UNITED STATES OF AMERICA
CONSUMER FINANCIAL PROTECTION BUREAU

In the Matter of:
Wall & Associates, Inc.

PETITION TO SET ASIDE OR MODIFY SEPTEMBER 26, 2017 CIVIL INVESTIGATIVE DEMAND

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I. Preliminary Statement

Pursuant to 12 U.S.C. § 5562(f) and 12 C.F.R. § 1080.6(d), Wall & Associates ("W&A") hereby petitions the Director of the Consumer Financial Protection Bureau (the "Bureau") to set aside or modify the Civil Investigative Demand issued to W&A on September 26, 2017 (the "Revised CID"). The Bureau issued the Revised CID to W&A after withdrawing an earlier Civil Investigative Demand issued to W&A on July 6, 2017 (the "Initial CID"). The Revised CID fails to cure fundamental defects in the Initial CID and should be set aside or modified.

First, under the Consumer Financial Protection Act of 2010, 12 U.S.C. § 5301, *et seq.* (the "CFPA"), the Bureau lacks enforcement authority over W&A, a tax representation service provider. Although the Revised CID purports to seek information concerning potential violations of CFPA's unfair, deceptive, or abusive acts or practices ("UDAAP") provisions, the CFPA does not apply to W&A. W&A's tax representation services are not a "consumer financial product or service"—a prerequisite to the Bureau's exercise of UDAAP enforcement authority.

Second, the Revised CID appears to be an improper attempt by the Bureau to evade limitations on enforcement of the Telemarketing Sale Rule ("TSR") against tax representation service providers like W&A. The Federal Trade Commission ("FTC")—which retains rulemaking authority for the TSR—stated in its most recent enforcement policy that the TSR would not be enforced against tax representatives like W&A. The Bureau's Initial CID cited potential violations of the TSR in its notification of purpose. However, in its July 27, 2017 Petition to Modify or Set Aside the Initial CID, W&A explained that, having issued no contrary guidance, the Bureau may not discard the FTC's enforcement position in this investigation. The Bureau then withdrew the Initial CID and issued the Revised CID, omitting any explicit reference to the TSR but, tellingly, repackaging the Bureau's TSR investigation as one under

UDAAP. Further, in the meet-and-confer over the Revised CID, the Bureau suggested it was not ruling out the possibility of pursuing TSR violations in this matter. The Bureau may not disguise the Revised CID as a request for information concerning potential violations of UDAAP when—in reality—it is an attempt to obtain TSR-related information.

Third, the Revised CID offers improperly purports to seek to "to determine whether Bureau action to obtain legal or equitable relief would be within the Bureau's authority" while at the same time seeks substantive information about virtually all aspects of W&A's business—far beyond what is necessary to determine if Bureau jurisdiction exists. If the Bureau's investigation truly revolves around whether the Bureau has the authority to obtain legal or equitable relief against W&A, then its Revised CID should be limited to jurisdictional inquiries and not press beyond those confines unless and until the Bureau's authority is established. Because the breadth of the Revised CID's Notification of Purpose and requests for documents information belie any meaningful limits to the Bureau's investigation, the Revised CID should be set aside.

Finally, the Revised CID—even if the Bureau had authority to issue it—is overbroad because the Bureau's Notification of Purpose does not comply with the CFPA's requirements. Specifically, the Revised CID fails to meaningfully notify W&A of its alleged wrongful conduct in violation of the CFPA or, as it appears underneath, the TSR. The Revised CID neither identifies the nature of the conduct nor establishes the requisite link between the relevant conduct and the alleged violation. For these reasons, and as discussed in more detail below, W&A respectfully requests that the Bureau set aside the Revised CID.

II. Background on Wall & Associates

W&A's business focuses on representation of individual and corporate taxpayers to help them reduce, remove, and resolve unpaid federal, state, and local tax liabilities of all types and to become compliant with applicable tax filing and payment requirements. (Declaration of Mark

Yates, October 9, 2017 ("Yates Dec") ¶ 4.) A true and correct copy of the Yates Declaration is attached as **Exhibit A**. W&A has and continues to serve a wide array of clients, including: (1) sole proprietors; (2) partnerships; (3) corporations; (4) non-profit organizations; and (5) professional service firms. (*Id.* at ¶ 5.) In working with its clients, W&A does not handle tax funds, but instead advises clients about tax issues and—through its enrolled agents—negotiates directly with the Internal Revenue Service (the "IRS") or other taxing authorities on behalf of its clients. (*Id.* at ¶ 6.)

The tax representation services that W&A offers are entirely different, and based on an entirely different model, than consumer debt relief assistance offered by other companies. (*Id.* at ¶ 7.) Unlike consumer debt relief companies, W&A is regulated by the IRS, and employs "enrolled agents" who earn the privilege of representing taxpayers before the IRS by either passing a three-part comprehensive test covering individual and business tax returns, or through experience as a former employee. (*Id.* at ¶ 8); *see also* IRS Enrolled Agent Information, available at https://www.irs.gov/tax-professionals/enrolled-agents/enrolled-agent-information. (Yates Decl. ¶ 8.) There is no similar licensure for consumer debt relief providers. W&A's model does not involve consumer debt reduction or negotiation services. (*Id.* at ¶ 8.) W&A has on rare occasions communicated with third parties about its clients' overall financial circumstances, which may include indebtedness its clients have. (*Id.*)

III. The Bureau's Investigation, the Initial CID, and the Revised CID

On July 6, 2017, the Bureau issued the Initial CID. A true and correct copy of the Initial CID is attached as **Exhibit B**. The Initial CID purportedly sought "to determine whether debt relief providers or other unnamed persons have engaged or are engaging in unlawful acts and practices in connection with the marketing, sale, and operation of debt relief services, including tax relief services" in violation of the CFPA and the TSR, or some other unspecified federal

consumer financial law. *See* Initial CID, Notification of Purpose. According to the Initial CID's Notification of Purpose (the "Initial Notification"), the Bureau sought reports, information, documents, and testimony about a host of topics, including "the complete organizational structure of Wall & Associates," (Initial CID Interrogatory # 2), contact information of former employees, (Initial CID Request for Written Report #3), and all versions of employee manuals (without any limitation on the topic of the manual). Initial CID, Request for Documents #2. The Initial CID also sought information, reports, and documents about virtually every aspect of W&A's business. *See generally* Initial CID.

Upon receipt of the Initial CID, and consistent with 12 C.F.R. § 1080.6(c), counsel for W&A contacted counsel for the Bureau to schedule a meet and confer. Counsel for the Parties met and conferred on July 17, 2017 and July 21, 2017 about W&A's anticipated challenge to the Bureau's enforcement jurisdiction and the overbreadth of the Initial CID in compliance with 12 C.F.R. § 1080.6(c). Despite good faith efforts by the Parties, on July 24, 2017, Counsel for the Bureau informed W&A that he would not recommend that the Initial CID be set aside or modified.

