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PETER D. LEPISCOPO, ESQ.**JAMES M. GRIFFITHS, ESQ.****MARSHALL R. LURTZ, ESQ.****OF COUNSEL:****SENATOR BILL MORROW, ESQ.***California State Senator-Retired***CONFIDENTIAL TREATMENT REQUESTED (12 C.F.R. §§ 1080.6(g) & 1080.14)**

November 17, 2018

THE HONORABLE KRISTEN DONOGHUE

Assistant Director of Enforcement

Consumer Financial Protection Bureau

1700 G Street NW, Washington, D.C. 20552

Email: Kristen.Donoghue@cfpb.gov Enforcement@cfpb.gov**MONICA JACKSON**

Office of the Executive Secretary

Consumer Financial Protection Bureau

1700 G Street NW, Washington, D.C. 20552

Email: monica.jackson@cfpb.gov ExecSec@cfpb.gov**E. VANESSA ASSAE-BILLE, ESQ.****COLIN REARDON, ESQ.**

Enforcement Attorneys

Consumer Financial Protection Bureau

1700 G Street NW, Washington, D.C. 20552

Email: Elisabeth.Assae-Bille@cfpb.gov Colin.Reardon@cfpb.gov**Re: PETITION TO WITHDRAW, SET-ASIDE, OR MODIFY CID ISSUED TO JAWAD NESHEIWAT**

Dear Assistant Director Donoghue, Ms. Jackson, Ms. Assae-Bille, and Mr. Reardon:

I.**STATEMENT OF REPRESENTATION**

This firm represents petitioner, Jawad Nesheiwat ("Petitioner"), in connection with the Civil Investigative Demand issued on October 26, 2018 ("CID") by the Consumer Financial Protection Bureau ("CFPB" or "Bureau"). (See Attachment 1 hereto.) Accordingly, please direct all contacts and correspondence to our San Diego Office (see address above), as well as directly to the undersigned counsel of record via email: lepiscopo@att.net

CONFIDENTIAL TREATMENT REQUESTED

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II.
SPECIAL APPEARANCE AND RELIEF REQUESTED

Pursuant to § 1052(f) of the Dodd Frank Wall Street Reform and Consumer Protection Act (“Dodd Frank Act” or the “Act”), 12 U.S.C. § 5562(f), and 12 C.F.R. §§ 1080.6(g) & 1080.14, Petitioner specially appears to challenge the Bureau’s jurisdiction regarding the CID in this matter and to petition the Bureau to withdraw, set aside, or modify the CID issued to Petitioner.

III.
**PETITIONER REQUESTS THE PETITION AND ALL OTHER COMMUNICATIONS
IN THIS MATTER BE ACCORDED CONFIDENTIAL TREATMENT**

By way of this Petition, Petitioner hereby respectfully requests confidential treatment of this Petition and all communications between Petitioner and his legal counsel, on the one hand, and the Bureau’s staff and legal counsel, on the other hand, whether occurring before or after the Bureau’s decision in this matter. This Petition and any other communication relating to the inquiry under the CID constitute Petitioner’s personal, privileged, private, and sensitive information and are intended to be confidential. All such information is intended only for review by the Bureau’s staff and legal counsel, and, therefore, Petitioner hereby declines to consent to release of such information to the public. Accordingly, Petitioner hereby respectfully requests that such information receive the highest level of protection for confidentiality available under: the Bureau’s Rules of Practice, 12 C.F.R. §§ 1070, 1080.6(g), & 1080.14; the Freedom of Information Act, 5 U.S.C. § 552, 12 C.F.R. §§ 1070.10 to 1070.23; the Consumer Financial Protection Act, 12 U.S.C. § 5512(c)(6); the right to privacy secured by the First, Fourth, Fifth, and Ninth Amendments to the Constitution, U.S. CONST. amends. I, IV, V, and IX, *see also*, *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (“*Poe*”), *Roe v. Wade*, 410 U.S. 113, 152-156 (1973) (“*Roe*”), and *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (“*Casey*”); and any other applicable constitutional provisions, statutes, regulations, and rules.

A redacted version of this Petition is provided herewith, which redacts references to the identity of the Petitioner and other confidential information. A true and correct copy of which is attached hereto and marked as Attachment 3 (it is omitted from the redacted version).



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IV.

THE MEET AND CONFER REQUIREMENT DOES NOT APPLY TO THIS PETITION

Prior to filing a petition to set aside or modify a civil investigative demand, 12 C.F.R. § 1080.6(d)(1) requires counsel for any petitioner to meet and confer with the Bureau's legal counsel. However, in her October 26, 2018 letter accompanying the CID, the Bureau's enforcement attorney, E. Vanessa Assae-Bille, Esq., has indicated that the Deputy Assistant Director has **waived** the meet and confer requirement relative to the CID in this matter:

"Rule 1080.6(c) of the Bureau's Rules Relating to Investigations permits the Deputy Assistant Director to authorize the waiver of the requirement to meet and confer in circumstances where she determines that a meeting is unnecessary. The Deputy Assistant Director has **authorized such a waiver** because this CID does not require the production of any materials."

(See Attachment 2 hereto; emphasis added.)

V.

