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UNITED STATES OF AMERICA
BEFORE THE CONSUMER FINANCIAL PROTECTION BUREAU

IN THE MATTER OF
Pennsylvania Higher Education Assistance Agency

PETITION TO SET ASIDE CIVIL INVESTIGATIVE DEMAND

July 11, 2023

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Pursuant to 12 U.S.C. § 5562(f)(1) and 12 C.F.R. § 1080.6(e), Petitioner Pennsylvania Higher Education Assistance Agency ("PHEAA") respectfully petitions the Consumer Financial Protection Bureau ("CFPB" or "Bureau") to set aside the Civil Investigative Demand ("CID") issued to PHEAA.

I. INTRODUCTION

On June 21, 2023, the CFPB served PHEAA with a CID. According to the CID's *Notification of Purpose Pursuant to 12 C.F.R. § 1080.5*, the Bureau seeks to review whether PHEAA, in its capacity as a student loan servicer, continued loan-servicing activities on student loans that allegedly had already been discharged in bankruptcy:

> The purpose of this investigation is to determine whether a student loan servicer or associated persons, in connection with student loan servicing, have failed to maintain policies and procedures to determine whether the education loans it services are dischargeable in bankruptcy and therefore made collection attempts on loans that have in fact been discharged, in a manner that is unfair, deceptive, or abusive in violation of Sections 1031 and 1036 of the Consumer Financial Protection Act, 12 U.S.C. §§ 5531, 5536. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

Consistent with the "Meet and Confer" requirements in the CID, on June 30, 2023, PHEAA's counsel conferred with the Bureau's counsel. During this discussion, PHEAA advised the CFPB of its intention to submit a petition to set aside the CID. As required by CFPB regulations, PHEAA submits the instant Petition to Set Aside within twenty (20) calendar days of service of the CID.

For the reasons stated below, the Bureau should grant this petition and set aside the CID. *First*, there can be no dispute that the CFPB lacks authority to interpret the Bankruptcy Code, and, as a result, it would be improper for the Bureau to render a determination as to whether a student loan servicer continued to service loans that purportedly had been discharged in bankruptcy. *Second*, even if the CFPB had authority to enforce or administer the Bankruptcy Code, its recently published interpretation of the statutory provisions governing the dischargeability of certain types of student

loans is flawed and seeks to retroactively usurp the authority of the federal bankruptcy courts—government bodies that, unlike the Bureau, are charged with interpreting the Bankruptcy Code.

II. ARGUMENT

The Bureau should set aside the CID, which targets subject matter beyond the Bureau's statutory authority and advances a dubious UDAAP theory based on a novel interpretation of bankruptcy law.

As a form of administrative subpoena, a CID is subject to meaningful judicial scrutiny. *See CFPB v. Accrediting Council for Indep. Colls. & Univs.*, 854 F.3d 683, 688–89 (D.C. Cir. 2017). To be enforceable, a CID must embody an inquiry "within the authority of the agency," present a demand that "is not too indefinite," and seek information that "is reasonably relevant." *Id.* (quoting *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001)) (internal quotation marks omitted). It also must not be "unduly burdensome or unreasonably broad." *Id.* at 689 (quoting *FTC v. Texaco, Inc.*, 555 F.2d 862, 881–82 (D.C. Cir. 1977) (en banc)). Further, because agencies are "not afforded 'unfettered authority to cast about for potential wrongdoing,'" a CID is unenforceable "when the investigation's subject matter is outside the agency's jurisdiction." *Id.* (quoting *In re Sealed Case (Admin. Subpoena)*, 42 F.3d 1412, 1418 (D.C. Cir. 1994)).

There are, in short, "real limits on any agency's subpoena power," *id.*, and, as the Bureau well knows, these principles apply with full force here. *See id.* at 686, 691–92 (affirming denial of Bureau's petition to enforce CID in "investigation to determine whether any entity or person has engaged or is engaging in unlawful acts and practices in connection with accrediting for-profit colleges, in violations of sections 1031 and 1036 of the Consumer Financial Protection Act"); *see also CFPB v. Source for Pub. Data, L.P.*, 903 F.3d 456, 458–60 (5th Cir. 2018) (reversing order granting Bureau's petition to enforce CID in investigation "to determine whether consumer

reporting agencies, persons using consumer reports, or other persons have engaged or are engaging in unlawful acts or practices in connection with the provision or use of public records information in violation of the Fair Credit Reporting Act," and rendering judgment in favor of respondent).