On July 27, 2017, W&A served a petition (the "July 27 Petition") to set aside or modify the Initial CID. A true and correct copy of the July 27 Petition is attached as **Exhibit C**. On September 26, 2017, the Bureau sent W&A a letter stating that "the civil investigative demand served on Wall & Associates, Inc. on July 7, 2017 is withdrawn." A true and correct copy of the letter is attached as **Exhibit D**. The same day, the Bureau issued the Revised CID to W&A. A true and correct copy of the Revised CID is attached as **Exhibit E**.

The Revised CID differs in some respects from the Initial CID, but in many ways is identical. Specifically, the Bureau's Revised CID's Notification of Purpose (the "Revised

Notification") narrows somewhat the scope of its investigation by limiting requests for information to consumers on an ***individual*** or ***personal*** basis, where the Initial CID encompassed W&A's services provided to non-consumer businesses. This change appears to have been prompted by W&A's July 27 Petition, which pointed out that the Bureau did not have authority to investigate such services. *See* Ex. C, p. 12-13. The Revised CID also dropped references to the TSR—again, apparently based on W&A July 27 Petition, which explained that under the TSR, tax obligations are not "debt" and referenced guidance by the FTC holding that it would defer enforcement against tax representation services. Despite these changes, the Revised CID's requested interrogatories, written reports, and documents are virtually identical to those in the Initial CID.

As stated in the Revised Notification, the Bureau's investigation of W&A purportedly has three purposes. First, the Bureau seeks "to determine whether providers of tax debt relief products or services are offering or providing financial advisory services to consumers on individual matters." Second, the Bureau seeks "to determine whether any person, in connection with the marketing, sale, or provision of such tax debt relief products and services to consumers, has engaged in unfair, deceptive, or abusive acts or practices" in violation of the CFPA. Third, the Bureau seeks "to determine whether Bureau action to obtain legal or equitable relief would be within the Bureau's authority and in the public interest."

The Parties participated in an initial meet-and-confer on October 6, 2017, within ten days of W&A's receipt of the Revised CID. *See* 12 C.F.R. § 1080.6(c). During this initial conference, counsel for W&A shared W&A's concerns that the Revised CID did not remedy the fundamental defects of the Initial CID identified in the July 27 Petition. Despite good faith

efforts, W&A and the Bureau were unable to resolve by agreement the issues raised by W&A, resulting in this Petition.

IV. The Bureau Lacks Enforcement Authority Over Wall & Associates.

As set forth below, the Bureau may not exercise enforcement authority over W&A under the CFPA. Accordingly, the CID should be set aside.

A. The CFPA Does Not Empower the Bureau to Issue the Revised CID.

The Bureau's authority to issue a civil investigative demand is limited to situations where the Bureau is seeking information "relevant to a violation" of a consumer financial law within the Bureau's jurisdiction. *See* CFPA, 12 U.S.C. § 5562(b). Similarly, the Bureau may only conduct hearings to ensure or enforce compliance with the CFPA or other applicable consumer financial laws it is permitted to enforce. *Id.* at § 5563(a).

Through the Revised CID, the Bureau apparently seeks to investigate potential violations of Sections 1031 and 1036 of the CFPA. Section 1031 of the CFPA grants the Bureau authority to pursue "a covered person or service provider" who engages in an "unfair, deceptive, or abusive" act and practice. Section 1036 of the CFPA similarly prohibits "unfair, deceptive, or abusive" acts and practices and also prohibits a covered person or service provider from "offering a consumer financial product or service not in conformity with Federal consumer financial law."

Accordingly, whether W&A is a "covered person" under the CFPA is pivotal in determining whether the Bureau has the authority to issue the Revised CID and whether CFPA's UDAAP prohibitions apply to W&A. The CFPA defines "covered person" to mean "any person that engages in offering or providing a consumer financial product or service" and any affiliate thereof "if such affiliate acts as a service provider to such person." *Id.* § 5481(6). Relevant here, the CFPA defines "consumer financial product or service" to include "providing financial

advisory services," such as "services to assist a consumer with debt management or debt settlement, modifying the terms of any extension of credit, or avoiding foreclosure." *Id.* at § 5481(15)(viii)(I). As discussed below, W&A's tax representation services are not services offered to consumers with respect to "debt management" or "debt settlement." Accordingly, the Revised CID should be aside.

i. "Debt management" and "debt settlement" do not include tax representation services.

The CFPA does not apply to W&A. In meet-and-confer discussions with the Bureau prior to submission of W&A's July 27 Petition, the Bureau grounded its authority to issue the CID in CFPA section 5481(15)(viii)(I), which, as noted above, defines "consumer financial advisory services" to encompass "providing financial advisory services," including "services to assist a consumer with debt management or debt settlement, modifying the terms of any extension of credit, or avoiding foreclosure." Here, the Revised CID is targeted at "tax debt relief products or services."

Simply put, section 5481(15)(viii)(I), does not authorize the Revised CID because nowhere does that section refer to "tax" or taxpayer representative services. On its face, therefore, section 5481(15)(viii)(I) does not apply. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (employing rules of statutory construction to determine whether "Congress has directly spoken to the precise question at issue.").

Apparently, the Bureau's position is that "taxes" are a form of "debt." However, the CFPA does not formally define the terms "debt," "tax," and "tax debt relief." *See* 12 U.S.C. § 1002. Without any statutory definition of "debt," courts look to other provisions in the CFPA for guidance. *See Burgess v. United States*, 553 U.S. 124, 129–30 (2008) (in a dispute involving the meaning of a term within a statutory scheme, the statute itself provides guidance). Here, the

CFPA includes several key exemptions which reinforce the conclusion that Congress did not intend to include tax representatives like W&A within the definition of "debt management" or "debt settlement." For instance, Congress exempted accountants, tax-related service providers, and those who are regulated by the IRS from the Bureau's enforcement authority. *See* 12 U.S.C. § 5517(1)(d)) (noting that the Bureau may not exercise rulemaking, supervising, or enforcement authority over certified public accountants, tax preparers, and other licensed accountants). The "tax preparers" exemption encompasses "any person regulated by the Secretary [31 U.S.C. § 330]," which generally covers those who are authorized to appear before the IRS – attorneys, certified public accountants, and enrolled agents. Similarly, attorneys are also exempt from the Bureau's jurisdiction. *See* 12 U.S.C. § 5517(1)(e))(noting that the Bureau may not exercise supervisory or enforcement authority over "any activity engaged in by an attorney as part of the practice of law.").

These exemptions make clear Congress did not intend for the Bureau to exercise jurisdiction over tax representatives like W&A. W&A, like other tax representatives, employs CPAs and enrolled agents to provide its clients with tax representation services, which often require directly negotiating with and appearing before the IRS. W&A has certified public accountants that supervise non-accountant staff members who may perform tax representation services. Although it is not part of W&A's business model, other tax representation providers employ licensed attorneys to assist with tax representation services.

