cfpb Consumer Financial Protection Bureau
1700 G Street NW, Washington, DC 20552

IN RE HEARTLAND CAMPUS SOLUTIONS, ECSI	)
2017-MISC-HEARTLAND CAMPUS SOLUTIONS, ECSI-0001	)

DECISION AND ORDER ON PETITION BY HEARTLAND CAMPUS SOLUTIONS, ECSI, TO SET ASIDE OR MODIFY CIVIL INVESTIGATIVE DEMAND AND REQUEST FOR CONFIDENTIAL TREATMENT

Heartland Campus Solutions, ECSI ("ECSI") has filed a petition (the "Petition") with the U.S. Consumer Financial Protection Bureau ("CFPB" or "the Bureau") for an order to set aside or modify a civil investigative demand ("CID") issued to ECSI, and a request (the "Request") for confidential treatment of materials related to the Petition. For the reasons set forth below, the Petition and Request are denied.

FACTUAL BACKGROUND

On May 18, 2017, the Bureau issued a CID (the "May 18 CID") to ECSI seeking information about its student loan servicing activities. The CID's Notification of Purpose stated:

> The purpose of this investigation is to determine whether a student loan servicer or other persons have engaged or are engaging in unlawful acts and practices in connection with the servicing of student loans in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536; the Fair Credit Reporting Act, 15 U.S.C. §§ 1681, et seq., and its implementing Regulation V, 12 C.F.R. Part 1022; or any other Federal consumer financial 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.

May 18 CID at 1. The CID required ECSI to produce documents and provide answers to interrogatories by June 19, 2017. *See id.*

Pursuant to the Bureau's rules, ECSI was required to meet and confer with a Bureau investigator within 10 days of its receipt of the CID. *See* 12 C.F.R. § 1080.6(c). Counsel for ECSI conferred with the Bureau on May 24, 2017. During the meet and confer, ECSI objected that the CID's Notification of Purpose did not comply with the notification requirements of section 1052(c)(2) of the Consumer Financial Protection Act ("CFPA"), 12 U.S.C. § 5562(c)(2), which requires that a CID "state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." Specifically, ECSI argued that the CID's Notification of Purpose did not adequately identify the nature of the conduct constituting the alleged violation pursuant to the holding of *CFPB v. Accrediting Council for Independent Colleges & Schools*, 854 F.3d 683 (D.C. Cir. 2017) ("*ACICS*"). ECSI also objected that the relevance of each document request and interrogatory was difficult to

determine because, according to ECSI, it could not determine the intended scope of the investigation. ECSI further objected to what it claimed were burdensome and vague interrogatories and requests for documents.

On June 9, 2017, the Bureau withdrew the May 18 CID and issued ECSI a new CID (the "June 9 CID"). The June 9 CID contained interrogatories and requests for documents substantially similar to those in the May 19 CID but contained a revised Notification of Purpose[1]:

> The purpose of this investigation is to determine whether student-loan servicers or other persons, in connection with servicing of student loans, including processing payments, charging fees, transferring loans, maintaining accounts, and credit reporting, 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 engaged in conduct that violates the Fair Credit Reporting Act, 15 U.S.C. §§ 1681, et seq., and its implementing Regulation V, 12 C.F.R. Part 1022. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

June 9 CID at 1.

Pursuant to the Bureau's rules, ECSI met and conferred with a Bureau investigator on June 19, 2017. *See* 12 C.F.R. § 1080.6(c). During the meet and confer ECSI reiterated its prior objections, arguing that because the revised Notification of Purpose merely described "all or nearly all" of ECSI's activities associated with its "primary business activity" of student loan servicing the CID still failed to comply with the requirements of section 1052(c)(2) as construed under *ACICS*.[2] Petition at 4. Based on the June 19 meet and confer and other representations by ECSI's counsel, the Bureau issued ECSI a letter on June 27, 2017 modifying and clarifying certain interrogatories and requests for documents. On June 30, 2017, ECSI timely filed its Petition to Set Aside or Modify Civil Investigative Demand, together with its Request for Confidential Treatment in Connection with Petition to Set Aside or Modify Civil Investigative Demand.

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[1] As ECSI notes in its petition, the June 9 CID contained only "technical changes" to the interrogatories and requests for documents. Petition at 4.