THIS PETITION IS TIMELY

The Bureau issued the CID on October 26, 2018 (*see* Attachment 1), which was served on Petitioner the following Monday, October 29, 2018. Accordingly, pursuant to 12 U.S.C. § 5562(f) and 12 C.F.R. § 1080.6(e) this Petition is timely, as it was filed with the Bureau within twenty (20) calendar days of service of the CID on Petitioner.

VI.

STANDARD OF REVIEW

With the growth of the administrative state in the last Century, the Supreme Court has circumscribed the power of agencies to issue subpoenas or CIDs, which 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." *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("*Morton Salt*"). More recently, the U.S. District Court for the District of Columbia explained:

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“[W]here it is clear that an agency either lacks the authority to investigate or is seeking information irrelevant to a lawful investigatory purpose, a court must set such inquiry aside.”

Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs, 183 F.Supp.3d 79, 82 (D.D.C. 2016) (internal citations omitted) *aff’d* in *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs*, 854 F.3d 683 (D.C. Cir. 2017).

In addition to the foregoing judicial restraints, Congress has authorized the CFPB to issue CIDs, and the CFPB has implemented its own rules governing the process to be utilized when issuing a CID. 12 U.S.C. § 5562; 12 C.F.R. § 1080, *et seq.* The CFPB’s authority, however, is not unbridled and, to be enforceable, a CID must comply with statutory and judicial requirements. *United States v. Markwood*, 48 F.3d 969, 975 (6th Cir. 1995); *United States v. Powell*, 379 U.S. 48, 58 (1964). Indeed, the federal courts are utilized to police these administrative agencies and prevent them from abusing power, abusing process and otherwise depriving the subjects of such administrative action of their constitutional rights. *See e.g. United States v. Powell*, 379 U.S. 48, 58 (1964) (“it is the court’s process which is invoked to enforce the administrative summons and a court may not permit its process to be abused.”); *Securities and Exchange Commission v. Arthur Young & Co.*, 584 F.2d 1018, 1028 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979) (“ . . . so long as the courts retain their power of individual inquiry prior to enforcement of administrative subpoenas, there is relatively little for anyone to fear”).

The United States Court of Appeals, District of Columbia Circuit, described the limits imposed by the courts on administrative agencies as follows:

“There are, of course, limits; to begin with, ‘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.’ Moreover, while the statutory powers of federal regulatory agencies to investigate have traditionally been extensive, . . . ‘the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.’ The federal courts stand guard, of course, against abuses of their subpoena-enforcement processes but constitutional mandates aside, “(t)he gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.” Resultantly, it has long been clear that ‘it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.’”



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Securities and Exchange Commission v. Arthur Young & Co., 584 F.2d 1018, 1023-1024 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979).

Finally, any overbroad or indefinite CIDs are unenforceable as well:

“[A] governmental investigation . . . may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power.”

Morton Salt, supra, 338 U.S. at 652

VII.

**AS IT HAS FAILED TO PROPERLY INVOKE ITS JURISDICTION IN THIS MATTER,
THE BUREAU SHOULD WITHDRAW, SET ASIDE, OR MODIFY THE CID**

In the CID challenged by this Petition, the Notification of Purpose Section provides:

“The purpose of this investigation is to determine whether student loan debt-relief providers, mortgage lenders, or other persons, in connection with obtaining, using, or disclosing consumer information or with marketing or selling products and services relating to student loan consolidations, repayment plans, and forgiveness plans, have engaged in unfair, deceptive, or abusive acts or practices in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536; or have violated the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., or the Telemarketing Sales Rule, 16 C.F.R. Part 310. The purpose of this investigation is to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.”

(See Attachment 1, p. 1.) Clearly, the foregoing is a summary of laws that are in search of a violator. Such is not the law or procedures of the United States. *See e.g.* U.S. CONST. amend. V, Due Process Clause.



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In its relevant part, 12 C.F.R. § 1080.5 (emphasis added) provides:

“Any person compelled to furnish . . . oral testimony . . . to the Bureau shall be advised of the nature of the **conduct** constituting the alleged violation that is under investigation and the provisions of law applicable to such violation.”

Similarly, Section 1052(c)(2) of the Dodd Frank Act requires any civil investigative demand to “state the nature of the **conduct** constituting the violation which is under investigation.” 12 U.S.C. § 5562(c) (emphasis added).

The CID in this matter completely fails to advise Petitioner of: (a) the nature of the conduct, (b) the dates of such conduct, (c) the types of victims, (d) Petitioner’s specific conduct that violated the specific laws listed, or (e) the location of such conduct constituting the alleged violation. Most telling, however, is the last sentence that indicates the purpose of the CID and the Bureau’s investigation is to determine whether “Bureau action to obtain legal or equitable relief would be in the public interest.” (See Attachment 1, p. 1.)

Obviously, the purpose of the Bureau is to act in a manner to protect the public interest, but to issue CIDs for the purpose embarking on a fishing expedition to **find** conduct requiring the protection of the public interest is not permitted under the Due Process Clause of the Fifth Amendment, 12 C.F.R. § 1080.5, or Section 1052(c)(2) of the Dodd Frank Act. *See e.g. United States v. Williams*, 553 U.S. 285, 304 (2008).

Moreover, this is a matter of fairness. In this regard, the U.S. Supreme Court has held that federal agencies such as the CFPB must provide “fair warning” or “fair notice” of required or prohibited conduct. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012). Justice Kennedy articulated this principle most succinctly:

“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”

FCC v. Fox TV Stations, Inc., 567 U.S. 239, 253 (2012).