The gravamen of the CID, as stated in the *Notification of Purpose Pursuant to 12 C.F.R. § 1080.5*, is whether PHEAA "made collection attempts on loans that have in fact been discharged." In order to effectuate the CID, however, the CFPB must interpret the Bankruptcy Code—a statute that it indisputably lacks authority to enforce. And even if the CFPB somehow enjoys a measure of oversight over the Bankruptcy Code, despite the plain language of its enabling statute, the Bureau's recent guidance on student loan dischargeability is specious and conflicts with nearly twenty years of jurisprudence. In effect, the Bureau seeks not only to rewrite the Bankruptcy Code and overturn a vast body of precedent, but also to retroactively impose its flawed interpretation on PHEAA. The CID cannot stand.

A. The CFPB Has No Authority to Interpret or Promulgate Guidance on the Bankruptcy Code

As an administrative agency, the CFPB is a "creature[] of statute" that "posses[es] only the authority that Congress has provided" in its enabling legislation. *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665 (2022) (per curiam). Throughout the Consumer Financial Protection Act ("CFPA")—originally Title X of the Dodd–Frank Act—the Bureau's authority is defined with reference to "Federal consumer financial law." *See, e.g.*, 12 U.S.C. § 5491(a) (the Bureau "shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws"); *id.* § 5511(a), (b) (the Bureau's purpose is to "implement and, where applicable, enforce Federal consumer financial law," and the Bureau "is authorized to exercise its authorities under Federal consumer financial law"); *id.* § 5514(b)(1), (c)(1), (d) (the Bureau "shall require reports and conduct examinations"

of nondepository covered persons for purposes of "assessing compliance with the requirements of Federal consumer financial law," and, in cases of concurrent agency jurisdiction, the Bureau has "exclusive authority to enforce that Federal consumer financial law" and to "prescribe rules, issue guidance, conduct examinations, require reports, or issue exemptions" for "purposes of assuring compliance with Federal consumer financial law"); *id.* §§ 5561(5), 5562(c)(1) (the Bureau may issue a CID "before the institution of any proceedings under the Federal consumer financial law" whenever it "has reason to believe" that any person may have documents or information "relevant to a violation," meaning "any act or omission that, if proved, would constitute a violation of any provision of Federal consumer financial law").

"Federal consumer financial law" is another defined term. It means "the provisions of this title, the enumerated consumer laws, the laws for which authorities are transferred under subtitles F and H, and any rule or order prescribed by the Bureau under this title, an enumerated consumer law, or pursuant to the authorities transferred under subtitles F and H." *Id.* § 5481(14). The "enumerated consumer laws," in turn, means *only* eighteen specific federal statutes ranging from the Equal Credit Opportunity Act, to the Fair Debt Collection Practices Act, to the Truth in Lending Act. *Id.* § 5481(12)(A)–(R). Conspicuously absent from this list: The Bankruptcy Code. The same is true of "the authorities transferred under subtitles F and H." *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, §§ 1061–67, 1081–1100H, 124 Stat. 1376, 2035–56, 2080–2113 (2010) (codified in relevant part at 12 U.S.C. §§ 5581–87).

This is no mere oversight. The Dodd–Frank Act, which contains the CFPA, defines the term "Bankruptcy Code" and uses it more than *thirty times*. *See id.* § 201(a)(2) ("The term 'Bankruptcy Code' means title 11, United States Code.'"); *see also, e.g.*, *id.* §§ 202(c), (e), (f), 203(c), 205(c), 208(a), (b), 215(a), 216(a), 217(a) (referencing the Bankruptcy Code). Likewise,

the Dodd–Frank Act expressly refers to "title 11," denoting the Bankruptcy Code, nearly *twenty times*. *See, e.g.*, *id.* §§ 165(d)(4), 713(a), (c), 724(a), 763, 1101(b), 1106(c). And "when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—[courts] 'presume[]' that Congress intended a difference in meaning." *Loughrin v. United States*, 573 U.S. 351, 358 (2014). There is, therefore, no doubt that Congress excluded the Bankruptcy Code from the Bureau's jurisdiction. *See id.*