The definition of "debt" in statutes other than the CFPA, as well as in case law, likewise supports the conclusion that W&A's tax representation services are not covered by the CFPA. When statutory terms are undefined, courts look to the same or similar terms in other statutes and applicable case law for guidance. *See Southeast Conference v. Vilsack*, 684 F. Supp. 2d 135, 143

(D. D.C. 2010) (looking to "how other, related statutes define" the term at issue when the term is not defined in the statute); *Erlenbaugh v. United States*, 409 U.S. 239, 243–44 (1972) (noting that the rule of *in pari materia* provides that words have consistent meaning and the same word in a later statute may be an interpretation of an earlier statute). Other statutes show that the terms "tax" and "debt" are treated differently; as a result, tax representation services do not encompass "debt settlement" or debt management."

For instance, the CFPA empowers the Bureau to enforce the Fair Debt Collection Practices Act ("FDCPA"), 12 U.S.C. § 1063(i), a statute that specifically deals with debt, debt collection, and unfair and deceptive practices of debt collection. 15 U.S.C. § 1692 *et seq.* ("debt collectors" of a "debt" are potentially subject to liability under the FDCPA); *McCray v. Federal Home Loan Mortg. Corp.*, 839 F.3d 354, 359 (4th Cir. 2016) (analyzing the term "debt collector" under the FDCPA). Under the FDCPA, a debt is defined as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. § 1692a.

Case law interpreting the FDCPA holds that "at a minimum, the statute contemplates that the debt has arisen as a result of the rendition of a service or purchase of property or other item of value." *Beggs v. Rossi*, 145 F.3d 511, 512 (2d Cir. 1998) (internal quotations omitted). Applying this reasoning, taxes are not "debts" under the FDCPA. *See, e.g.*, *Beggs v. Rossi*, 994 F. Supp. 114 (D. Conn. 1997), *aff'd*, 145 F.3d 511 (2d Cir. 1998) (personal property taxes were not "debts" under FDCPA because there is no transaction of the kind contemplated by the statute); *see also City of Jefferson v. Cingular Wireless, LLC*, No. 04-4099-CV-C-NKL, 2006

WL 2987678, at *2 (W.D. Mo. Oct. 17, 2006), *order clarified*, No. 04-4099 CV CNKL, 2006 WL 3937243 (W.D. Mo. Dec. 20, 2006) ("A tax is not a debt in the ordinary sense of that term, as it is not founded upon contract, and as a general thing a debt cannot be created in any other way.").

In addition, the law treats tax obligations and consumer debts differently in numerous ways. First, a statutory lien upon all of the taxpayer's property and property rights arises ten days after a tax assessment. 26 U.S.C. § 6321, I.R.C. § 6321. Second, this "assessment lien" is effective from the date the IRS assesses the tax and, if not paid, is deemed to relate back to the date of the assessment. Third, the recording of a Notice of Filing Tax Lien is not required to perfect the lien against the taxpayer. I.R.C. §6321; I.R.M. §§ 5.17.2.1-2.2, 3.1. Fourth, the overwhelming majority of tax obligations are not dischargeable in bankruptcy unless a non-fraudulent return was filed more than 3 years prior to the time of the bankruptcy petition. 11 U.S.C. § 523(a)(1). Fifth, a tax obligation is given a priority position in a distribution of assets from the bankruptcy estate. 11 U.S.C. § 507(a)(8). Tellingly, these examples of special treatment of tax obligations do not apply to consumer debt and reinforce that "debt management" and "debt settlement" do not include tax representation services.

ii. The Bureau has not defined "tax debt relief" nor provided fair notice that it intends to define "debt management" or "debt settlement" to include tax representation services.

The Bureau has never previously asserted jurisdiction over tax representation services and has never defined the term "tax debt relief products or services," which is used in the Revised CID. In fact, the Bureau's previous regulations and public statements have shown that "debt" does ***not*** include tax liability. Accordingly, exercising enforcement jurisdiction over W&A here would violate the Due Process Clause and W&A's right to fair notice.

The Due Process Clause prevents the government from retroactively imposing liability without giving "fair notice of conduct that is forbidden." *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). This "bedrock principle of American law," *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 727 (6th Cir. 2013), "preclude[s] an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *Satellite Broad. Co. v. F.C.C.*, 824 F.2d 1, 3 (D.C. Cir. 1987). Fair notice depends on whether "'by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform.'" *Trinity Broad. of Fla., Inc. v. F.C.C.*, 211 F.3d 618, 628 (D.C. Cir. 2000). Several courts reviewing agency interpretations have held that the application of a rule or statute based on an agency's new interpretation or strained reading of a rule or statute violates the Due Process guarantee of fair notice. *See KPMG, LLP v. S.E.C.*, 289 F.3d 109, 116 (D.C. Cir. 2002) ("because the [agency] interpretation is novel and involves a strained reading of the rule, [the petitioner] cannot be said to have had fair notice" that the conduct would be prohibited); *PMD Produce Brokerage Corp. v. U.S.D.A.*, 234 F.3d 48, 53 (D.C. Cir. 2000) (noting that petitioner did not have fair notice of the application of the regulation to it because the Secretary's Rules of Practice were silent on application and the underlying rationale for the procedures in the regulation did not compel USDA's interpretation of the regulations).

Two of the Bureau's public actions evidence that the Bureau does not interpret "debt" to include tax liability for purposes of its jurisdiction. First, the Bureau has not proposed or finalized any rule governing "tax debt relief products or services." A brief historical review of the Bureau's activity in this regard is appropriate. On June 28, 2011, pursuant to Section

5514(b)(2) of the CFPA, the Bureau issued a Notice for Comment for its "larger participant" rule where it sought "to implement a program to supervise certain non-depository covered persons for compliance with Federal consumer financial laws." *See* 76 F.R. 38059. The Bureau solicited comments "regarding which markets for consumer financial products and services should be addressed in an initial rule." *Id.* at 38061. The Bureau indicated it would include "certain specific markets" in an initial rule and that additional markets may be included through subsequent rulemaking. Six markets were identified in the proposed larger participant rule, including markets for "debt collection" and "debt relief services." *Id.* While the Notice for Comment did not identify the tax representation service industry as a potential market that would be subject to enforcement and supervision, the Bureau implied in a footnote that entities in the tax representation service industry could be included in the "debt relief services" market. *Id.* at 38061, fn. 33 ("Principally, these [debt relief service] providers offer to reduce consumers' credit card debt, but some providers offer to reduce medical or tax debt.").

During a two month comment period regarding which markets to define and how to define them, the Bureau received over 500 comments from various stakeholders about the larger participant rule. *See* 77 F.R. 9594. Several of the comments opposed the inclusion of tax representation service providers within the definition of "debt relief" providers for a number of reasons, including the unique nature of tax debt as generally secured debt that creates a statutory lien upon all of the taxpayer's property, the general rule that a tax obligation is not dischargeable in bankruptcy, and the existing regulatory framework that exercises jurisdiction over tax representation service providers. *See* Comment of TPRSC to CFPB on Defining Larger Participants in Certain Consumer Financial Products and Services Markets (August 15, 2011), available at https://www.regulations.gov/document?D=CFPB-2011-0002-0487.

