frank Act, the CID fails to identify "the nature of conduct constituting the alleged violation that is under investigation." 12 C.F.R. § 1080.5. Further, the CID is overly broad in its temporal scope, reaching back further in time than the authorities relied upon to issue the CID have existed.

Aspire respectfully submits this Petition for an order modifying or setting aside the CID.

I. LEGAL OBJECTIONS

A. The Applicable Relevance Standard

The recognized standard in determining whether a CID should be quashed or limited in scope or breadth was adopted by the Supreme Court in *U.S. v. Morton Salt Co.,* 338 U.S. 632 (1950). Although the Court enforced the decree in *Morton Salt Co.,* it recognized that "a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power." *Id.* at 652. Accordingly, the Court instructed that agency subpoenas or CIDs should not be enforced if it is determined that they demand information that is: (a) not "within the authority of the agency;" (b) "too indefinite;" or (c) not "reasonably relevant to the inquiry." *Id.*

The agency subpoena enforcement standard enunciated in *Morton Salt Co.* has been consistently applied by the courts. As the U.S. Court of Appeal for the D.C. Circuit recognized in *SEC v. Arthur Young & Co.,* "[t]he gist of the protection is in the requirement . . . that the disclosure sought shall not be unreasonable. Correspondingly, the need for moderation in the subpoena's call is a matter of reasonableness." 584 F.2d 1018, 1030 (D.C. Cir. 1978). The court explained further that "'the requirement of reasonableness . . . comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry.'" 584 F.2d at 1030 (quoting *Oklahoma Press Publ'g Co. v. Walling,* 327 U.S. 186, 209 (1946)). The subpoena request must "not [be] so overbroad as to reach into areas that are irrelevant or immaterial." *Id.* at 1028. The court added: "the test is relevance to the specific purpose." *Id.* at 1031.

Following *Morton Salt Co.,* the court in *SEC v. Blackfoot Bituminous, Inc.,* 622 F.2d 512, 514 (10th Cir. 1980), confirmed that "[t]o obtain judicial enforcement of an administrative

subpoena, an agency must show that the inquiry is not too indefinite, is reasonably relevant to an investigation which the agency has authority to conduct, and all administrative prerequisites have been met." (citing *U.S. v. Powell,* 379 U.S. 48, 57-58 (1964)); *accord SEC v. Wall St. Transcript Corp.,* 422 F.2d 1371, 1375 (2d Cir.), *cert. denied,* 398 U.S. 958 (1970). Other courts following the *Morton Salt Co.* standard have recognized that the disclosure sought by an agency through compulsory process must be both relevant to the inquiry and reasonable. *See U.S. v. Construction Prods. Research, Inc.,* 73 F.3d 464, 471 (2d Cir. 1996) ("the disclosure sought must always be reasonable"); *FTC v. Invention Submission Corp.,* 965 F.2d 1086, 1089 (D.C. Cir. 1993) (CID enforced only "if the information sought is reasonably relevant"); *FTC v. Texaco, Inc.,* 555 F.2d 862, 881 (D.C. Cir. 1977) ("the disclosure sought shall not be unreasonable").

B. The CID Fails to Identify the Nature of the Conduct Under Investigation

Section 1052(c)(2) of the Dodd-Frank Act requires a CID to "state the nature of the conduct constituting the violation which is under investigation," as well as citing the applicable provision of law. *See also* 12 C.F.R. § 1080.5. This explicit statutory requirement is crucial to the recipient's ability to understand and respond to the CID, as well as to formulate appropriate objections and to challenge the overbroad aspects of the CID.

Despite this clear statutory directive, however, the CID fails to "state the nature of the conduct" at issue. Rather, the CID merely states that the purpose is "to determine whether mortgage lenders have engaged or are engaging in unlawful practices in the advertising, marketing, or provision of mortgage and reverse-mortgage products in violation of Sections 1031 and 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 23 U.S.C. §§ 5531, 5536; the Mortgage Acts and Practices Advertising Rule, Regulation N, 12 C.F.R. Part

1014; the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601 et seq., Regulation X, 12 C.F.R. § 1024; or any other Federal consumer financial law." This statement fails to fulfill the statutory requirement and, additionally, is insufficient to provide notice to Aspire regarding the nature of the investigation.

The CFPB's authority to issue CIDs is conditioned on "the administrative steps required by the [statute] hav[ing] been followed." *See United States v. Powell*, 379 U.S. 48, 58 (1964). Since the CID fails to comply with the Dodd-Frank Act's requirement to "state the nature of the conduct constituting the violation which is under investigation," and the CFPB has refused to amend the CID to comply with the statute, the CID is void and must be withdrawn.

Accordingly, the CFPB should modify the CID to clearly "state the nature of the conduct constituting the violation which is under investigation." Absent such modification, the CID is void and must be set aside. *See* Dodd-Frank Act § 1052(f)(3) (petition for order modifying or setting aside CID "may be based upon any failure of the demand to comply with the provisions of this section").