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While an administrative agency has the power to conduct investigations and issue CIDs, its power has limits. The CFPB must comply with the law and the constitutional framework upon which this Country is based. The recipient of a CID is entitled to due process, which includes, among other things, the right to know the charges being made against him. *Equal Employment Opportunity Comm'n v. Maryland Cup Corp.*, 785 F.2d 471, 475 (4th Cir. 1986) (“the issuing agency must make a threshold showing that . . . ***the agency has satisfied statutory requirements of due process***, . . .”).

The CFPB acts without jurisdiction when it exceeds its statutory authority because the “charge requirement evidences Congress’ desire to prevent the [CFPB] from exercising unconstrained investigative authority.” *Equal Employment Opportunity Comm’n v. United Air Lines, Inc.*, 287 F.3d 643,652 (7th Cir. 2002). The very purpose of this requirement is to reign in the CFPB’s authority and prevent fishing expeditions that would otherwise deprive the CID recipient, such as the Petitioner, of his constitutional rights. *Id.* at 653.

Without a proper notification of purpose, the CID fails. Not only does it constitute a violation of the CFPB’s own rules and practices, but it clearly constitutes an abuse of process and, in fact, deprives the Petitioner of his fundamental right to due process of law in that he has no notice of the claims being made against him. This is not a case like *Material Handling*, where “there could be no doubt that the [subject] understood what conduct was under investigation” after “a two-year history of correspondence and telephone conversations as well as one other CID, all of which sought information concerning the anticompetitive effects of the Institute’s restrictive membership practices.” *Material Handling Institute, Inc. v. McLaren*, 426 F.2d 90, 92 (3d Cir. 1970) (“*Material Handling*”). Unlike *Material Handling*, the Petitioner has no knowledge or any idea of what is being alleged against him, as the CID is merely a statement of the law but does not indicate any conduct in which he has engaged that violated any of the laws listed in the CID.

Finally, there is no escaping the undisputed fact that the CID fails to identify any of Petitioner’s conduct, or even the date upon which it occurred, that violates the list of laws set forth in the Notification of Purpose in the CID. The CID fails to allege a connection between Petitioner and violation of any of the laws list in the CID. In fact, as written, the CID could be served on any person in the United States by merely substituting the name and address in the CID. As such, and as the foregoing authorities demonstrate, the CID fails to properly and constitutionally invoke the Bureau’s jurisdiction. Accordingly, the CID should be withdrawn or set aside, or, at the very least, modified to properly invoke the Bureau’s jurisdiction and advise the Petitioner of the alleged violations in which he has been engaged.



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VIII.

**WITH THE TIMELY FILING OF THE INSTANT PETITION, THE PETITIONER IS
RELIEVED OF THE LEGAL REQUIREMENT OF APPEARING AT THE
INVESTIGATIONAL HEARING SCHEDULED FOR NOVEMBER 26, 2018**

As set forth in greater detail in Section V, *supra*, this Petition has been timely filed. Accordingly, pursuant to 12 C.F.R. § 1080.6(f) the proceedings under the CID are stayed, and, therefore, the Petitioner is not legally required to appear at the investigational hearing scheduled for November 26, 2018.

Based on the foregoing, the Petitioner will not appear at the November 26, 2018 investigational hearing.

**IX.
CONCLUSION**

Based on the foregoing arguments and authorities, Petitioner respectfully requests that the CID issued to Petitioner be withdrawn, set aside, or modified.

Thank you in advance for your anticipated courtesy and cooperation regarding this matter.

Very Truly Yours,

LEPISCOPO & ASSOCIATES LAW FIRM

Peter D. Lepiscopo

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SAN DIEGO OFFICE

ATTACHMENT 1



United States of America
Bureau of Consumer Financial Protection

Civil Investigative Demand

To **Jawad Nesheiwat**
2 Forest St.
Ladera Ranch, CA 92694

This demand is issued pursuant to Section 1052 of the Consumer Financial Protection Act of 2010 and 12 C.F.R. Part 1080 to determine whether there is or has been a violation of any laws enforced by the Bureau of Consumer Financial Protection.

Action Required (choose all that apply)

☒ **Appear and Provide Oral Testimony**

Location of Investigational Hearing United States Attorney's Office Civil Division 300 N. Los Angeles Street Los Angeles, CA 90012	Date and Time of Investigational Hearing November 26, 2018, at 9:00 a.m. Bureau Investigators Vanessa Assae-Bille and Colin Reardon
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☐ **Produce Documents and/or Tangible Things** by the following date:

☐ **Provide Written Reports and/or Answers to Questions** by the following date:

Notification of Purpose Pursuant to 12 C.F.R. § 1080.5

The purpose of this investigation is to determine whether student loan debt-relief providers, mortgage lenders, or other persons, in connection with obtaining, using, or disclosing consumer information or with marketing or selling products and services relating to student loan consolidations, repayment plans, and forgiveness plans, have engaged in unfair, deceptive, or abusive acts or practices in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536; or have violated the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., or the Telemarketing Sales Rule, 16 C.F.R. Part 310. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

Custodian / Deputy Custodian

Deborah Morris / Shaunté Johnson
Bureau of Consumer Financial Protection
1700 G Street, NW
ATTN: Office of Enforcement
Washington, DC 20552

Bureau Counsel

Vanessa Assae-Bille / Colin Reardon
Bureau of Consumer Financial Protection
1700 G Street, NW
ATTN: Office of Enforcement
Washington, DC 20552

Date Issued

10/26/2018

Signature

Deborah Morris

Digitally signed by Deborah Morris

Date: 2018.10.26 11:05:20 -04'00'

Name / Title

Deborah Morris, Deputy Enforcement Director

Service

The delivery of this demand to you by any method prescribed by the Consumer Financial Protection Act of 2010, 12 U.S.C. § 5562, is legal service. If you fail to comply with this demand, the Bureau may seek a court order requiring your compliance.