Despite notice of potential rulemaking to cover the debt relief services market, and despite receiving many comments opposing inclusion of tax representatives within the scope of such a rule, the Bureau has yet to propose or finalize a rule regulating larger participants in the debt relief services market or "tax debt relief products or services" market, including tax representation companies or otherwise. Additionally, on May 22, 2012, the IRS issued a statement that "there is no intention for [the Bureau] to put regulations out dealing with tax debt resolution activity without continuing dialogue and conversation with [IRS Office of Professional Responsibility and better understanding about how that would interplay with the Circular 230 provisions." *See* IRS Publication, IRS Plans Contact with Tax Resolution Companies, Talks With Consumer Financial Protection Bureau, available at https://www.irs.gov/pub/irs-utl/irs_plans_contact_with_tax_resolution_companies_and_updated_cir._230_rules.pdf. Given the Bureau's silence on this issue, W&A certainly has not had notice of the Bureau's now-asserted view that the CFPA applies to its business. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (noting that agency silence can give rise to lack of fair notice).

Second, in addition to the lack of a final rule defining the debt relief services market, another of the Bureau's rules suggests that the Bureau does not deem "debt" to include tax liability for purposes of its jurisdiction. On February 17, 2012, the Bureau issued a proposed rule indicating that it intended to exercise supervisory and enforcement authority over the "consumer debt collection" market. *See* 77 F.R. 9592. Nearly a year later, the Bureau issued a final rule, with an effective enforcement date of January 2, 2013, on the "consumer debt collection" market. *See* 77 F.R. 65776. The rule covers only "debt incurred by a consumer primarily for personal, family, or household purposes and related to a consumer financial product

or service." *Id.* at 65782. In so doing, the Larger Participant Rule for the consumer debt collection market mirrored the FDCPA's definition of debt, which focuses on debt related to a consumer transaction. Tax obligations are clearly not covered because they are not related to consumer transactions. *See, e.g.*, *City of Jefferson v. Cingular Wireless, LLC*, No. 04-4099-CV-C-NKL, 2006 WL 2987678, at *2 (W.D. Mo. Oct. 17, 2006), *order clarified*, No. 04-4099-CV-CNKL, 2006 WL 3937243 (W.D. Mo. Dec. 20, 2006) ("A tax is not a debt in the ordinary sense of that term, as it is not founded upon contract, and as a general thing a debt cannot be created in any other way.).

In sum, the Bureau's indication in the 2011 proposal that it may consider debt settlement to include tax liability has been superseded by the Bureau's conscious decision not to define the debt relief service market and the Bureau's clear decision to define "debt" in the 2012 debt collection rule in a way that would not include tax obligations. Thus, the Bureau's decision not to finalize its definition of debt relief services, coupled with its definition of consumer debt, have created a clear message that the Bureau did not intend to cover tax representation services. Under the principles of Due Process and fair notice, the Bureau shouldn't take action against tax representatives until it makes clear that it intends to regulate tax representatives like W&A. Until it takes such action, market participants like W&A should be able to rely on the Bureau's implemented policy unless and until the Bureau defines "debt relief services," clarifies whether "debt relief services" encompasses "debt relief products," "debt management," and "debt settlement," and advises whether those terms include tax representation.

B. The Revised CID Continues to Improperly Seek Information Related to the Telemarketing Sales Rule, Which Does Not Apply to W&A.

The Revised CID does not include references to the TSR that were contained in the Initial CID. *Compare* Initial Notification ("The purpose of this investigation is to determine whether

debt relief providers or other unnamed persons have engaged or are engaging in unlawful acts and practices in connection with the marketing, sale, and operation of debt relief services, including tax debt relief services, in violation of the [CFPA] . . . and ***the Telemarketing Sales Rule, 16 C.F.R. Part 310***, or any other Federal consumer financial law") *with* Revised Notification (eliminating all references to the TSR and "any other Federal consumer financial law," but stating that "The purpose of this investigation is also to determine whether any person, in connection with the marketing, sale or provision of such tax debt relief products and services to consumers, has engaged in unfair deceptive, or abusive acts or practices"). While on its face the Revised CID appears to eliminate requests for information related to the TSR, the Revised CID substantively continues to improperly seek TSR-related information.

Notably, the Bureau's requests for interrogatories, written reports, and documents in the Revised CID remain substantively ***identical*** to the requests in the Initial CID, and the Revised CID's notification of purpose makes clear that the Bureau seeks to investigate activities addressed by the TSR—i.e., "marketing," "sale," and "provision." Without any modifications to the Bureau's requests for interrogatories, written reports, and documents, the Bureau's Revised CID is a disguised attempt to obtain TSR-related information. *See, e.g.*, Requests for Interrogatories No. 4 (seeking information about the cost to customers of each product or service); Requests for Written Reports No. 1(g)-(o) (seeking specific information about fees charged by W&A, amounts paid by customers, and information related to reduction of "tax debt"). Tellingly, at least two requests by the Bureau mirror the 2010 Amended TSR's (*supra,* p. 16) prohibitions of deceptive and abusive practices, demonstrating that the Bureau did not truly "withdraw" its TSR investigation. *Compare* 16 C.F.R. §310.4(a)(5) (prohibiting debt relief companies from engaging in certain conduct with respect to "any program or service represented,

directly or by implication, to ***renegotiate, settle, or in any way alter the terms of payment of other terms of the debt*** between a person and one or more unsecured creditors or debt collectors . . . .") *with* Requests for Written Reports No. 1(l) ("Provide a written report listing . . . The date, if any, on which the customer's tax debt was ***modified, changed, renegotiated, settled, or in any way altered*** as a result of your provision of your products and services") and Requests for Written Reports No. 1(m) ("Provide a written report listing . . . The nature or type of any ***modification, change, renegotiation, settlement, or alteration of the customer's tax debt***").

The district court rejected these misleading tactics in *ACICS*. *See infra,* p. 24-26, *ACICS,* 183 F. Supp. 3d at 84. In *ACICS,* the Bureau argued that it had "authority to investigate for-profit schools in relation to their lending and financial-advisory services." *Id.* at 83. The district court stated:

> Indeed, the statement of purpose says nothing about an investigation into the lending or financial-advisory practices of for-profit schools. Moreover, the CFPB's requests—for a list *of all schools* ACICS has accredited since 2010, for a list *of all individuals involved in the accreditation* of twenty-one enumerated schools, and for representatives to attest to the *overall approach* to accrediting seven enumerated schools—***clearly reveal its investigation targets the accreditation process generally. This the CFPB was never empowered to do.***

Id. at 84 (italics in original and emphasis added). The language used by the 2010 Amended TSR and the Bureau's Requests for Written Reports is nearly identical and strikingly similar—reinforcing that the Bureau continues to inappropriately seek TSR-related information.