[2] ECSI neither elaborates on nor provides any legal support for this argument. The CFPA contains no such provision limiting the Bureau's CID authority, and courts have regularly enforced administrative subpoenas regarding conduct coextensive with the scope of an entity's primary business activity. *See, e.g.*, *F.T.C. v. Invention Submission Corp.*, 965 F.2d 1086, 1087-88 (D.C. Cir. 1992) (enforcing administrative subpoena issued to a company "in the business of promoting other people's inventions" regarding the "advertising, offering for sale and sale of its services relating to the promotion of inventions or ideas"); *F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 867-68 (D.C. Cir. 1977) (enforcing administrative subpoena issued to natural gas producers regarding the "exploration and development, production, or marketing of natural gas, petroleum and petroleum products, and other fossil fuels").

The Request seeks confidential treatment of "the Petition, the [June 9] CID, any response, and any communications, including this [request], that may reveal the existence of the inquiry." Request at 2. ECSI made its request pursuant to 12 C.F.R. § 1080.6(g), which provides that petitions to modify or set aside and orders in response thereto "are part of the public records of the Bureau unless the Bureau determines otherwise for good cause shown," and 12 C.F.R. § 1080.14(b), which states that "Bureau investigations generally are non-public." ECSI requested that if the Bureau determined that confidential treatment was not warranted, ECSI be provided advance notice of that determination pursuant to 12 C.F.R. § 1070.46(b) and that the Petition and other materials intended for publication be redacted.[3] *Id.* ECSI provided a redacted version of the Petition with references to ECSI's name removed.

LEGAL DETERMINATION

I. ECSI'S PETITION TO SET ASIDE OR MODIFY THE CID

In its petition to modify or set aside the June 9 CID ECSI raises two principal objections: 1) the CID's Notification of Purpose fails to comply with 12 U.S.C. § 5562(c)(2), and 2) because the CID fails to comply with § 5562(c)(2), ECSI cannot assess the relevance of the individual requests in the CID. ECSI also raises three objections to specific document requests. None of these objections warrants setting aside or modifying the CID.

A. The June 9 CID Complies with 12 U.S.C. § 5562(c)(2).

ECSI first argues that the CID's Notification of Purpose fails to satisfy the requirements of 12 U.S.C. § 5562(c)(2) for the reasons discussed by the D.C. Circuit in *ACICS*. Petition at 7. ECSI's reliance on *ACICS* is misplaced, as it misapprehends the nature of the defects the *ACICS* court found in the CID at issue. The CID in *ACICS* was issued to an organization engaged in the accreditation of for-profit colleges. *ACICS*, 854 F.3d at 685. Although the Bureau acknowledged it had no interest in educational accreditation as such, the Bureau argued that it had an interest in investigating the link between the accreditation process and the lending practices of colleges accredited through that process. *Id.* at 691. These lending practices were "consumer financial products or services" as defined by the CFPA, and therefore subject to the prohibition on unfair, deceptive, or abusive acts or practices under §§ 1031 and 1036 of the CFPA. *See id.* at 687-88. The court found that the CID was defective, not because the link between accreditation and these lending practices was beyond the scope of the Bureau's investigative authority, but because that link "[did] not appear on the face of the Notification of Purpose." *Id.*

According to the *ACICS* court, the Notification of Purpose offered "no description whatsoever of the conduct the CFPB [was] interested in investigating." *Id.* Instead, the Notification of Purpose referred only to "unlawful acts and practices in connection with accrediting for-profit colleges" that may have violated §§ 1031 and 1036 of the CFPA, as well as "any other Federal consumer financial law." *Id.* The court explained that its review of the CID's

[3] 12 C.F.R. § 1070.46(b) provides that, prior to disclosing confidential information pursuant under § 1080.46(a), "the CFPB may, as it deems appropriate under the circumstances, provide written notice to the person to whom the confidential information pertains that the CFPB intends to disclose its confidential information in accordance with this section."

validity was governed by the analysis in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), under which a court determining whether to enforce a CID considers whether "[(1)] the inquiry is within the authority of the agency, [(2)] the demand is not too indefinite and [(3)] the information sought is reasonably relevant." *Id.* at 688 (quoting *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001) (quoting *Morton Salt*, 338 U.S. at 652)). Based on the Notification of Purpose, the court in *ACICS* could not determine whether the Bureau's inquiry was "within the authority of the agency and whether the information sought [was] reasonably relevant," as required by *Morton Salt*. *Id.* at 691. The court concluded that the CID thus failed to provide the notice required under § 5562 of the "nature of the conduct constituting the alleged violation which is under investigation."[4] *See id.* at 690-91 (quoting 12 U.S.C. § 5562(c)(2)).