Travel Expenses

Request a travel voucher to claim compensation to which you are entitled as a witness before the Bureau pursuant to Section 1052 of the Consumer Financial Protection Act of 2010, 12 U.S.C. § 5562.

Right to Regulatory Enforcement Fairness

The Bureau is committed to fair regulatory enforcement. If you are a small business under Small Business Administration standards, you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

Paperwork Reduction Act

This demand does not require approval by OMB under the Paperwork Reduction Act of 1980.

**CIVIL INVESTIGATIVE DEMAND FOR
ORAL TESTIMONY**

I. Definitions.

- A. **"CID"** means the Civil Investigative Demand, including the **"Definitions and Instructions."**
- B. **"Bureau"** means the Bureau of Consumer Financial Protection.
- C. **"Jawad Nesheiwat"** or **"you"** or **"your"** means **Jawad Nesheiwat** and all employees, agents, representatives, consultants, attorneys, accountants, independent contractors, and other persons working for or on behalf of the foregoing.
- D. **"Deputy Enforcement Director"** refers to a Deputy Assistant Director of the Office of Enforcement.
- E. **"Enforcement Director"** refers to the Assistant Director of the Office of Enforcement.
- F. **"Person"** means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

II. Instructions.

- A. **Confidentiality:** This CID relates to a nonpublic, law-enforcement investigation being conducted by the Bureau. We ask that you not disclose the existence of this CID, except to legal counsel, until you have been notified that the investigation has been completed. Premature disclosure of this investigation could interfere with the Bureau's law-enforcement activities.
- B. **Sharing of Information:** The Bureau may make its files available to other civil and criminal federal, state, or local law-enforcement agencies under 12 C.F.R. §§ 1070.43(b)(1) and 1070.45(a)(5). Information you provide may be used in any civil or criminal proceeding by the Bureau or other agencies. As stated in 12 C.F.R. § 1080.14, information you provide in response to this CID is subject to the requirements and procedures relating to the disclosure of records and information set forth in 12 C.F.R. pt. 1070.
- C. **Meet and Confer:** As allowed by 12 C.F.R. § 1080.6(c), the Enforcement Director or a Deputy Enforcement Director has waived the meet-and-confer requirement for this CID. Please contact Enforcement Attorney **E. Vanessa Assae-**

Bille at 202-435-7688 if you have any questions.

D. Petition for Order Modifying or Setting Aside Demand: Under 12 U.S.C. § 5562(f) and 12 C.F.R. § 1080.6(e), you may petition the Bureau for an order modifying or setting aside this CID. To file a petition, you must send it by e-mail to the Bureau's Executive Secretary at ExecSec@cfpb.gov, copying the Enforcement Director at Enforcement@cfpb.gov, within 20 calendar days of service of the CID or, if the return date is less than 20 calendar days after service, before the return date. The subject line of the e-mail must say "Petition to Modify or Set Aside Civil Investigative Demand." If a request for confidential treatment is filed, you must file a redacted public petition in addition to the unredacted petition. All requests for confidential treatment must be supported by a showing of good cause in light of applicable statutes, rules, Bureau orders, court orders, or other relevant authority.

E. Procedures Governing Hearing: This CID is issued under section 1052 of the Consumer Financial Protection Act, 12 U.S.C. § 5562. The taking of oral testimony pursuant to this CID will be conducted in conformity with that section and 12 C.F.R. §§ 1080.6(a)(4), 1080.7, and 1080.9.

F. Scope of Investigational Hearing: This CID covers information in your possession, custody, or control, including but not limited to documents in the possession, custody, or control of your attorneys, accountants, other agents or consultants, directors, officers, and employees.



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SAN DIEGO OFFICE

ATTACHMENT 2

1700 G Street NW,
Washington, DC 20552



October 26, 2018

Via Process Server

Jawad Nesheiwat
2 Forest St.
Ladera Ranch, CA 92694

Re: Civil Investigative Demand served on Jawad Nesheiwat on October 26, 2018

Mr. Nesheiwat:

Attached is a civil investigative demand (CID) issued to you by the Bureau of Consumer Financial Protection (Bureau) under 12 C.F.R. § 1080.6 and section 1052(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5562.

Rule 1080.6(c) of the Bureau's Rules Relating to Investigations permits the Deputy Assistant Director to authorize the waiver of the requirement to meet and confer in circumstances where she determines that a meeting is unnecessary. The Deputy Assistant Director has authorized such a waiver because this CID does not require the production of any materials. If you have any questions, my telephone number is (202) 435-7688.

Sincerely,

A handwritten signature in black ink, appearing to read "E. Assae-Bille".