Here, the Bureau has already withdrawn the Initial CID and issued the Revised CID, omitting any explicit reference to the TSR, but has now repackaged the Bureau's TSR investigation as one under UDAAP which, as set forth above, the Bureau lacks the authority to do. Further, during the parties' meet-and-confer on October 6, counsel for the Bureau stated to W&A's counsel that although the Revised CID did not mention the TSR specifically, the Bureau reserved the right to seek to enforce the TSR as to W&A in this investigation. Because the

Revised CID plainly seeks TSR-related information, the Revised CID should be set aside or modified because the TSR does not apply to W&A and, therefore, the Bureau is not entitled to obtain TSR-related information in its Revised CID.

i. Tax obligations are not "debt" within the meaning of the TSR.

In 1994, Congress adopted the Telemarketing and Consumer Fraud and Abuse Prevention Act, which required the FTC to promulgate regulations prohibiting deceptive or abusive telemarketing practices. *See* Telemarketing and Consumer Fraud and Abuse Prevention Act, Pub. L. No. 103-297, 108 Stat. 1545 (1994). These regulations are now codified under the TSR. 16 C.F.R. § 310, *et seq.* The FTC has amended the TSR several times since its inception. *See* 68 Fed. Reg. 4580 (Jan. 29, 2003) (implementing widespread amendments to the TSR); 73 Fed. Reg. 51164, 51165 (Aug. 29, 2008) (codified the TSR under 16 C.F.R. § 310) (amendments addressing prerecorded messages and call abandonment); 75 Fed. Reg. 48458 (Aug. 10, 2010) (amendments addressing the telemarketing of debt relief services); 80 Fed. Reg. 77520 (Dec. 14, 2015) (amendments regarding the use of certain payment methods in all telemarketing transactions and expanding the scope of advance fee ban); 81 Fed. Reg. 59845 (Aug. 31, 2016) (updating fees charged to entities accessing the National Do Not Call Registry).

As noted above, the CFPA sets forth and outlines the limitations on the Bureau's rulemaking, supervisory, enforcement, and authority. 12 U.S.C. § 5517. The CFPA prohibits the Bureau from exercising enforcement authority over a person except where "such person is engaged in the offering or provision of any consumer financial product or service or is otherwise subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H." 12 U.S.C. § 5517(f)(2). The CFPA authorizes the Bureau, along with the FTC, to jointly enforce the TSR. *See* CFPA, § 6102(b); Minute Order, *Consumer Financial Protection*

Bureau v. Vincent Howard et al., Case No. 8:17-cv-00161-JLS-JEM, at p. 6 (C.D. Cal. May 26, 2017) ("both the CFPB and FTC have the authority to enforce [the TSR]").

In August 2010, the FTC amended the TSR ("2010 Amended TSR") to address deceptive and abusive practices associated with debt relief services. 16 C.F.R. § 310.4(a)(5). The 2010 Amended TSR prohibits debt relief companies from engaging in certain conduct with respect to any "debt relief service." 16 C.F.R. §§ 310.4(a)(5)(i)(A), (B). "Debt relief service" means "any program or service represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment of other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the balance, interest rate, or fees owed by a person to an unsecured creditor or debt collector." 16 C.F.R. § 310.2(o).

While the TSR defines "debt relief service," the TSR—like the CFPA—does not define "debt." *See generally* 16 C.F.R. § 310.2. The FTC clarified in its 2010 Amended TSR that the TSR's regulations were limited to debt relief services that dealt specifically with "unsecured debt." 2010 Amended TSR, 75 Fed. Reg. at 48466 ("The Commission has determined to keep the proposed rule's limitation of debt relief services to ***unsecured debt***.") (emphasis added). The FTC further stated that "the definition in the Final Rule covers all types of ***unsecured debts***, including credit card, medical, and tax debts." *Id.*; *see also, infra*, section IV.B.ii. (noting that the FTC deferred enforcement of the TSR against "tax debt relief services").

Shortly after issuing its 2010 Amended TSR, the FTC issued an Enforcement Policy Statement on October 27, 2010 regarding tax representation services and the debt relief amendments to the 2010 Amended TSR. *See* FTC Press Release, *FTC Issues Enforcement Policy Statement on New Debt Relief Rule* (October 27, 2010), https://www.ftc.gov/news-

events/press-releases/2010/10/ftc-issues-enforcement-policy-statement-new-debt-relief-rule ("FTC Enforcement Policy"). In the Enforcement Policy Statement, the FTC acknowledged that "certain providers of services to assist consumers in reducing, renegotiating, or settling their federal or state tax debts expressed concern and uncertainty about the coverage of those services under the Rule." *Id.* The FTC explicitly stated that it "is in the process of considering these concerns and, ***until further notice, will defer any enforcement action for violation of the TSR's debt relief amendments*** with respect to the provision of programs or services that represent, directly or by implication, to renegotiate, settle, or alter the terms of a ***tax obligation between a person and a taxing entity*** (tax debt relief services)." *Id.* (emphasis added). The FTC also noted that it was "considering other options, including additional rulemaking" to address allegations of misconduct within the tax representation services industry. Since the release of the enforcement policy on October 27, 2010, however, the FTC has not issued any updated Enforcement Policy Statement.[1] The FTC has not solicited any public feedback or comment on an updated TSR enforcement policy. Similarly, the FTC has not issued any enforcement policies, proposed rules, or final rules related to the TSR's effect specifically on ***tax*** representation services. In short, the FTC has not given tax representatives like W&A the "further notice" of a revised position that it promised in the 2010 Enforcement Policy Statement.

Here, W&A, a tax representation service provider, falls squarely within the entities exempt from TSR enforcement under the TSR Enforcement Policy Statement. Because tax obligations carry unique characteristics—including its typical secured status—tax obligations are not "unsecured debt" within the meaning of the TSR. *Supra,* Section IV.A.ii. Accordingly,

[1] Further, the Bureau does not have rulemaking authority under the TSR. *See infra* § IV(B)(ii) CFPA § 6102(b).

W&A is not subject to the TSR's requirements and the Bureau cannot disguise its Revised CID as a UDAAP investigation when it in reality seeks is an effort to investigate inapplicable TSR-related matters. *Compare with Consumer Financial Protection Bureau v. Accrediting Council for Indep. Colleges & Sch.*, 854 F.3d 683, 691 (D.C. Cir. 2017) (affirming denial of the Bureau's petition to enforce the CID because, among other reasons, the Bureau's investigation was beyond the agency's jurisdiction, which is limited to enforcing federal consumer financial law, not policing the accreditation of for-profit colleges).

ii. The Bureau may not circumvent the FTC's rulemaking authority under the TSR.

While the CFPA authorizes the Bureau, along with the FTC, to jointly enforce the TSR, section 6012(b) of the CFPA plainly states that the Commission retained rulemaking authority under the TSR—authority neither entrusted to nor shared with the Bureau:

> (b) RULEMAKING AUTHORITY.— The Commission shall have authority to prescribe rules under subsection (a), in accordance with section 553 of title 5, United States Code. In prescribing a rule under this section that relates to the provision of a consumer financial product or service that is subject to the Consumer Financial Protection Act of 2010, including any enumerated consumer law thereunder, the Commission shall consult with the Bureau of Consumer Financial Protection regarding the consistency of a proposed rule with standards, purposes, or objective administered by the Bureau of Consumer Financial Protection.

