

UNITED STATES OF AMERICA  
BEFORE THE CONSUMER FINANCIAL PROTECTION BUREAU

IN THE MATTER OF  
Heartland Campus Solutions, ECSI

**REQUEST FOR CONFIDENTIAL TREATMENT IN CONNECTION WITH  
PETITION TO SET ASIDE OR MODIFY CIVIL INVESTIGATIVE DEMAND**

Venable LLP  
Allyson B. Baker  
Alexandra Megaris  
Erin Zacuto Cass  
600 Massachusetts Avenue NW  
Washington, DC 20001  
(202) 344 – 4708  
Counsel for Heartland Campus Solutions, ECSI

## CONFIDENTIAL TREATMENT REQUESTED

### I. INTRODUCTION

Pursuant to 12 C.F.R. §§ 1080.6(g) and 1080.14, Heartland Campus Solutions, ECSI (“Petitioner” or “ECSI”) respectfully requests confidential treatment of the Petition, the CID, any response, and any communications, including this letter, that may reveal the existence of the inquiry (collectively “Petition materials”). This request accompanies ECSI’s Petition to Set Aside or Modify the Civil Investigative Demand (“CID”), issued by the Consumer Financial Protection Bureau (“Bureau” or “CFPB”) on June 9, 2017.<sup>1</sup>

In the alternative, if the Bureau determines that confidential treatment of the Petition materials is unwarranted, ECSI requests advance notice, pursuant to 12 C.F.R. § 1070.46(b), of this determination. ECSI further requests that the Petition and any other materials that the Bureau intends to publish be redacted to protect against the public disclosure of ECSI’s identity. A redacted copy of the Petition, which redacts all references to the identity of ECSI, also is enclosed. ECSI will provide additional redacted materials upon request. This request for confidentiality is not a waiver of any other protection from disclosure or confidential treatment afforded by law.

12 C.F.R. § 1080.6(g) provides that petitions to set aside or modify a CID and the Director’s order in response to the petition may be shielded from the public record “for good cause shown.” There is good cause to give confidential treatment to the Petition materials under 12 C.F.R. § 1080.6(g) for a number of reasons.

First, the Bureau’s own regulations militate against disclosure. Bureau regulations provide that investigations are generally nonpublic, and identify limited exceptions to this general rule that have no application here. Second, public disclosure of ECSI’s identity would serve no legitimate

---

<sup>1</sup> The June 9 CID did not contain the signature of the CFPB official authorizing the CID. On June 19, Enforcement Counsel resent the CID with a new cover page containing the signature. This version of the CID was still dated June 9, 2017.

## **CONFIDENTIAL TREATMENT REQUESTED**

purpose. Given the early stages of the proceedings, it cannot be said that the public has a substantial interest in ascertaining the identity of a recipient of a civil investigative demand, nor does public disclosure inure any possible benefit to the Bureau's investigation. Third, ECSI has a substantial privacy interest in maintaining the confidentiality of the CID, as it could suffer harm as a presumptive target of an ongoing nonpublic investigation, particularly in a case, such as this, with a far-reaching and vague Notification of Purpose that would not even allow ECSI to address any inquiries about the nature of the investigation. Courts, for example, have been particularly wary of disclosing a party's identity in cases such as this, where there has been no finding of wrongdoing by an agency and a party risks suffering reputational harm without an opportunity to defend itself on the merits in a public forum. For these reasons, the Petition materials should be given confidential, non-public treatment.

### **II. THE BUREAU'S REGULATIONS PROVIDE THAT INVESTIGATIONS ARE NONPUBLIC.**

Bureau regulations provide that "Bureau investigations are generally non-public." 12 C.F.R. § 1080.14(b). Section 1080.14 enumerates a single exception to this general rule: "Bureau investigators may disclose the existence of an investigation to potential witnesses or third parties to the extent necessary to advance the investigation." *Id.* As the U.S. District Court for the District of Columbia has recognized, this exception "undercuts any claim that public disclosure is appropriate in the absence of an investigative necessity or other substantial purpose." *John Doe Co. No. 1 v. Consumer Fin. Prot. Bureau*, 195 F. Supp. 3d 9, 19-20 (D.D.C. 2016). This conclusion finds support in the Bureau's comments during the final rulemaking process regarding the importance of confidentiality and impact of an investigation. In response to a commenter's concerns regarding "the potential reputation risk to an entity if an investigation is disclosed to the public," the Bureau wrote:

## CONFIDENTIAL TREATMENT REQUESTED

Section 1080.14 of the Interim Final Rule provides that investigations generally will not be disclosed to the public, but permits Bureau investigators to disclose the existence of an investigation when necessary to advance the investigation. The Interim Final Rule does not contemplate publicizing an investigation, but rather disclosing the existence of the investigation to, for example, a potential witness or third party with potentially relevant information . . . . This limited exception sufficiently balances the concerns expressed by the commenter with the Bureau's need to obtain information efficiently.

Final Rule, Rules Relating to Investigations, Comments on Final Rulemaking, Consumer Financial Protection Bureau, 77 Fed. Reg. 39104 (June 29, 2012). Accordingly, this “limited exception” has no application to the Petition—there is no “potential witness or third party” to whom the Bureau would be disclosing the existence of the investigation, public disclosure would not assist the Bureau in “obtain[ing] information efficiently,” and there is no “investigative necessity or other substantial purpose” supporting public disclosure. In short, the Bureau has no identifiable interest in publishing what would otherwise presumptively be non-public information. *See id*; *John Doe Co. No. 1*, 195 F. Supp. 3d at 20. Indeed, the only ostensible purpose for publicly disclosing a petition to set aside or modify is to deter CID recipients from filing such petitions in the first instance.

### **III. PUBLIC DISCLOSURE OF ECSI'S IDENTITY SERVES NO LEGITIMATE PURPOSE.**

Nor can it be argued that the public has a substantial interest in discovery of the Petition materials. Materials exchanged during the course of agency investigations are routinely withheld from public view; in fact, that is the default rule. *See e.g.*, 12 C.F.R. § 1080.14(b); *In re Sealed Case*, 237 F.3d 657. No First Amendment public right of access attaches to these materials. *See Pfeiffer v. C.I.A.*, 60 F.3d 861, 866 (D.C. Cir. 1995). Moreover, because the Petition concerns the enforceability of an administrative subpoena, it is akin to a discovery dispute, which are “afforded a stronger presumption of privacy, as those materials typically are not publically accessible.” *See*

## CONFIDENTIAL TREATMENT REQUESTED

*Friedman v. Sebelius*, 672 F. Supp. 2d 54, 61 (D.D.C. 2009). Accordingly, the public interest in discovering the Petition materials is virtually non-existent, especially when balanced against the harm to the petitioning party.

#### IV. ECSI HAS A SUBSTANTIAL PRIVACY INTEREST IN MAINTAINING THE CONFIDENTIALITY OF THE CID.

On the other hand, public disclosure could cause harm to ECSI. Publicizing ECSI's identity in connection with an investigation by the CFPB – especially one as broad as the Notification of Purpose appears to contemplate – may cause ECSI financial and reputational harm. This is particularly unfair at this early stage of the government's investigation, where the Bureau has not yet alleged any violation. First, unlike claims asserted in litigation, where the Bureau would be required to certify that the factual contentions asserted have “evidentiary support,” in compliance with Federal Rule of Civil Procedure 11, the existence of an investigation by the government involves only “insinuations of wrongdoing – seemingly endorsed by the government.” *John Doe Co. No. 1*, 195 F. Supp. 3d at 23. Second, whereas a litigant is afforded the opportunity to defend him or herself in open court, the subject of an ongoing investigation may never get that opportunity. *See id.* at 13 (“This is not the typical case where disclosure of allegations made in litigation may cause reputational harm, but one where the CFPB has yet to make any allegations of wrongdoing – and may never do so.”); *Fund for Constitutional Gov't v. Nat'l Archives & Records Serv.*, 656 F.2d 856, 865 (D.C. Cir. 1981) (“The disclosure of [the targets' identities] would produce the unwarranted result of placing the named individuals in the position of having to defend their conduct in the public forum outside of the procedural protections normally afforded the accused in criminal proceedings.”); *see also John Doe Co. No. 1*, 195 F. Supp. 3d at 13 (“the disclosure of an ongoing government investigation, even if not criminal and even if not subject to a statutory or regulatory prohibition, can cause substantial and unfair injury”); *GTE Sylvania, Inc.*