E. Vanessa Assae-Bille
Enforcement Attorney

Attachment

consumerfinance.gov



LEPISCOPO & ASSOCIATES

*SERVING SAN DIEGO & ORANGE
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SAN DIEGO OFFICE

ATTACHMENT 3



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California State Senator-Retired

CONFIDENTIAL TREATMENT REQUESTED (12 C.F.R. §§ 1080.6(g) & 1080.14)

November 17, 2018

THE HONORABLE KRISTEN DONOGHUE

Assistant Director of Enforcement

Consumer Financial Protection Bureau

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Enforcement Attorneys

Consumer Financial Protection Bureau

1700 G Street NW, Washington, D.C. 20552

Email: Elisabeth.Assae-Bille@cfpb.gov Colin.Reardon@cfpb.gov

Re: PETITION TO WITHDRAW, SET-ASIDE, OR MODIFY CID ISSUED TO [REDACTED]

Dear Assistant Director Donoghue, Ms. Jackson, Ms. Assae-Bille, and Mr. Reardon:

I.

STATEMENT OF REPRESENTATION

This firm represents petitioner, [REDACTED] ("Petitioner"), in connection with the Civil Investigative Demand issued on October 26, 2018 ("CID") by the Consumer Financial Protection Bureau ("CFPB" or "Bureau"). (See Attachment 1 hereto.) Accordingly, please direct all contacts and correspondence to our San Diego Office (see address above), as well as directly to the undersigned counsel of record via email: lepiscopo@att.net

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**PETITIONER REQUESTS THE PETITION AND ALL OTHER COMMUNICATIONS
IN THIS MATTER BE ACCORDED CONFIDENTIAL TREATMENT**

By way of this Petition, Petitioner hereby respectfully requests confidential treatment of this Petition and all communications between Petitioner and his legal counsel, on the one hand, and the Bureau’s staff and legal counsel, on the other hand, whether occurring before or after the Bureau’s decision in this matter. This Petition and any other communication relating to the inquiry under the CID constitute Petitioner’s personal, privileged, private, and sensitive information and are intended to be confidential. All such information is intended only for review by the Bureau’s staff and legal counsel, and, therefore, Petitioner hereby declines to consent to release of such information to the public. Accordingly, Petitioner hereby respectfully requests that such information receive the highest level of protection for confidentiality available under: the Bureau’s Rules of Practice, 12 C.F.R. §§ 1070, 1080.6(g), & 1080.14; the Freedom of Information Act, 5 U.S.C. § 552, 12 C.F.R. §§ 1070.10 to 1070.23; the Consumer Financial Protection Act, 12 U.S.C. § 5512(c)(6); the right to privacy secured by the First, Fourth, Fifth, and Ninth Amendments to the Constitution, U.S. CONST. amends. I, IV, V, and IX, *see also*, *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (“*Poe*”), *Roe v. Wade*, 410 U.S. 113, 152-156 (1973) (“*Roe*”), and *Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (“*Casey*”); and any other applicable constitutional provisions, statutes, regulations, and rules.

A redacted version of this Petition is provided herewith, which redacts references to the identity of the Petitioner and other confidential information. A true and correct copy of which is attached hereto and marked as Attachment 3 (it is omitted from the redacted version).



CONFIDENTIAL TREATMENT REQUESTED

SERVING SAN DIEGO & ORANGE COUNTIES

PETITION TO WITHDRAW, SET-ASIDE, OR MODIFY CID

THE HONORABLE KRISTEN DONOGHUE

MONICA JACKSON

E. VANESSA ASSAE-BILLE, ESQ.

COLIN REARDON, ESQ.

November 17, 2018

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IV.

THE MEET AND CONFER REQUIREMENT DOES NOT APPLY TO THIS PETITION

Prior to filing a petition to set aside or modify a civil investigative demand, 12 C.F.R. § 1080.6(d)(1) requires counsel for any petitioner to meet and confer with the Bureau's legal counsel. However, in her October 26, 2018 letter accompanying the CID, the Bureau's enforcement attorney, E. Vanessa Assae-Bille, Esq., has indicated that the Deputy Assistant Director has **waived** the meet and confer requirement relative to the CID in this matter:

"Rule 1080.6(c) of the Bureau's Rules Relating to Investigations permits the Deputy Assistant Director to authorize the waiver of the requirement to meet and confer in circumstances where she determines that a meeting is unnecessary. The Deputy Assistant Director has **authorized such a waiver** because this CID does not require the production of any materials."

(See Attachment 2 hereto; emphasis added.)

V.

THIS PETITION IS TIMELY

The Bureau issued the CID on October 26, 2018 (*see* Attachment 1), which was served on Petitioner the following Monday, October 29, 2018. Accordingly, pursuant to 12 U.S.C. § 5562(f) and 12 C.F.R. § 1080.6(e) this Petition is timely, as it was filed with the Bureau within twenty (20) calendar days of service of the CID on Petitioner.

VI.

STANDARD OF REVIEW

With the growth of the administrative state in the last Century, the Supreme Court has circumscribed the power of agencies to issue subpoenas or CIDs, which 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." *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) ("*Morton Salt*"). More recently, the U.S. District Court for the District of Columbia explained:

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“[W]here it is clear that an agency either lacks the authority to investigate or is seeking information irrelevant to a lawful investigatory purpose, a court must set such inquiry aside.”

Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs, 183 F.Supp.3d 79, 82 (D.D.C. 2016) (internal citations omitted) *aff’d* in *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs*, 854 F.3d 683 (D.C. Cir. 2017).

In addition to the foregoing judicial restraints, Congress has authorized the CFPB to issue CIDs, and the CFPB has implemented its own rules governing the process to be utilized when issuing a CID. 12 U.S.C. § 5562; 12 C.F.R. § 1080, *et seq.* The CFPB’s authority, however, is not unbridled and, to be enforceable, a CID must comply with statutory and judicial requirements. *United States v. Markwood*, 48 F.3d 969, 975 (6th Cir. 1995); *United States v. Powell*, 379 U.S. 48, 58 (1964). Indeed, the federal courts are utilized to police these administrative agencies and prevent them from abusing power, abusing process and otherwise depriving the subjects of such administrative action of their constitutional rights. *See e.g. United States v. Powell*, 379 U.S. 48, 58 (1964) (“it is the court’s process which is invoked to enforce the administrative summons and a court may not permit its process to be abused.”); *Securities and Exchange Commission v. Arthur Young & Co.*, 584 F.2d 1018, 1028 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979) (“... so long as the courts retain their power of individual inquiry prior to enforcement of administrative subpoenas, there is relatively little for anyone to fear”).

The United States Court of Appeals, District of Columbia Circuit, described the limits imposed by the courts on administrative agencies as follows:

“There are, of course, limits; to begin with, ‘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.’ Moreover, while the statutory powers of federal regulatory agencies to investigate have traditionally been extensive, . . . ‘the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.’ The federal courts stand guard, of course, against abuses of their subpoena-enforcement processes but constitutional mandates aside, “(t)he gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.” Resultantly, it has long been clear that ‘it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.’”



CONFIDENTIAL TREATMENT REQUESTED

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PETITION TO WITHDRAW, SET-ASIDE, OR MODIFY CID

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Securities and Exchange Commission v. Arthur Young & Co., 584 F.2d 1018, 1023-1024 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979).

Finally, any overbroad or indefinite CIDs are unenforceable as well:

“[A] governmental investigation . . . may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power.”

Morton Salt, supra, 338 U.S. at 652

VII.

**AS IT HAS FAILED TO PROPERLY INVOKE ITS JURISDICTION IN THIS MATTER,
THE BUREAU SHOULD WITHDRAW, SET ASIDE, OR MODIFY THE CID**

In the CID challenged by this Petition, the Notification of Purpose Section provides:

“The purpose of this investigation is to determine whether student loan debt-relief providers, mortgage lenders, or other persons, in connection with obtaining, using, or disclosing consumer information or with marketing or selling products and services relating to student loan consolidations, repayment plans, and forgiveness plans, have engaged in unfair, deceptive, or abusive acts or practices in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536; or have violated the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., or the Telemarketing Sales Rule, 16 C.F.R. Part 310. The purpose of this investigation is to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.”

(See Attachment 1, p. 1.) Clearly, the foregoing is a summary of laws that are in search of a violator. Such is not the law or procedures of the United States. *See e.g.* U.S. CONST. amend. V, Due Process Clause.



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In its relevant part, 12 C.F.R. § 1080.5 (emphasis added) provides:

“Any person compelled to furnish . . . oral testimony . . . to the Bureau shall be advised of the nature of the **conduct** constituting the alleged violation that is under investigation and the provisions of law applicable to such violation.”

Similarly, Section 1052(c)(2) of the Dodd Frank Act requires any civil investigative demand to “state the nature of the **conduct** constituting the violation which is under investigation.” 12 U.S.C. § 5562(c) (emphasis added).

The CID in this matter completely fails to advise Petitioner of: (a) the nature of the conduct, (b) the dates of such conduct, (c) the types of victims, (d) Petitioner’s specific conduct that violated the specific laws listed, or (e) the location of such conduct constituting the alleged violation. Most telling, however, is the last sentence that indicates the purpose of the CID and the Bureau’s investigation is to determine whether “Bureau action to obtain legal or equitable relief would be in the public interest.” (See Attachment 1, p. 1.)

Obviously, the purpose of the Bureau is to act in a manner to protect the public interest, but to issue CIDs for the purpose embarking on a fishing expedition to **find** conduct requiring the protection of the public interest is not permitted under the Due Process Clause of the Fifth Amendment, 12 C.F.R. § 1080.5, or Section 1052(c)(2) of the Dodd Frank Act. *See e.g. United States v. Williams*, 553 U.S. 285, 304 (2008).

Moreover, this is a matter of fairness. In this regard, the U.S. Supreme Court has held that federal agencies such as the CFPB must provide “fair warning” or “fair notice” of required or prohibited conduct. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012). Justice Kennedy articulated this principle most succinctly:

“A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”

FCC v. Fox TV Stations, Inc., 567 U.S. 239, 253 (2012).

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While an administrative agency has the power to conduct investigations and issue CIDs, its power has limits. The CFPB must comply with the law and the constitutional framework upon which this Country is based. The recipient of a CID is entitled to due process, which includes, among other things, the right to know the charges being made against him. *Equal Employment Opportunity Comm'n v. Maryland Cup Corp.*, 785 F.2d 471, 475 (4th Cir. 1986) (“the issuing agency must make a threshold showing that . . . ***the agency has satisfied statutory requirements of due process***, . . .”).