Indeed, a federal court earlier this year flatly rejected the proposition that the Bureau's authority extends to even the *interpretation* of the Bankruptcy Code. In *Freedom Mortgage Corp. v. Dean*, 647 B.R. 780 (M.D. Fla. 2023), a mortgage servicer argued that it permissibly relied on CFPB guidance in modeling the mortgage statements it sent to consumers who sought bankruptcy protection. *Id.* at 782–83. The court refused to defer to the Bureau's interpretation of the automatic stay provisions in the Bankruptcy Code "as embodied in" the CFPB's model form because, simply put, "Congress never charged the CFPB with administering the bankruptcy code." *Id*. at 783. In fact, the court cautioned that mortgage servicers "should not assume" that the Bureau's guidance on the Bankruptcy Code is correct or authoritative just "because CFPB promulgated it." *Id*.

It is no answer to invoke the Bureau's broad and amorphous UDAAP powers in Sections 1031 and 1036 of the CFPA. An interpretation of those provisions that would allow the Bureau to police violations of the Bankruptcy Code—a statute deliberately placed beyond its authority—would nullify the boundaries set by Congress and defy any limiting principle. The Supreme Court has sharply rejected this kind of logic when construing agency authority, especially in recent years. *See, e.g.*, *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665; *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 307 (2013) ("The fox-in-the-henhouse syndrome is to be avoided . . . by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where Congress has

established a clear line, the agency cannot go beyond it . . . ."); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."); *cf. Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1073 (2018) ("This Court has long rejected the notion that '*whatever* furthers the statute's primary objective must be the law.' Even if Congress could or should have done more, still it 'wrote the statute it wrote—meaning, a statute going so far and no further." (internal citation omitted)). Further, as explained below, a wealth of federal case law indicates that discharge injunctions can be enforced only through civil contempt in the subject bankruptcy proceeding. *See infra* Section II(B). Just as a private cause of action under a federal debt collection statute is precluded by the Bankruptcy Code, *e.g.*, *Walls v. Wells Fargo Bank, N.A.*, 276 F.3d 502, 510 (9th Cir. 2002), an enforcement action under the CFPA premised on a violation of a discharge order encroaches on bankruptcy jurisdiction. The only way to avoid this morass, and the corresponding prospect of litigation over the scope of the Bureau's extra-statutory powers, is to set aside the CID.

B. The CFPB's March 2023 Guidance Regarding the Dischargeability of Certain Student Loans and Its UDAAP Theory Underlying the CID Are Flawed

Alternatively, even if the CFPA somehow could be read to vest the CFPB with jurisdiction to review matters under the Bankruptcy Code, the Bureau's recent published guidance on student loan dischargeability is erroneous.

On March 23, 2023, the Bureau published a Compliance Bulletin and Policy Guidance "to address the treatment of certain private student loans (student loans) following bankruptcy discharge." Bulletin 2023–01: Unfair Billing and Collection Practices After Bankruptcy Discharges of Certain Student Loan Debts, 88 Fed. Reg. 17366, 17366–67 (Mar. 23, 2023). In the Bulletin, the Bureau sets forth its reading of Section 523(a)(8) of the Bankruptcy Code and asserts,

predominantly on the basis of three decisions issued by different circuit courts of appeals since October 2019, that certain types of "private student loans" are "discharged by standard bankruptcy discharge orders, just like most other unsecured consumer debts." *Id.* at 17367. As a result, the Bulletin continues, "CFPB examiners determined that student loan servicers engaged in an unfair act or practice, in violation of the Dodd–Frank Act, when they resumed collection of debts that were discharged by bankruptcy courts." *Id.* at 17368. Despite averring that "[t]his conduct violates Federal consumer financial law," however, the Bulletin cites no provision of the CFPA directed at violations of discharge injunctions or the Bureau's authority to police the same. *See id.* at 17367–68. Nevertheless, the Bulletin warns loan servicers that the Bureau will deploy its "enforcement resources" to "evaluating whether lenders and servicers cease collection of student loans once they have been discharged." *Id.* at 17368.