C. The CFPB Is Not Entitled to Demand Materials Pre-Dating the Existence of the Dodd-Frank Act and Regulation N

The CFPB can enforce any violation of a consumer financial law or regulation as a violation of Title X of the Dodd-Frank Act. The statute of limitations for such actions is three years. Dodd-Frank Act § 1054(g)(1). However, there is no indication anywhere in Title X of the Dodd-Frank Act that Congress intended Sections 1031 or 1036 to have retroactive effect. Thus, any enforcement action under Sections 1031 or 1036 cannot be predicated on acts occurring prior to July 21, 2011, the effective date of Sections 1031 and 1036. *See* Dodd-Frank Act § 1037. Similarly, because Regulation N did not exist until July 2011, no enforcement action for

violation of it can be predicated on acts occurring prior to July 2011. *See* 76 Fed. Reg. 43826 (July 19, 2011); 16 C.F.R. Part 321.[1]

The CFPB's power to issue a CID is an enforcement power (not a supervisory power) contained in Title X, Subtitle E (Enforcement Powers), and is limited to "documentary material or . . . information[] *relevant to a violation.*" Dodd-Frank Act § 1052(c)(1) (emphasis added). Documents pre-dating the existence and effective dates of Sections 1031 and 1036 of the Dodd-Frank Act, and Regulation N, are *ipso facto* not "relevant to a violation."

While it is true that the CID also relies upon provisions of the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601 *et seq.*, as well as Regulation X, 12 C.F.R. Part 1024 (collectively, "RESPA"), no provision of RESPA pertains to advertising, nor are any of the requests reasonably related to RESPA. Although marketing services agreements arguably are relevant to RESPA, Aspire offered to produce any such marketing services agreements that existed back to the January 2010 time period. The CFPB, however, has refused to accept this reasonable compromise offered by Aspire as of the date of this Petition.

The issue of undue burden is assessed both with respect to the burden on the day-to-day business operations of the recipient, which in this case would be substantial,[2] and also with respect to the regulator's legitimate interest in the documents. Where the issuing regulator has no possible legitimate interest in the documents requested—such as for documents whose age pre-dates the existence and effective date of the statutory authority relied upon to issue the CID—imposing any substantial burden on the recipient would be undue.

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[1] In fact, the effective date of Regulation N was August 19, 2011. 76 Fed. Reg. 43826 (July 19, 2011).

[2] *See* Letter from J. McElroy to J. Wells dated February 11, 2013.

Accordingly, since documents from before July 2011 cannot possibly be "relevant to a violation" within the CFPB's jurisdiction, the CID should be modified to reflect the reasonable compromise offered by Aspire.

II. CONCLUSION

The CID served on Aspire on January 25, 2013, fails to comply with the statute governing such administrative demands and is, on its face, impermissibly broad with respect to its temporal scope. Aspire recognizes the CFPB's investigatory powers, and the Company is willing to work with the CFPB on the production of information and documents that will advance its investigation. However, the CID, as currently written, simply requests material beyond the authority of the CFPB. Therefore, the CID is unenforceable as written and Aspire requests that the CID be modified to seek information only back to July 2011, or, alternatively, set aside.

Dated: February 15, 2013

Respectfully submitted,

By: _____

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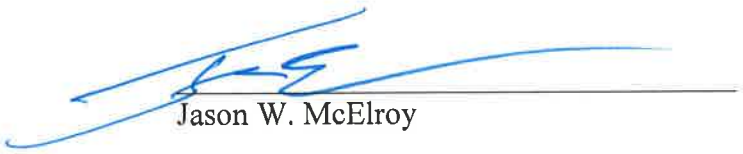
CERTIFICATION

Pursuant to 12 C.F.R. § 1080.6(d)(1), counsel for petitioner Aspire Financial, Inc., hereby certifies that they have conferred with counsel for the Consumer Financial Protection Bureau by phone, e-mail and letter correspondence in a good faith effort to resolve by agreement the modifications sought by this Petition, but have been unable to reach an agreement. Among other things, Aspire Financial, Inc., sought a modest modification of the CID with respect to its temporal scope, as well as a rolling production schedule to better assist Aspire Financial, Inc., in responding timely and fully to the CID. As of the date of this Petition, neither of these requests has been granted.



Jason W. McElroy

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of February, 2013, I caused the original of the Petition to Modify or Set Aside Civil Investigative with attachments to be delivered to Kent Markus, Chief of Enforcement, by first class mail delivery at 1700 G Street, N.W., Washington, DC 20552, as well as by electronic mail to Enforcement@cfpb.gov; as well as a copy of the same to be delivered to the Executive Secretary of the Consumer Financial Protection Bureau, by electronic mail to ExecSec@cfpb.gov.

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