The *ACICS* court found the CID in that case defective for a second and related reason. In addition to identifying the conduct at issue, a CID issued by the Bureau must identify "the provision of law applicable to such violation." *Id.* at 691 (quoting 12 U.S.C. § 5562(c)(2)). The *ACICS* court found that the citation in the CID to §§ 1031 and 1036 of the CFPA was insufficient because it stood "broadly alone," with no mention of a relationship to consumer financial products or services as defined by the CFPA. *ACICS*, 854 F.3d at 691 (citing *F.T.C. v. Carter*, 636 F.2d 781, 788 (D.C. Cir. 1980) (explaining that a citation to unfair and deceptive practices under Section 5 of the Federal Trade Commission Act "standing broadly alone" would not provide adequate notice, but that a citation to section 5 would be sufficient where it was "defined by its relationship" to other language identifying the purpose of the investigation)). This was the case "especially considering the Bureau's failure to adequately state" the conduct under investigation. *Id.*

The June 9 CID issued to ECSI does not suffer from the defects identified by the court in *ACICS*. First, while the *ACICS* court found that the CID in question there failed to identify the Bureau's interest in the investigation and thus could not be evaluated under *Morton Salt*, *see* 854 F.3d at 690-91, that is not the case here. The Notification of Purpose in the CID issued to ECSI identifies the nature of the conduct at issue as the "servicing of student loans," which is a consumer financial product or service that falls squarely within the Bureau's authority under the CFPA. *See* 12 U.S.C. § 5481(15)(A)(i). The June 9 CID goes even further in describing the nature of the conduct, stating that it includes "processing payments, charging fees, transferring loans, maintaining accounts, and credit reporting." June 9 CID at 1. Credit reporting also falls squarely within the Bureau's authority under the Fair Credit Reporting Act ("FCRA") and its implementing regulation, Regulation V. *See* 15 U.S.C. § 1681s(b)(1)(H). ECSI is therefore mistaken to state that the CID "gives no description whatsoever of the conduct the CFPB is

[4] Because the court ruled on this narrower ground it declined to address the Bureau's asserted interest in the link between educational accreditation and student lending. *See ACICS*, 854 F.3d at 691. However, the Bureau's CID authority is not limited to those entities over whom it has direct enforcement or regulatory authority. As the court noted in *ACICS*, the Bureau's authority to require the production of documents and oral testimony extends to "'*any person*' that it believes may be in possession of 'any documentary material or tangible things, or may have any information, relevant to a violation' of the laws that the Bureau enforces." *Id.* at 688 (quoting 12 U.S.C. § 5562(c)(1)) (emphasis added).

interested in investigating."[5] Petition at 7 (quoting *ACICS*, 854 F.3d at 691). The June 9 CID provides an ample basis to evaluate whether, under *Morton Salt*, "the inquiry is within the authority of the agency and whether the information sought is reasonably relevant." *ACICS*, 854 F.3d at 691. The June 9 CID therefore provides notice of the "nature of the conduct constituting the alleged violation which is under investigation." 12 U.S.C. § 5562(c)(2).

Because the June 9 CID notifies ECSI of the nature of the conduct at issue, the second defect the *ACICS* court found, regarding identification of the applicable provision of law, is also not present here. As noted above, the face of the June 9 CID identifies the Bureau's interest in investigating unfair, deceptive, or abusive acts or practices in connection with various areas of conduct associated with student loan servicing. June 9 CID at 1. Similarly, the CID specifies credit reporting as an area of conduct under investigation, and thus identifies the FCRA and Regulation V as applicable provisions of law. *Id.* The identification of these statutory and regulatory provisions therefore satisfies the requirement of 12 U.S.C. § 5562(c)(2) that the Bureau identify "the provision of law" applicable to the violations at issue.