It stands to reason that the Bureau's assessment will rely on its own guidance memorialized in the Bulletin. Any such reliance is badly misplaced. At the outset, PHEAA reminds the Bureau of the standard verbiage present in all discharge orders—most student loans *are not* discharged:

Chapter 7 Discharge (Form 318)

Some debts are not discharged
Examples of debts that are not discharged are:

debts that are domestic support obligations;

debts for most student loans;

debts for most taxes;

debts that the bankruptcy court has decided or will decide are not discharged in this bankruptcy case;

Chapter 13 Discharge (Form 3180W)

Some debts are not discharged
Examples of debts that are not discharged are:

- debts that are domestic support obligations;
- debts for most student loans;
- debts for certain types of taxes specified in 11 U.S.C. §§ 507(a)(8)(C), 523(a)(1)(B), or 523(a)(1)(C) to the extent not paid in full under the plan;

Official Bankruptcy Form 318, U.S. Courts, *available at* https://www.uscourts.gov/forms/bankruptcy-forms/discharge-debtor-chapter-7-case; Official Bankruptcy Form 3180W, U.S. Courts, *available at* https://www.uscourts.gov/forms/bankruptcy-forms/chapter-13-discharge.

The Bankruptcy Code makes this clear. The code prescribes a general rule of discharge of debts in proceedings under Chapters 7 and 13, but it excepts certain discrete categories of debt, including much—if not most—traditional student loan debt:

> (a) A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual from any debt—
>
> . . . .
>
> (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—
>
> (A)
>
> (i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution;
>
> (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
>
> (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual . . . .

11 U.S.C. § 523(a)(8). In simple terms, three categories of educational debt cannot be discharged in bankruptcy absent proof of "undue hardship": (1) loans and educational benefit overpayments backed by the government or a nonprofit; (2) obligations to repay funds received as an educational benefit, scholarship, or stipend; and (3) "qualified [private] education loan[s]." *Id.* The presumptive non-dischargeability of student loan debt is so firmly ingrained in American jurisprudence that the Supreme Court took it as a given nearly twenty years ago, *see Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 449–50 (2004), and, as shown above, the federal judiciary's current Official Bankruptcy Forms advise creditors that a general discharge order will not affect "debts for most student loans," *supra* p. 7.

The first and third categories of educational debt in Section 523(a)(8)—subsections (A)(i) and (B)—are defined, in large part, by the Bankruptcy Code and other statutes referenced therein. Subsection (A)(i) covers government or nonprofit-backed loans and "educational benefit overpayment[s]" (*e.g.*, payments to a GI Bill recipient who has left school). Subsection (B) covers "qualified education loan[s]" from private entities. The essential features of a "qualified education loan" can be gleaned from a series of statutes. Section 221(d) of the Internal Revenue Code ("I.R.C.") defines a "qualified education loan" as, among other things, "any indebtedness incurred by the taxpayer solely to pay qualified higher education expenses" that are "attributable to education furnished during a period during which the recipient was an eligible student," 26 U.S.C. § 221(d)(1); defines "qualified higher education expenses" as "the cost of attendance (as defined in section 472 of the Higher Education Act of 1965 . . .) at an eligible educational institution," reduced by scholarships and other payments, *id.* § 221(d)(2); and defines "eligible educational institution" as bearing the same meaning as in Section 25A(f)(2) of the I.R.C., except that the term also includes "an institution conducting an internship or residency program leading to a degree or certificate awarded by an institution of higher education, a hospital, or a health care facility which offers postgraduate training," *id.* Section 25A of the I.R.C., in turn, defines "eligible student" to mean, among other things, one attending school at least half-time, and defines "eligible educational institution" to mean an institution of higher education that is eligible to participate in federal student aid programs under Title IV of the Higher Education Act of 1965. *Id.* § 25A(b)(3), (f)(2). Case law provides an additional gloss on key aspects of this definition: In determining the "cost of attendance" as used in Section 221(d)(1) of the I.R.C., courts generally look to the stated purpose for which the loan was obtained, rather than the borrower's actual use of the proceeds, and decline to draw a hard line between tuition and living expenses. *See, e.g.*, *In re Rumer*, 469 B.R. 553, 562

(Bankr. M.D. Pa. 2012) (citing, *inter alia*, *Sokolik v. Milwaukee Sch. of Eng'g (In re Sokolik)*, 635 F.3d 261, 266 (7th Cir. 2011), and *In re Murphy*, 282 F.3d 868, 870 (5th Cir. 2002)).