## CONFIDENTIAL TREATMENT REQUESTED

*v. Consumer Prod. Safety Comm'n*, 404 F.Supp. 352, 373 (D. Del. 1975) (noting that the “irreparable nature of injury to commercial reputations has been widely recognized”). Third, because the CFPB has not informed ECSI of the specific nature of its investigation, ECSI would be unable to meaningfully respond to any inquiries resulting from public disclosure of the investigation.

Indeed, a private party’s interests in avoiding public disclosure of an ongoing investigation are recognized in various statutory and regulatory schemes. For example, the District Court in *John Doe* compared the “strong confidentiality interest” of a private party seeking to protect its commercial and reputational interests to Federal Rule of Criminal Procedure 6(e)(6), which protects the secrecy of grand jury proceedings. *Id.* at 18 (citations omitted); *In re Sealed Case*, 237 F.3d 657, 666-67 (D.C. Cir. 2001) (holding that exhibits relating to an ongoing Federal Election Commission investigation should have been sealed when the FEC filed them in connection with a petition to enforce a third-party subpoena). “In both contexts, secrecy is vital ‘to protect an innocent accused who is exonerated from disclosure of the fact that he has been under investigation.’” *In re Sealed Case*, 237 F.3d at (quoting *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 n.6 (1958)).

Similarly, ECSI has significant commercial and privacy interests that must be protected from public disclosure, particularly at this early stage of the investigation, and particularly when the Bureau has failed to comply with the Consumer Financial Protection Act’s (“CFPA”) Notification of Purpose requirement. Premature disclosure of the fact of the investigation unnecessarily causes harm to a company that is the subject of the investigation, as recognized by the District Court in *John Doe Co. No. 1*:

In the course of the investigation, [the petitioner] might convince the Bureau that there is no reason to bring an enforcement action. And if the

## CONFIDENTIAL TREATMENT REQUESTED

process does result in an enforcement action, they will then have an opportunity to respond publicly and to defend themselves. Until then, however, they have a substantial claim that disclosure of the ongoing investigation may unfairly suggest that they have in fact engaged in wrongdoing, causing them severe financial losses.

*John Doe Co. No. 1*, 195 F. Supp. 3d at 23. The Bureau’s investigation is not similarly prejudiced by granting this request.

The merits of the Petition further support ECSI’s request for confidential treatment. The CFPB requires that every CID issued by the Bureau “shall 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). This is the only specific statutory requirement that the Bureau must follow when it issues a CID. *See id.* As discussed in more detail in the Petition, the D.C. Circuit recently declined to enforce a CFPB CID containing a notification of purpose that is substantially similar to the Notification of Purpose in the CID issued to ECSI. *See Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs.*, 854 F.3d 683 (D.C. Cir. 2017).

Public disclosure in such an instance would unfairly prejudice – if not punish – ECSI for merely requesting that the Bureau follow the CFPB, its enabling statute. Such an outcome would be manifestly unfair.

## V. CONCLUSION

For the reasons set forth above, ECSI respectfully requests that all of its Petition materials be treated as confidential and given non-public treatment.

**CONFIDENTIAL TREATMENT REQUESTED**

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'AB', with a long horizontal flourish extending to the right.

Dated: June 29, 2017

Allyson B. Baker  
Alexandra Megaris  
Erin Zacuto Cass  
Venable LLP  
600 Massachusetts Avenue NW  
Washington, DC 20001  
(202) 344-4708  
*Counsel for Petitioner*

Enclosures: Petition to Modify or Set Aside Civil Investigative Demand (Unredacted)  
Petition to Modify or Set Aside Civil Investigative Demand (Redacted)