B. ECSI's Objection Regarding Relevance Determinations Is Without Merit.

ECSI also objects that it is unable to "assess the relevance" of individual interrogatories and document requests and that "because the Notification of Purpose is invalid, it is impossible to ascertain whether the individual requests are sufficiently related to the investigation's purpose." Petition at 9. ECSI's only support for its relevance objection is the *ACICS* court's statement that when a CID "gives no description whatsoever of the conduct the CFPB is

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[5] ECSI is also incorrect in claiming that conduct described in the June 9 CID had to be "considerably more precise and specific." Petition at 8. In making this claim ECSI relies on the D.C. Circuit's opinion in *FTC v. Church & Dwight Co.*, 665 F.3d 1312 (D.C. Cir. 2011), which concerned a CID issued by the FTC as part of an investigation into anti-competitive practices in the marketing and sale of condoms. *See* 665 F.3d at 1313. Although the court in *ACICS* noted in passing that the CID in *Church & Dwight* informed the recipient of the purpose of the investigation, neither *ACICS* nor *Church & Dwight* addressed whether statements of purpose must be as precise as the FTC's statement in that case. *See ACICS*, 854 F.3d at 690; *Church & Dwight*, 665 F.3d 1312. In contrast, the D.C. Circuit did have occasion to address the sufficiency of such statements in *FTC v. Texaco, Inc.*, in which the FTC issued an investigative demand that identified "a broad range of activities" regarding natural gas production and marketing. 555 F.2d 862, 874 (D.C. Cir. 1977). The court found that such broad statements of conduct "are not uncommon in the investigative process, and the agency was not required to articulate its purpose with greater specificity." *Id.* at 874 n.26. The court noted that the agency could not reasonably identify more specific practices "without access to the relevant documents," and that "the precise character of possible violations cannot be known in advance." *Id.* at 877. A similar conclusion applies here, as the Bureau cannot reasonably identify more specific practices regarding potential violations without first having access to the documents in question. Notably, the court in *ACICS* relied on these underlying principles from *Texaco* in its opinion. *See ACICS*, 854 F.3d at 690 ("a notification of purpose may use broad terms to articulate an investigation's purpose" (citing *Texaco*, 555 F.2d at 874 n.26, 877)); *id.* at 691 (noting that the Bureau "need not speculate as to 'the precise character of [the] possible violations' its investigation might uncover" (quoting *Texaco*, 555 F.2d at 877)).

interested in investigating," the court "cannot accurately determine whether the inquiry is within the authority of the agency and whether the information sought is reasonably relevant." *Id.* (quoting *ACICS*, 854 F.3d at 691 (internal quotation marks omitted)).

ECSI's argument is again misplaced. As discussed above in Part I.A, the June 9 CID identifies potential violations of specific statutory and regulatory provisions regarding conduct associated with student loan servicing and credit reporting. From the description of that conduct ECSI can readily determine "whether the inquiry is within the authority of the agency and whether the information sought is reasonably relevant." *See* Petition at 9. Unlike the accrediting of for-profit colleges in *ACICS*, student loan servicing and credit reporting unambiguously fall within the Bureau's statutory authority. *See* Part I.A, *supra*. Because the June 9 CID identifies "what unlawful acts and practices are under investigation," ECSI can determine "whether the information sought is reasonably relevant." *See ACICS*, 854 F.3d at 691.

C. ECSI Fails to Demonstrate That Individual Document Requests Are Overbroad or Unduly Burdensome.

ECSI also raises three objections regarding individual document requests based on claims of overbreadth and undue burden. The Bureau has previously stated that in making claims of overbreadth and undue burden a petitioner must "prove[] the inquiry is unreasonable because it is overbroad or unduly burdensome." *See, e.g.*, *In re Great Plains Lending, LLC*, 2013-MISC-Great Plains Lending-0001 (Sept. 26, 2013), at 8 (citing *FDIC v. Garner*, 126 F.3d 1138, 1143 (9th Cir. 1997)); *In re Assurant, Inc.*, 2015-MISC-Assurant-0001 (Apr. 25, 2016), at 5.[6] A petitioner therefore "must undertake a good-faith effort to show 'the exact nature and extent of the hardship' imposed, and state specifically how compliance will harm its business." *In re Great Plains Lending, LLC*, 2013-MISC-Great Plains Lending-0001, at 8 (quoting *In re PHH Corp.*, 2012-MISC-PHH Corp-0001 (Sept. 20, 2012), at 6).[7] ECSI has failed to make such a showing with respect to any of its three objections.