The CFPB acts without jurisdiction when it exceeds its statutory authority because the “charge requirement evidences Congress’ desire to prevent the [CFPB] from exercising unconstrained investigative authority.” *Equal Employment Opportunity Comm’n v. United Air Lines, Inc.*, 287 F.3d 643,652 (7th Cir. 2002). The very purpose of this requirement is to reign in the CFPB’s authority and prevent fishing expeditions that would otherwise deprive the CID recipient, such as the Petitioner, of his constitutional rights. *Id.* at 653.

Without a proper notification of purpose, the CID fails. Not only does it constitute a violation of the CFPB’s own rules and practices, but it clearly constitutes an abuse of process and, in fact, deprives the Petitioner of his fundamental right to due process of law in that he has no notice of the claims being made against him. This is not a case like *Material Handling*, where “there could be no doubt that the [subject] understood what conduct was under investigation” after “a two-year history of correspondence and telephone conversations as well as one other CID, all of which sought information concerning the anticompetitive effects of the Institute’s restrictive membership practices.” *Material Handling Institute, Inc. v. McLaren*, 426 F.2d 90, 92 (3d Cir. 1970) (“*Material Handling*”). Unlike *Material Handling*, the Petitioner has no knowledge or any idea of what is being alleged against him, as the CID is merely a statement of the law but does not indicate any conduct in which he has engaged that violated any of the laws listed in the CID.

Finally, there is no escaping the undisputed fact that the CID fails to identify any of Petitioner’s conduct, or even the date upon which it occurred, that violates the list of laws set forth in the Notification of Purpose in the CID. The CID fails to allege a connection between Petitioner and violation of any of the laws list in the CID. In fact, as written, the CID could be served on any person in the United States by merely substituting the name and address in the CID. As such, and as the foregoing authorities demonstrate, the CID fails to properly and constitutionally invoke the Bureau’s jurisdiction. Accordingly, the CID should be withdrawn or set aside, or, at the very least, modified to properly invoke the Bureau’s jurisdiction and advise the Petitioner of the alleged violations in which he has been engaged.



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VIII.

**WITH THE TIMELY FILING OF THE INSTANT PETITION, THE PETITIONER IS
RELIEVED OF THE LEGAL REQUIREMENT OF APPEARING AT THE
INVESTIGATIONAL HEARING SCHEDULED FOR NOVEMBER 26, 2018**

As set forth in greater detail in Section V, *supra*, this Petition has been timely filed. Accordingly, pursuant to 12 C.F.R. § 1080.6(f) the proceedings under the CID are stayed, and, therefore, the Petitioner is not legally required to appear at the investigational hearing scheduled for November 26, 2018.

Based on the foregoing, the Petitioner will not appear at the November 26, 2018 investigational hearing.

**IX.
CONCLUSION**

Based on the foregoing arguments and authorities, Petitioner respectfully requests that the CID issued to Petitioner be withdrawn, set aside, or modified.

Thank you in advance for your anticipated courtesy and cooperation regarding this matter.

Very Truly Yours,

LEPISCOPO & ASSOCIATES LAW FIRM

Peter D. Lepiscopo

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LEPISCOPO & ASSOCIATES

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COUNTIES*



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SAN DIEGO OFFICE

ATTACHMENT 1



United States of America
Bureau of Consumer Financial Protection

Civil Investigative Demand

To

**REDACTED: PRIVILEGED &
PRIVACY**

This demand is issued pursuant to Section 1052 of the Consumer Financial Protection Act of 2010 and 12 C.F.R. Part 1080 to determine whether there is or has been a violation of any laws enforced by the Bureau of Consumer Financial Protection.

Action Required (choose all that apply)



Appear and Provide Oral Testimony

Location of Investigational Hearing United States Attorney's Office Civil Division 300 N. Los Angeles Street Los Angeles, CA 90012	Date and Time of Investigational Hearing November 26, 2018, at 9:00 a.m. Bureau Investigators Vanessa Assae-Bille and Colin Reardon
--	--



Produce Documents and/or Tangible Things-----by the following date-----



Provide Written Reports and/or Answers to Questions-----by the following date-----

Notification of Purpose Pursuant to 12 C.F.R. § 1080.5

The purpose of this investigation is to determine whether student loan debt-relief providers, mortgage lenders, or other persons, in connection with obtaining, using, or disclosing consumer information or with marketing or selling products and services relating to student loan consolidations, repayment plans, and forgiveness plans, have engaged in unfair, deceptive, or abusive acts or practices in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536; or have violated the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., or the Telemarketing Sales Rule, 16 C.F.R. Part 310. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

Custodian / Deputy Custodian

Deborah Morris / Shantel Johnson
Bureau of Consumer Financial Protection
1700 G Street, NW
ATTN: Office of Enforcement
Washington, DC 20552

Bureau Counsel

Vanessa Assae-Bille / Colin Reardon
Bureau of Consumer Financial Protection
1700 G Street, NW
ATTN: Office of Enforcement
Washington, DC 20552

Date Issued

10/26/2018

Signature

Deborah Morris

Digitally signed by Deborah Morris
Date: 2018.10.26 11:05:20 -04'00'

Name / Title

Deborah Morris, Deputy Enforcement Director

Service

The delivery of this demand to you by any method prescribed by the Consumer Financial Protection Act of 2010, 12 U.S.C. § 5562, is legal service. If you fail to comply with this demand, the Bureau may seek a court order requiring your compliance.