The second category of educational debt in Section 523(a)(8)—subsection (A)(ii)—is the true focus of the Bureau's recent enforcement efforts. Notwithstanding its emphasis in Bulletin 2023–01 on the distinction between qualified and non-qualified loans set out in subsection (B), *all* of the decisions cited by the Bureau actually interpret the phrase "an obligation to repay funds received as an educational benefit, scholarship, or stipend" in subsection (A)(ii). *See* 88 Fed. Reg. at 17367 nn.5–7, 11–12 (citing *Homaidan v. Sallie Mae, Inc.*, 3 F.4th 595 (2d Cir. 2021), *In re McDaniel*, 973 F.3d 1083 (10th Cir. 2020), *In re Crocker*, 941 F.3d 206 (5th Cir. 2019), and *In re Campbell*, 547 B.R. 49 (Bankr. E.D.N.Y. 2016)). According to those decisions, the text of subsection (A)(ii) cannot be read to cover any loan made for educational purposes (*e.g.*, bar-study loans), but rather must be confined to conditional educational grants. *See Homaidan*, 3 F.4th at 604–05; *McDaniel*, 973 F.3d at 1098; *Crocker*, 941 F.3d at 224; *Campbell*, 547 B.R. at 55.

Bulletin 2023–01 neglects to mention, however, that until the Fifth Circuit issued *Crocker* in October 2019—a published opinion on a matter of first impression—the "overwhelming majority of bankruptcy cases" had adopted a contrary reading for "more than a decade." Jason Iuliano, *The Student Loan Bankruptcy Gap*, 70 Duke L.J. 497, 512 (2020). "Relying on [a] broad understanding of the statute" that treated a loan as an "educational benefit" if its "stated purpose" was to "fund educational expenses," courts nationwide had long "ruled that funds borrowed to pay for everything from tutoring services to bar review courses to vocational schools . . . count as an 'educational benefit' and are, therefore, nondischargeable." Jason Iuliano, *Student Loan Bankruptcy and the Meaning of Educational Benefit*, 93 Am. Bankr. L.J. 277, 285–86 (2019) (footnotes omitted) (citing cases); *see also id.* at 298–99 (noting that "the vast majority of courts

adhere to the Broad Reading" of "educational benefit"). Any loan servicer that continued servicing activities following the receipt of a standard discharge order, it follows, would have been acting in accordance with the weight of judicial authority. This is especially true for the pre-*Crocker* era (*i.e.*, before October 2019), but it remains no less compelling today, given that eight regional circuits are yet to weigh in—to say nothing of the Supreme Court.[1]

More telling, the CFPB's Bulletin wholly ignores the plethora of caselaw requiring borrowers to prove "undue hardship" to discharge the very types of loans described by the Bureau: direct-to-consumer loans,[2] bar or medical examination study loans,[3] K–12 loans,[4] and loans to attend non-Title IV institutions.[5] If nothing else, these decisions underscore the extent to which

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[1] Notably, the CID defines the "Applicable Period" as beginning on January 1, 2017—nearly three years before the *Crocker* decision.

[2] *See, e.g.*, *Sokolik*, 635 F.3d at 267 (loan provided directly to debtor as part of school's loan program was non-dischargeable "educational loan"); *In re Duits*, No. 14-05277-RLM-13, 2020 WL 256770, at *3 (Bankr. S.D. Ind. Jan. 15, 2020) (loans obtained by debtor from JPMorgan Chase and guaranteed by non-profit to pay educational expenses were exempt from discharge); *Decker v. EduCap, Inc.*, 476 B.R. 463, 468 (W.D. Pa. 2012) (direct-to-consumer loan was "educational loan" exempt from discharge).

[3] *See, e.g.*, *Brown v. CitiBank, N.A. (In re Brown)*, 539 B.R. 853, 859–60 (Bankr. S.D. Cal. 2015) (bar study loan was exempt from discharge under Section 524(a)(8)(A)(ii) as an "educational benefit"); *Skipworth v. Citibank Student Loan Corp. (In re Skipworth)*, No. 09-83982-JAC-7, 2010 WL 1417964, at *2 (Bankr. N.D. Ala. Apr. 1, 2010) (same); *see also Vuini v. Zions Bank & Access Grp., Inc. (In re Vuini)*, No. 11-AP-00227-KSJ, 2012 WL 5554406, at *3 (Bankr. M.D. Fla. Nov. 14, 2012) (bar study loan from nonprofit lender was exempt from discharge).