First, ECSI objects that the request for "policies and procedures" in Requests for Documents 1, 4, 5, 6, 8, 9, 11, and 12 regarding student loan servicing activities is "extremely broad and arguably could include informal instructions or guidance communicated to employees via email, messaging applications, etc." Petition at 10-11. ECSI's observation that "policies and procedures" might include informal instructions or guidance, or might appear in email and other communications, does not demonstrate that the requests are overbroad; it simply identifies the nature of such documents and the formats in which they might exist. Moreover, ECSI refutes its own claim that the term "policies and procedures" is insufficiently precise, as it acknowledges that "there arguably is a common understanding" of the term. *Id.* at 10.

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[6] Available at http://files.consumerfinance.gov/f/201309_cfpb_decision-on-petition_great-plains-lending-to-set-aside-civil-investigative-demands.pdf; http://files.consumerfinance.gov/f/documents/201604_cfpb_decision-and-order-on-petition-by-assurant-inc-to-modify-or-set-aside.pdf.

[7] Available at http://www.consumerfinance.gov/f/201209_cfpb_setaside_phhcorp_0001.pdf.

ECSI also objects that the request for "policies and procedures" is unduly burdensome because Requests "1, 2, 5, and 6 . . . seek all policies and procedures, including those that may not be ECSI policies." *Id.* at 11. However, Request 1 is expressly limited to documents concerning ECSI, Request 2 does not seek *any* policies and procedures, and Requests 5 and 6 concern loan transfer and balance calculation issues tailored to ECSI's student loan servicing business. Even if ECSI happened to possess non-ECSI policies and procedures responsive to these requests, it has made no showing that production of such documents would be unduly burdensome.

ECSI also claims that the requests regarding policies and procedures are unduly burdensome because the CID's applicable period spans two and a half years, covers an "array of subject matters," and implicates unspecified "implementation and storage procedures." *Id.* at 11. ECSI offers no further details regarding any of these objections.[8] ECSI thus makes no attempt to demonstrate "the exact nature and extent of the hardship" associated with any of these objections, or how "compliance will harm its business." *In re Great Plains Lending, LLC*, 2013-MISC-Great Plains Lending-0001, at 8. ECSI refused the Bureau's request to provide an estimate of the time and costs associated with these requests, claiming that it lacked "any precise understanding about the nature of the specific materials the Bureau seeks in these requests." Petition at 11. As discussed above in Part I.A, this generalized objection to the June 9 CID is without merit. The CID provided a description of the nature of the Bureau's investigation sufficient for ECSI to make a good-faith effort at demonstrating the nature of its claimed burden, including by making an estimate of the time and cost of compliance. In the absence of any such estimate or any other basis to support its claim of undue burden, ECSI's objection is without merit.

Second, ECSI objects to the request for templates of communications with consumers in Requests for Documents 2, 7, 10, 14, and 15 because "it would be very burdensome to provide historical documentation of ECSI's consumer-facing website disclosures or information, such as scripting, available only through ECSI's loan management system, SAL." *Id.* ECSI offers no explanation why providing historical documentation of such communications through its loan management system is unduly burdensome, or why templates of consumer communications are available exclusively through that system.[9] As with its first objection, ECSI notes that the Bureau requested an estimate of the time and costs of compliance with these requests, but once again claims that "the request is too broad in scope for ECSI to even begin to estimate the time and cost" to comply with the Bureau's requests. *Id.* As with its first objection, ECSI's general objection to the scope of the CID is without merit and does not excuse it from its obligation to make a good-faith effort at demonstrating how the Bureau's requests are unduly burdensome. The objection is therefore without merit.

Finally, ECSI objects to a modification of Document Request 16 in the Bureau's June 27, 2017 letter. Petition at 12. Whereas Request 16 in the June 9 CID sought "all regular reports of

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[8] ECSI claims that it has "explained" its practices regarding implementation and storage, but it offers no such explanation in its petition. *See* Petition at 11.