CFPA, § 6012(b). The CFPA specifically intended for the FTC to retain its rulemaking authority; otherwise, it would have amended subsection (b) of § 6102 [Telemarketing rules] to allow the Bureau also issue rules. *Compare* CFPA, § 6102(b) (FTC has sole rulemaking authority under TSR) *with* CFPA, §§ 6104(c) (the FTC or the Bureau may commence a civil action against any defendant), 6105(b), (d) (permitting joint enforcement of the TSR by the Bureau with the FTC). Indeed, the CFPA deliberately made this change, evidenced by Section

1100C's mandate for the Commission to "consult with the [Bureau] regarding the consistency of a proposed rule with standards, purposes, or objectives administered by the [Bureau]."

Here, W&A falls squarely within the FTC's Enforcement Policy Statement.[2] Further, W&A has relied on the Enforcement Policy Statement, which explicitly defers enforcement actions under the TSR concerning "tax debt relief services." *See supra,* FTC Enforcement Policy ("This deferral of [TSR] enforcement applies only to ***tax debt relief services***. The Commission will enforce the TSR as to other debt relief services.") Without any formal policies or rules contradicting the FTC's Enforcement Policy Statement, the Bureau must comply with the current state of the TSR and must defer enforcement of the TSR provision as to W&A until the FTC clarifies, changes, or updates its position on the FTC Enforcement Policy Statement. *See supra,* CFPA, § 6102(b) (noting FTC has sole authority to prescribe rules under the TSR); *see also* 5 U.S.C. § 553(b)(A); *SmithKline Beecham Corp.*, 132 S. Ct. at 2168 (noting that agency silence can give rise to lack of fair notice). The FTC has not yet provided W&A with any notice that the provisions in the 2010 Amended TSR applies to it. *See supra,* FTC Enforcement Policy (the FTC "is in the process of considering these concerns, and, ***until further notice***, will defer any enforcement action for violation of the TSR's debt relief amendments). Indeed, agency pronouncements far less formal than this can deprive regulated parties of fair notice. *See, e.g., General Elec. Co. v. U.S. E.P.A.*, 53 F.3d 1324, 1332 (informal letter from "one EPA regional office"); *United States v. Chrysler Corp.*, 158 F.3d 1350, 1356 (D.C. Cir. 1998) (NHTSA's internal test schematic).

[2] While it is clear that W&A falls within the Enforcement Policy Statement based on the FTC's guidance, as noted above, "tax debt relief services" is not the most appropriate way to describe W&A's business. W&A more appropriately described as a tax representative and offers tax representation. *See supra* Section II.

Here, the 2010 Amended TSR prohibits "debt relief companies" from engaging in certain conduct with respect to any "debt relief service." The TSR includes no statutory definition for "debt" and guidance from other debt-related statutes do not cure the inherent ambiguity. *Supra,* Section IV.A.i. Even the FTC's Enforcement Policy Statement acknowledged there remains uncertainty over the applicability of the TSR with companies such as W&A. *Supra,* FTC Press Release (Oct. 27, 2010). The FTC Enforcement Policy Statement is the most recent source that informs W&A and others in the tax representation services industry of the conduct that the FTC considers prohibited. *See Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972) (Due Process requires that the regulation "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.").

Similarly, the FTC's Enforcement Policy statement acknowledged that it was "considering other options, including additional rulemaking" to address allegations of misconduct within the tax representation services industry. *See supra,* FTC Press Release (Oct. 27, 2010). If the FTC decides to formally clarify, change, or update its position through a proposed and final rule, section 553 of the Administrative Procedure Act ("APA") outlines the procedural requirements the FTC must follow. *See* 5 U.S.C. § 553(b) (requiring a federal agency, such as the FTC, to provide public notice and an opportunity for comment on any proposed rule). Specifically, the FTC would follow the three-step procedure for notice-and-comment rulemaking: (1) issue a "[g]eneral notice of proposed rule making," ordinarily by publication in the Federal Register; (2) if "notice [is] required," the agency must give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments"; and (3) when the agency promulgates the final rule, it must include in the rule's text "a concise general statement of [its] basis and purpose." *See Perez v. Mortgage*

Bankers Ass'n, 135 S. Ct. 1199 (2015) (noting the notice-and-comment process does not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice). Until that time, W&A has reasonably relied upon and—to date—has complied with the FTC's guidance. Accordingly, the Revised CID cannot use UDAAP allegations as a pretext to obtain TSR-related information.

C. At a Minimum, the Scope of the Revised CID Should Be Limited at This Stage to Information Needed to Assess the Bureau's Jurisdiction.

In the Revised Notification, the Bureau states that it seeks "to determine whether Bureau action to obtain legal or equitable relief would be within the Bureau's authority and in the public interest." (*See* Revised Notification.) The Revised CID, however, belies this stated objective, as many of the Bureau's requests for information push well beyond information needed to assess the Bureau's jurisdiction over W&A. *See, e.g.*, Revised CID, Requests for Written Reports No. 1 (seeking specific information about (i) all customers who used W&A services, (ii) the amounts they were charged, (iii) when fees were charged and paid, and (iv) the date, nature, and dollar amount the customer's tax debt was modified, changed, renegotiated, settled, or altered), Requests for Written Reports No. 2 (seeking specific information related to all complaints made or filed with W&A directly or with any government or private entity).

Indeed, the *ACICS* court rejected the same approach the Bureau attempts to take here. There, the Bureau issued a CID to the Accrediting Council for Independent Colleges and Schools ("ACICS"), a non-profit organization that accredits for-profit colleges, thus allowing students at accredited for-profit colleges eligible to receive federal student aid funding. *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs.*, 183 F. Supp. 3d 79, 83 (D. D.C. 2016), *aff'd,* 854 F.3d 683, 686 (D.C. Cir. 2017) (hereinafter "*ACICS*"). The Bureau's CID to ACICS contained the following statement of purpose:

> The purpose of this investigation is to determine whether any entity or person has engaged or is engaging in unlawful acts or practices in connection with accrediting for-profit colleges, in violation of sections 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536, or any other Federal consumer financial protection law. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

ACICS petitioned the Bureau to set aside or modify the CID on the grounds that "ACICS is not within the jurisdiction of the [Bureau]." *ACICS*, 183 F. Supp. at 81; *see also* ACICS Petition to Set Aside or Modify the Civil Investigative Demand dated September 14, 2015, available at http://files.consumerfinance.gov/f/201510_cfpb_decision-on-petition-by-selling-ACICS-to-set-aside-civil-investigative-demand.pdf ("ACICS is not within the jurisdiction of the CFPB . . . [and] ACICS respectfully requests that the [Bureau] withdraw the CID"). ACICS argued that the Bureau was attempting to conduct an investigation outside of its statutory authority—that is, an investigation into the accreditation process of for-profit schools where its authority is limited to inquiries to determine whether there has been a violation of any consumer financial laws." *Id.* at 83.