[4] *See, e.g.*, *Boris v. Nat'l Collegiate Student Loan Trust 2007-1*, No. 2:16-cv-19-FtM-99CM, 2016 WL 11578271, at *3–4 (M.D. Fla. Nov. 28, 2016) (nonprofit-funded loan made to finance cost of elementary school attendance was exempt from discharge); *Roy v. Sallie Mae (In re Roy)*, No. 09-AP-1406, 2010 WL 1523996, at *1 (Bankr. D.N.J. Apr. 15, 2010) (loans for tutoring services for debtor's child were exempt from discharge as an "educational benefit").

[5] *See, e.g.*, *Mata v. Nat'l Collegiate Student Loan Trust 2006-1 (In re Mata)*, No. 6:18-AP-01089-MH, 2020 WL 5543716, at *4–5, *10 (Bankr. C.D. Cal. July 31, 2020) (nonprofit-funded direct-to-consumer loans used to fund graduate studies at private religious university were "educational loans" exempt from discharge); *see also In re Corbin*, 506 B.R. 287, 290, 296 (Bankr. W.D. Wash. 2014) ("The Code does not define the term 'educational benefit,' but a majority of courts have held that a loan qualifies as an 'educational benefit' if the stated purpose for the loan is to fund educational expenses." (citing *In re Maas*, 497 B.R. 863, 869–70 (Bankr. W.D. Mich. 2013))); *Beesley v. Royal*

the dischargeability of any given educational loan, without proof of undue hardship, calls for a fact-specific analysis that takes into account a host of factors requiring an exacting review. Coupled with the persistent questions surrounding fundamental discharge procedure, the certainty projected by Bulletin 2023–01 becomes illusory. *See In re Navient Sols., LLC*, No. 22-1376, 2023 WL 3487051, at *3 (2d Cir. May 17, 2023) (summary order) (bankruptcy court correctly dismissed debtors' involuntary petition against lender seeking refund of student loan payments made after purported bankruptcy discharge because claims "were subject to myriad unresolved legal and factual issues" evincing a "bona fide dispute," including "whether, even if the relevant debts were dischargeable, a debtor is 'automatically entitled to a discharge' or, instead, 'must initiate an adversary proceeding'").

As to federal student loans, while the CFPB's Bulletin correctly acknowledges that loans made or insured under Title IV of the Higher Education Act of 1965 are not dischargeable absent proof of undue hardship, the CID inexplicably seeks information on federal loans. The CID defines "company" to mean "the Pennsylvania Higher Education Assistance Agency (PHEAA) also doing business as AES," and defines "student loan" to mean "all loans serviced by the company." As the Bureau surely knows, or at least should know from PHEAA's public website, AES (American Education Services) acts as a servicer and guarantor of federal loans issued under the Federal Family Education Loan Program ("FFELP"). *About PHEAA*, https://www.pheaa.org/about (last visited July 11, 2023). There is no dispute that FFELP loans are considered loans made or insured by the federal government within the meaning of Section 523(a)(8)(A)(i), and thus are not dischargeable absent a showing of undue hardship. *See, e.g.*, *Channer v. Pa. Higher Educ.*

Bank of Can. (In re Beesley), No. 12-AP-2444-CMB, 2013 WL 5134404, at *2, *4 (Bankr. W.D. Pa. Sept. 13, 2013) ("[C]ourts . . . have interpreted 'funds received as an educational benefit' to include loans.").

Assistance Agency (In re Channer), 833 F. App'x 502, 505–06 (2d Cir. 2020) (summary order). As written, though, the CID seeks information on PHEAA's servicing activities for FFELP loans.