[9] As with its first objection, ECSI claims that it has already "explained" this burden but offers no such explanation in its petition. *See* Petition at 11.

fees charged and collected related to student loans," the modified version seeks "documents sufficient to show the fees charged and collected by [ECSI] related to student loans." *See id.* ECSI claims that this modification "changes the nature of the request significantly and, indeed, arguably makes it *more burdensome* than the original" because it could require ECSI "to generate and produce records from its loan management system and/or produce communications with individual borrowers." *Id.* Although ECSI claims that this modified request is now more burdensome than the original request, it has failed to establish how this or the original request creates an undue burden. ECSI's objection is that it would have to generate and produce records and communications with borrowers. As with its other objections, it has made no attempt to demonstrate how producing such records would create an undue burden. ECSI's objection is therefore insufficient to set aside Document Request 16.

II. ECSI'S REQUEST FOR CONFIDENTIAL TREATMENT

In its request for confidential treatment ECSI claims that that it has shown good cause to withhold its petition and related materials from public disclosure. Under the framework the Bureau has set forth for evaluating requests for confidential treatment, ECSI has failed to demonstrate good cause for omitting these materials from the public record.

A. Petitions to Modify or Set Aside a CID Are Public Unless a Petitioner Shows Good Cause.

Under the Bureau's regulations governing investigations, a petition to modify or set aside a CID and the Bureau's order in response thereto are "part of the public records of the Bureau unless the Bureau determines otherwise for good cause shown." 12 C.F.R. § 1080.6(g). As the Bureau has previously stated, a petitioner under § 1080.6(g) bears the burden of demonstrating good cause that its petition should not be made public. *See In re Great Plains Lending LLC*, 2012-MISC-Great Plains Lending-0001 (Sept. 12, 2013), at 2; Decision on Request for Confidential Treatment of Petition to Set Aside Civil Investigative Demand, *In re Zero Parallel, LLC*, 2016-MISC-Zero Parallel-0001 (July 1, 2016), at 2.[10] *See also Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37, 40 n.4 (D.D.C. 1997) (in the "reverse-FOIA" context, "the party seeking to prevent a disclosure the government itself is otherwise willing to make assumes that burden"). This standard mirrors that of the Federal Trade Commission ("FTC" or "Commission")[11] and is consistent with the "general policy favoring disclosure of administrative

[10] Available at http://files.consumerfinance.gov/f/201309_cfpb_decision-on-confidentiality_greatplainslending-0001.pdf; https://www.consumerfinance.gov/documents/713/Zero_Parallel_confidentiality_decision_6-30-16_FINAL_with_signature.pdf.

[11] *See* 16 C.F.R. § 4.9(b)(4)(i) (the public record of the Commission includes "[p]etitions to limit or quash compulsory process and the rulings thereon," unless under 16 C.F.R. § 4.9(c)(4)(i) the FTC finds that the request for confidential treatment is "supported by a showing of justification in light of applicable statutes, rules, orders of the Commission or its administrative law judges, orders of the courts, or other relevant authority"); *see also* 77 Fed. Reg. 59,294, 59,300 (Sept. 27, 2012) (reiterating FTC's prior determination that "redaction of information that reveals the identity of the subject of a nonpublic investigation would 'impair the public's ability to assess and understand these important rulings.' . . . [T]he Commission has a compelling reason to continue its well-established practice of making petitions to limit or quash

agency proceedings." *FCC v. Schreiber*, 381 U.S. 279, 293 (1965) (affirming agency authority to promulgate rule generally requiring public disclosure of investigative information).

In evaluating whether a petitioner has shown good cause under 12 C.F.R. § 1080.6(g) to warrant the withholding of a petition and responsive order from the public record, the Bureau generally looks to the standards for withholding material from public disclosure established by Freedom of Information Act ("FOIA") amendments to the Administrative Procedure Act. *See In re Great Plains Lending*, 2012-MISC-Great Plains Lending-0001, at 2-3.[12] Accordingly, the Bureau will publicly disclose a petition to modify or set aside a CID unless the petitioner has made a factual showing that information in the petition falls within one of the FOIA exemptions, or unless, in particulars cases and consistent with § 1080.6(g), the Bureau in its discretion withholds all or portions of a petition from public disclosure when there is good cause and the withheld information is not otherwise required by law to be disclosed.