The Bureau argued that it had authority to issue the CID to determine whether it had jurisdiction over ACICS because it (i) "indisputably has authority to investigate for-profit schools in relation to their lending and financial-advisory services," (ii) "has authority to investigate whether any entity has engaged in any unlawful acts relating to the accreditation of those schools," and (iii) "is not obligated to accept at face value ACICS's generalized description of its interaction with the schools it accredits, or what aspects of those schools' activities it touches, but rather it has the right to investigate and determine for itself whether these assertions are true." *Id.* at 83.

The district court refused to enforce the CID and squarely rejected all of the Bureau's arguments, stating:

> Put simply, this post-hoc justification is a bridge too far! As ACICS has repeatedly and accurately explained, the accreditation process simply has no connection to a school's private student lending practices. . . . Moreover, ACICS is *not* involved in the financial aid decisions of the schools it accredits, which means that it plays no part in deciding whether to make or fund a student loan. . . .
>
> Please. Although it may be that the CFPB is entitled to learn whether ACICS is connected in any way to potential violations of the consumer financial laws by the schools it accredits, the statement of purpose and the CFPB's actual requests belie any notion that its inquiry is ***limited*** in this way. Indeed, the statement of purpose says nothing about an investigation into the lending or financial-advisory practices of for-profit schools . . . the CFPB's requests . . . clearly reveal its investigation targets the accreditation process generally. This the CFPB was never empowered to do.

Id. at 83-84 (emphasis added, internal citations omitted).

Likewise here, W&A has demonstrated that its tax representation services has no connection with a "consumer financial product or service" or "financial advisory services" as defined by the CFPA. And, just as in *ASICS*, the overly broad statement of purpose in the Revised CID, as well as the far-reaching nature of the Bureau's requests in the Revised CID, make it clear that the Bureau is attempting to reach much further than necessary merely to assess its jurisdiction.

Accordingly, the Revised CID should be set aside or modified because it impermissibly seeks jurisdictional discovery while simultaneously requesting substantive information from W&A.

V. Objections to the Scope of the Bureau's Investigation

A. Applicable Legal Standards

Several key principles govern the Revised CID. A company "may and should have protection from unlawful demands made in the name of public investigation," including "a governmental investigation in corporate matters" that is "of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power." *United*

States v. Morton Salt Co., 338 U.S. 632, 652 (1950). At a constitutional minimum, an agency's demand must be: (i) "within the authority of the agency," (ii) "not too indefinite," and (iii) "the information sought reasonably relevant." *Id.* "The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable." *Id.* at 652-53 (*quoting Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 208 (1946)). The CFPB's ability to define the scope of its investigation does not afford it unfettered authority to cast about for potential wrongdoing. *Consumer Financial Protection Bureau v. Accrediting Council for Indep. Colleges & Sch.*, 854 F.3d 683, 689 (D.C. Cir. 2017). Accordingly, "[a]n administrative subpoena thus may not be so broad so as to be in the nature of a "fishing expedition." *Peters v. United States*, 853 F.2d 692, 700 (9th Cir. 1988) (internal quotations omitted).

Among other things, a company subject to a Bureau investigation is entitled to a description of "each class of documentary material to be produced under the demand with such definiteness and certainty as to permit such material to be fairly identified" and "a return date or dates which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction." 12 U.S.C. §§ 5562(c)(3)(A)-(B). "In addition, while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." *See v. City of Seattle*, 387 U.S. 541, 543 (1967); *see also* 12 U.S.C. § 5562(h)(1). In addition to these protections, the recipient of a civil investigative demand by the Bureau is entitled to know "the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." *ACICS*, 854 F.3d at 688; *see also* 12 U.S.C. § 5562(c)(2); 12 C.F.R. § 1080.5.

"[T]here are real limits on any agency's subpoena power." *ACICS,* 854 F.3d at 689. "The statutory power to enforce CIDs in the district courts, *see* 12 U.S.C. § 5562(e), entrusts courts with the authority and duty not to rubber-stamp the Bureau's CIDs, but to adjudge their legitimacy." *Id.* "Accordingly, courts will not enforce a CID when the investigation's subject matter is outside the agency's jurisdiction" or "where there is too much indefiniteness or breadth in the terms requested." *Id.*

B. The Revised CID Fails to Meaningfully Notify W&A of its Allegedly Wrongful Conduct in Violation of the CFPA.

Section 5562(c) of the CFPA mandates that a CID must "state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." The Bureau fails to establish the link between the relevant conduct outlined in the Notification of Purpose and the alleged violation—a clear requirement under the CFPA and under *Morton Salt Co. See ACICS*, 854 F.3d at 691 (affirming denial of the Bureau's petition to enforce the CID because, among other reasons, there was no link between the relevant conduct and the alleged violation).

In *ACICS*, the Bureau's CID sought "to determine whether any entity or person has engaged or is engaging in unlawful acts and practices in connection with accrediting for-profit colleges." *Id.* at 690. The D.C. Circuit refused to enforce the CID because it could not determine "whether the information sought in the CID [was] reasonably relevant to the CFPB's investigation without knowing what 'unlawful acts and practices' are under investigation. *Id.* at 691. Moreover, the D.C. Circuit found that "the Notification of Purpose [gave] no description whatsoever of the conduct the CFPB [was] interested in investigating." *Id.* The D.C. Circuit reasoned that "the CFPA provides detailed definitions of 'Federal consumer financial law,' 12.

U.S.C. § 5481(12), (14), and '[c]onsumer financial product or service,' *id.* § 5481(5), (15), yet the CID contains no mention of these definitions or how they relate to its investigation." *Id.*

Here, the Bureau's Revised CID similarly fails to notify W&A of the nature of the conduct at issue and does not adequately inform W&A what aspects of its business are under investigation or the conduct constituting the alleged violation. The Revised CID generically states:

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

See Revised Notification. The Revised CID does not provide any facts, details, or background into how or in what ways W&A allegedly violated the CFPA. There is no explanation of how the "marketing, sale, or provision" would constitute unfair, deceptive, or abusive acts or practices. As in *ACICS*, without an adequate explanation of what acts and practices are under investigation, it is impossible to determine "whether the information sought in the Revised CID is reasonably relevant to the CFPB's investigation." *Compare with ACICS*, 854 F.3d at 691. This clear statutory requirement is vital to W&A's ability to understand and respond to the Revised CID, in addition to its ability to formulate tailored responses or objections to the same. Accordingly, as detailed below, the CID is procedurally and substantively flawed and should be set aside or, alternatively, modified.

i. The Revised CID does not adequately specify the nature of or the persons engaged in the investigated conduct and even fails to identify whether W&A itself is under investigation.