Travel Expenses

Request a travel voucher to claim compensation to which you are entitled as a witness before the Bureau pursuant to Section 1052 of the Consumer Financial Protection Act of 2010, 12 U.S.C. § 5562.

Right to Regulatory Enforcement Fairness

The Bureau is committed to fair regulatory enforcement. If you are a small business under Small Business Administration standards, you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

Paperwork Reduction Act

This demand does not require approval by OMB under the Paperwork Reduction Act of 1980.

**CIVIL INVESTIGATIVE DEMAND FOR
ORAL TESTIMONY**

I. Definitions.

A. **"CID"** means the Civil Investigative Demand, including the **"Definitions and Instructions."**

B. **"Bureau"** means the Bureau of Consumer Financial Protection.

C. REDACTED: PRIVILEGED
& PRIVACY or **"you"** or **"your"** means REDACTED:
PRIVILEGED
& PRIVACY and all employees, agents, representatives, consultants, attorneys, accountants, independent contractors, and other persons working for or on behalf of the foregoing.

D. **"Deputy Enforcement Director"** refers to a Deputy Assistant Director of the Office of Enforcement.

E. **"Enforcement Director"** refers to the Assistant Director of the Office of Enforcement.

F. **"Person"** means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

II. Instructions.

A. **Confidentiality:** This CID relates to a nonpublic, law-enforcement investigation being conducted by the Bureau. We ask that you not disclose the existence of this CID, except to legal counsel, until you have been notified that the investigation has been completed. Premature disclosure of this investigation could interfere with the Bureau's law-enforcement activities.

B. **Sharing of Information:** The Bureau may make its files available to other civil and criminal federal, state, or local law-enforcement agencies under 12 C.F.R. §§ 1070.43(b)(1) and 1070.45(a)(5). Information you provide may be used in any civil or criminal proceeding by the Bureau or other agencies. As stated in 12 C.F.R. § 1080.14, information you provide in response to this CID is subject to the requirements and procedures relating to the disclosure of records and information set forth in 12 C.F.R. pt. 1070.

C. **Meet and Confer:** As allowed by 12 C.F.R. § 1080.6(c), the Enforcement Director or a Deputy Enforcement Director has waived the meet-and-confer requirement for this CID. Please contact Enforcement Attorney **E. Vanessa Assae-**

Bille at 202-435-7688 if you have any questions.

D. Petition for Order Modifying or Setting Aside Demand: Under 12 U.S.C. § 5562(f) and 12 C.F.R. § 1080.6(e), you may petition the Bureau for an order modifying or setting aside this CID. To file a petition, you must send it by e-mail to the Bureau's Executive Secretary at ExecSec@cfpb.gov, copying the Enforcement Director at Enforcement@cfpb.gov, within 20 calendar days of service of the CID or, if the return date is less than 20 calendar days after service, before the return date. The subject line of the e-mail must say "Petition to Modify or Set Aside Civil Investigative Demand." If a request for confidential treatment is filed, you must file a redacted public petition in addition to the unredacted petition. All requests for confidential treatment must be supported by a showing of good cause in light of applicable statutes, rules, Bureau orders, court orders, or other relevant authority.

E. Procedures Governing Hearing: This CID is issued under section 1052 of the Consumer Financial Protection Act, 12 U.S.C. § 5562. The taking of oral testimony pursuant to this CID will be conducted in conformity with that section and 12 C.F.R. §§ 1080.6(a)(4), 1080.7, and 1080.9.

F. Scope of Investigational Hearing: This CID covers information in your possession, custody, or control, including but not limited to documents in the possession, custody, or control of your attorneys, accountants, other agents or consultants, directors, officers, and employees.



LEPISCOPO & ASSOCIATES

*SERVING SAN DIEGO & ORANGE
COUNTIES*



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SAN DIEGO OFFICE

ATTACHMENT 2

1700 G Street NW,
Washington, DC 20552



October 26, 2018

Via Process Server

REDACTED: PRIVILEGED &
PRIVACY

Re: Civil Investigative Demand served on

REDACTED:
PRIVILEGED
& PRIVACY

on October 26, 2018

REDACTED: PRIVILEGED &
PRIVACY

Attached is a civil investigative demand (CID) issued to you by the Bureau of Consumer Financial Protection (Bureau) under 12 C.F.R. § 1080.6 and section 1052(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5562.

Rule 1080.6(c) of the Bureau's Rules Relating to Investigations permits the Deputy Assistant Director to authorize the waiver of the requirement to meet and confer in circumstances where she determines that a meeting is unnecessary. The Deputy Assistant Director has authorized such a waiver because this CID does not require the production of any materials. If you have any questions, my telephone number is (202) 435-7688.

Sincerely,

A handwritten signature in black ink, appearing to read "E. Assae-Bille".

E. Vanessa Assae-Bille
Enforcement Attorney

Attachment



LEPISCOPO & ASSOCIATES

*SERVING SAN DIEGO & ORANGE
COUNTIES*



<http://www.linkedin.com/in/petelepiscopo/>
www.LepiscopoLawFirm.com

SAN DIEGO OFFICE

ATTACHMENT 3

Omitted from
Redacted Version