It is appropriate for the Bureau to use FOIA as a guidepost for evaluating the "good cause" in its own regulation because FOIA is a comprehensive, practical, and widely-used statutory framework for assessing the confidentiality of information submitted to federal agencies, and it is already incorporated into the Bureau's disclosure regulations. For example, Bureau regulations look to FOIA for considering whether information meets the definition of "confidential information," as well as for evaluating whether information is "business information" such that the Bureau must notify submitters when a third party requests it. 12 C.F.R. §§ 1070.2(f), 1070.20(b)(1). Application of FOIA standards to requests for non-public treatment of petitions also avoids potential inconsistencies whereby information in a petition deemed non-public under a different standard would nevertheless be subject to disclosure pursuant to a FOIA request.

B. ECSI Has Not Demonstrated Good Cause for Confidential Treatment of Its Petition.

ECSI offers three reasons in support of its request for confidential treatment: 1) the Bureau's own regulations militate against disclosure, 2) public disclosure of ECSI's identity serves no legitimate purpose, and 3) ECSI has a substantial privacy interest in maintaining confidentiality of the CID. Request at 2. None of these reasons constitutes good cause for withholding the petition or the Bureau's order from the public record, nor do they explicitly

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generally available unless a particularized showing is made that confidentiality should be granted") (quoting 42 Fed. Reg. 64,315 (Dec. 22, 1977)); 77 Fed. Reg. 39,101, 39,102 (June 29, 2012) (in promulgating Bureau rules governing investigations, noting that "[i]n light of the similarities between section 1052 of the Dodd-Frank Act and section 20 of the Federal Trade Commission Act . . . the Bureau drew most heavily from the FTC's nonadjudicative procedures in constructing the rules [relating to investigations]").

[12] On its webpage of petitions to modify or set aside, the Bureau identifies *In re Great Plains Lending* as "an example of the analysis we apply to determine good cause" for determining whether to "redact or withhold from public disclosure any petition or information contained within a petition." *See* http://www.consumerfinance.gov/policy-compliance/enforcement/petitions/.

address any of the FOIA exemptions relevant in evaluating a claim of good cause under 12 C.F.R. § 1080.6(g).

First, ECSI argues that its petition should be granted confidential treatment because a different Bureau regulation, 12 C.F.R. § 1080.14(b), provides that "Bureau investigations generally are non-public" and that "Bureau investigators may disclose the existence of an investigation to potential witnesses or third parties to the extent necessary to advance the investigation." *See* Request at 3. ECSI's argument ignores the specific prescription regarding petitions to set aside or modify under § 1080.6(g), under which "petitions and the Director's orders in response to those petitions are part of the public records of the Bureau" absent a showing of good cause. The language of § 1080.14(b) regarding Bureau investigations generally must be read in light of the specific provisions of § 1080.6(g) regarding the public nature of petitions to modify or set aside. Were ECSI's argument correct, the general provisions of § 1080.14(b) would render § 1080.6(g) superfluous.[13] The Bureau has previously rejected similar arguments that mistakenly apply the general provisions of § 1080.14(b) to petitions submitted under § 1080.6. *See In re Great Plains Lending*, 2012-MISC-Great Plains Lending-0001, at 8; *see also* 5 U.S.C. § 552(a)(2) (requiring that federal agencies make final opinions and orders publicly available).