The Revised Notification is insufficient because it does not advise W&A of "the nature of the conduct constituting the alleged violation," leaving W&A with no basis on which to evaluate the relevance the Bureau demand for oral testimony, production of documents, written reports, and answers to interrogatories. Courts refuse to enforce an administrative subpoena when the agency fails to adequately state the purpose for its investigation which precludes a court's determination of relevancy.[3]

Here, there is no reason why the Bureau should be unable to identify the nature of the conduct it believes is in violation of the CFPA (or TSR). The Bureau has no valid basis to withhold disclosure of or voluntarily omit information that explains how W&A—if it is indeed under investigation—engaged in allegedly wrongful conduct. The mere operation of "marketing, sale, or provision of such tax debt relief products and services to consumers" is not itself a violation of any law and is not otherwise wrongful. The Revised CID offers no guidance as to what the wrongful conduct may be. Rather, the Revised CID only cites to unspecified "unlawful

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[3] *See, e.g., Trailer Mar. Transport Corp. v. Fed. Maritime Comm'n*, 602 F.2d 379, 398-99 (D.C. Cir. 1979) (statement in administrative subpoena that requested information was necessary to enable the agency "to make initial determinations concerning the reasonableness" of a carrier's rates for water service to Puerto Rico did not adequately "state the reason and purpose for the information sought and thus establish a basis to determine the relevance of the information to agency action and the reasonableness of the agency request"); *U.S. v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 471 (2nd Cir. 1996) ("This is not to say that [a government] agency may conduct any investigation it may conjure up; the disclosure sought must always be reasonable."); *F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 881 (D.C. Cir. 1977) ("the disclosure sought shall not be unreasonable"); *Chao v. Local 743 Int'l Brotherhood of Teamsters*, 467 F.3d 1014, 1017 (7th Cir. 2006) (to obtain judicial enforcement of an administrative subpoena, an agency must show that the inquiry is not too indefinite, is reasonably relevant to an investigation which the agency has authority to conduct, and all administrative prerequisites have been met); *Arthur Young & Co.*, 584 F.2d 1018, 1031 (D.C. Cir. 1978) (noting a subpoena request should not be so overbroad as to reach into areas that are irrelevant or immaterial).

acts or practices in connection with" said services. W&A is entitled to understand the nature of the Bureau's investigation.[4] Ultimately, accepting the Revised Notification would effectively write out of the statute all of the notice requirements that Congress articulated in Section 5562 of the CFPA. Accordingly, the CID should be set aside or, at the very least, the CFPB must narrow the scope of its inquiry to identify the particular concern associated with W&A.

ii. The Revised CID does not identify any statute allegedly violated.

The Bureau fails to identify the nature of the investigated conduct and fails to name "the provision of law applicable to such violation," as required by Section § 5562(c)(2) of the CFPA. The Revised CID appears to indicate that the Bureau is investigating "unfair, deceptive, or abusive" acts or practices, but its broad description leaves W&A guessing whether the Bureau's focus is on financial advisory services, the CFPA, the TSR, jurisdictional discovery, or something else entirely (if anything at all).

The Revised Notification is so ambiguous that it effectively amounts to no notice at all. Although the Revised CID identifies Sections 5531 and 5536 of the CFPA, this offers no meaningful guidance because, as discussed above, the Bureau appears to continue requesting information related to the TSR, which does not apply to tax relief service providers like W&A.

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[4] The Bureau cannot remedy the CID's deficiencies by asserting that the investigation can be clarified through verbal communications to W&A or through post hoc rationalizations. Indeed, courts have rejected arguments that they should go beyond the text of a CID to define the intent behind an overly broad resolution, recognizing that "the validity of Commission subpoenas is to be measured against the purposes stated in the resolution, and not referenced to extraneous evidence. *F.T.C. v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980); *see also F.T.C. v. Church & Dwight Co., Inc.* 665 F.3d 1312, 1315 (D.C. Cir. 2011) ("we will not interpret the scope of the Resolution so broadly as to enable the agency to investigate a matter beyond the reaches of the laws it enforces"); *Montship Lines, Ltd. v. Fed. Maritime Bd.*, 295 F.2d 147, 155 (D.C. Cir. 1961) (investigatory purpose "must be apparent from the order itself and cannot be supplied by contentions in the briefs").

The Revised CID's reference to sections 5531 and 5536 is equally ambiguous, as those provisions prohibit a covered person or service provider—or any person knowingly or recklessly providing substantial assistance to a covered person or service provider—"from committing or engaging in an unfair, deceptive, or abusive act or practice under federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." *Id.*; § 5531(a). That covers not only the potential violation of 18 acts enumerated in the CFPA itself, *id.* § 5481(12), (14) (defining "enumerated consumer laws" and "Federal consumer financial law"), but also any "unfair, deceptive, or abusive act or practice under Federal Law" that can be plausibly conceived. Such a scattershot approach to the CID affords W&A no notice of what the Bureau is actually investigating. *See supra, Peters v. U.S.*, 853 F.2d at 700 (quashing the administrative subpoena and noting that "an administrative subpoena thus may not be so broad so as to be in the nature of a 'fishing expedition.'"). The *Peters* court rejected the sweeping, vague investigation that the Bureau attempts to use in this case. W&A (and a reviewing court) cannot comprehend the nature of the conduct constituting the alleged violation *and* the provisions of law applicable to such violation.

Accordingly, because the CID is overbroad and fails to comply with statutory requirements, the CID should be set aside or modified.

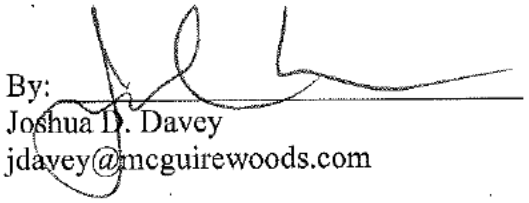
VI. CONCLUSION

For the foregoing reasons, W&A respectfully requests that the Director enter an order setting aside or modifying the CID consistent with the factual and legal objections raised herein.

This the 16th day of October, 2017.

Respectfully submitted,

McGuireWoods LLP



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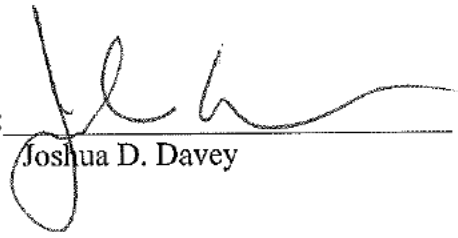
CERTIFICATION OF MEET-AND-CONFER

Counsel for W&A, Joshua Davey and Alexandra Villarreal O'Rourke, timely conferred by telephone conference, pursuant to 12 C.F.R. § 1080.6(c), with counsel for the Bureau in a good faith effort to resolve the matter. Specifically, on October 6, 2017, Mr. Davey and Ms. O'Rourke spoke by phone with Gabriel S.H. Hopkins and Casey Triggs, counsel for the Bureau, concerning the matters addressed in this Petition. Ultimately, W&A and the Bureau were unable to resolve by agreement the issues raised by this Petition.

This the 16th day of October, 2017.

By: 
Joshua D. Davey

CERTIFICATE OF SERVICE

I, Joshua D. Davey, hereby certify that on the 16th day of October, 2017, I caused the foregoing Petition to Set Aside or Modify the September 26, 2017 Civil Investigative Demand to be served by electronic mail to the following:

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By: _____
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