Moreover, the Bureau's position elides a critical threshold issue: Whether an alleged violation of a discharge injunction can be enforced outside of that specific bankruptcy case *at all*, much less as an independent cause of action under the CFPA. Bulletin 2023–01 is silent on this front, and a strong line of federal case law suggests otherwise. *See Walls*, 276 F.3d at 510 (debtor's exclusive remedy for loan servicer's alleged violation of discharge injunction is civil contempt, and FDCPA claims are precluded by the Bankruptcy Code); *Zehnder v. FDS Bank*, No. 09-CV-1865, 2010 WL 11575034, at *4 (M.D. Pa. Mar. 18, 2010) ("For the majority of courts, where a plaintiff seeks to raise a FDCPA claim grounded on a creditor's violation of a § 524 discharge injunction, the Bankruptcy Code precludes that claim."); *see also In re Crocker*, 941 F.3d at 216–17 (agreeing with the Second Circuit that discharge injunctions may be enforced through contempt proceedings only in the originating court (citing *Anderson v. Credit OneBank, N.A. (In re Anderson)*, 884 F.3d 382, 390–91 (2d Cir. 2018)).[6] In fact, the Supreme Court has signaled its hostility to the premise underlying the Bureau's theory, holding as recently as 2019 that civil contempt of a discharge order is subject to an exacting standard—that there "is *no fair ground of doubt* as to whether the order barred the creditor's conduct." *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1799 (2019). "And because discharge orders are written in general terms and operate against a complex statutory backdrop," the Court observed, "there will often be at least some doubt as to the scope of such orders." *Id.* at 1803.

[6] To be clear, if a student loan servicer continued its servicing activities on a student loan that was eliminated via a standard discharge order, the borrower may seek sanctions under Section 524 of the Bankruptcy Code. Following the CFPB's guidance to its logical conclusion, an untold number of bankruptcy attorneys may be subject to malpractice claims for failing to properly advise their clients and/or seek redress as appropriate under Section 524.

While public policy groups continue to advocate for an expansive reading of the Bankruptcy Code, Section 523(a)(8) has neither been amended nor definitively construed by the Supreme Court—or even most of the circuit courts of appeals. The release of three federal appellate decisions over the last four years—none from PHEAA's home circuit, and none reaching beyond a single subsection of the Bankruptcy Code—cannot justify the Bureau's effort to disregard the "overwhelming majority of bankruptcy cases" for "more than a decade." Iuliano, *The Student Loan Bankruptcy Gap*, *supra*, at 512.

III. CONCLUSION

Ultimately, the Bureau announced its interpretation of the Bankruptcy Code less than four months ago, relying on a handful of recent judicial decisions that departed from a longstanding consensus, and it now seeks to retroactively enforce its reading of the law on student loan servicers. Yet the Bankruptcy Code itself has not been amended by Congress, and there is no new Supreme Court precedent dictating how or when student loans may be discharged without proof of undue hardship. Moreover, the CFPB's enabling legislation unambiguously denies the Bureau any authority to enforce the Bankruptcy Code. PHEAA's servicing activities related to consumers seeking bankruptcy protection has been and remains consistent with controlling federal law, and while PHEAA strives to remain cooperative with all federal (and state) regulators, the CFPB cannot override the legislative and judicial branches by issuing its own guidance on an area of federal law beyond its regulatory ambit. For the foregoing reasons, PHEAA respectfully asks the Bureau to set aside the CID.

Dated: July 11, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of July 2023, pursuant to 12 C.F.R. § 1080.6(e), I caused the foregoing Petition to Set Aside Civil Investigative Demand to be served via email upon the Executive Secretary of the Bureau and the Assistant Director for the Office of Enforcement.

Dated: July 11, 2023

/s/ Steve Dollar
Steve Dollar

APPENDIX A

MEET AND CONFER STATEMENT

Counsel for petitioner, Pennsylvania Higher Education Assistance Agency ("PHEAA"), has conferred with counsel for the Bureau, pursuant to 12 C.F.R. § 1080.6(c), in a good faith effort to resolve, by agreement, the issues raised by this petition but have been unable to reach an agreement.

On Friday, June 30, 2023 at 2 p.m. Eastern Time, Steve Dollar and Tom Coulter, counsel for PHEAA, conferred with Emily Holness, Bureau counsel, by videoconference concerning the CID. During the call, PHEAA advised Ms. Holness of its objections to the CID and its intention to file this petition, including the specific grounds for relief asserted herein.

Following the meet and confer call, counsel for PHEAA sent the Bureau an email communication on Friday, June 30, 2023, confirming PHEAA's intent to file this petition. On Monday, July 3, 2023, Ms. Holness acknowledged receipt of such email communication.

The Bureau's counsel did not agree to withdraw the CID.

Because the parties were unable to reach an agreement concerning the issues described above, PHEAA files its petition.

Dated: July 11, 2023

/s/ Steve Dollar

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