In support of its argument ECSI also relies on *John Doe Co. No. 1 v. CFPB*, in which the court stated that the disclosure provision under § 1080.14 "undercuts any claim that public disclosure is appropriate in the absence of an investigative necessity or other substantial purpose." Request at 3 (quoting *John Doe Co. No. 1*, 195 F. Supp. 3d 9, 20 (D.D.C. 2016)). However, as *John Doe* itself makes clear, that case is not applicable to petitions to modify or set aside under 12 C.F.R. § 1080.6. The plaintiffs in *John Doe* were not filing a petition under § 1080.6 but rather were seeking to keep their identities under seal in a court proceeding. *See John Doe Co. No. 1*, 195 F. Supp. 3d at 12. As the court stated, parties seeking to remain anonymous in court proceedings are in a substantially different posture than parties seeking to modify or set aside a CID under § 1080.6. *See id.* at 19-21. Although subjects of government investigations may have some interest in preventing an investigation from becoming public, the court emphasized that the weight of that interest "will vary with the relevant statutory and regulatory regime." *Id.* at 19. Here, the regulatory regime under which ECSI filed its petition provides that petitions to modify or set aside "are part of the public record" absent a showing of good cause. 12 C.F.R. § 1080.6(g). Thus, as the court in *John Doe* noted, when a party takes the "affirmative action" of filing a petition to modify or set aside a CID under § 1080.6, it "initiates a formal process" under which the petition and subsequent order generally will be made public.

[13] For similar reasons, ECSI's reliance on the Bureau's response to a comment regarding § 1080.14 submitted in the final rulemaking process is similarly inapposite to its argument regarding confidential treatment under § 1080.6(g). In its response to a commenter, the Bureau characterized the disclosure provision under § 1080.14 regarding potential witnesses and third parties as a "limited exception" necessary to address the Bureau's need "to obtain information efficiently" as part of an investigation. *See* Request at 3-4 (quoting 77 Fed. Reg. 39,101, 39,107 (June 29, 2012)). ECSI argues that under § 1080.14 there is "no potential witness or third party" to whom the Bureau would be disclosing its petition, but that argument is inapplicable where, as here, a petition to modify is governed under the specific provisions of § 1080.6(g) favoring disclosure of petitions absent a showing of good cause.

John Doe Co. No. 1, 195 F. Supp. 3d at 21. *John Doe* therefore provides no support for ECSI's argument that the provisions of § 1080.6(g) do not apply to its petition.[14]

Second, ECSI argues that public disclosure of ECSI's identity serves no legitimate purpose. Request at 4. ECSI's argument ignores a principal purpose of the rule favoring disclosure under § 1080.6. The Bureau's policy of making available to the public petitions to set aside or modify CIDs, as well as the Bureau's rulings thereon, helps further the "general policy favoring disclosure of administrative agency proceedings." *See Schreiber*, 381 U.S. at 293. As the Supreme Court has recognized, there is a basic policy of "pierc[ing] the veil of administrative secrecy and open[ing] agency action to the light of public scrutiny." *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976)). The Bureau's rules under § 1080.6 serve the purpose of that policy, as "redaction of information that reveals the identity of the subject of a nonpublic investigation would impair the public's ability to assess and understand" the Bureau's rulings on petitions to modify or set aside CIDs. 77 Fed. Reg. 59,294, 59,300 (Sept. 27, 2012) (internal quotation marks omitted) (parallel FTC provision making petitions presumptively public).

ECSI's arguments fail to show that this purpose of disclosing petitions and its underlying policy are not legitimate. ECSI again claims that 12 C.F.R. § 1080.14 establishes a "default rule" of non-disclosure. *Id.* However, as noted above, that argument ignores the more specific provisions of § 1080.6 governing petitions to set aside or modify, as well as the public policy favoring disclosure of administrative proceedings. ECSI also claims that "[n]o First Amendment public right of access attaches to these materials," but fails to identify the relevance of such a constitutional question to the regulatory prescription governing disclosure of petitions under § 1080.6. *Id.* ECSI also mistakenly argues that its petition concerns the "enforceability of an administrative subpoena" and therefore "is akin to a discovery dispute, which are 'afforded a stronger presumption of privacy, as those materials typically are not public[ly] accessible.'" *Id.* at 4-5 (quoting *Friedman v. Sebelius*, 672 F. Supp. 2d 54, 61 (D.D.C. 2009)). As with its reliance on *John Doe*, the case on which ECSI relies in support of this argument concerned the sealing of court proceedings and therefore is not applicable to a petition filed under 12 C.F.R. § 1080.6. *See Friedman*, 672 F. Supp. 2d at 55; *John Doe Co. No. 1*, 195 F. Supp. 3d at 19-21.

Third, ECSI argues that it has a substantial privacy interest warranting confidential treatment of its petition and that public disclosure could cause ECSI financial and reputation harm. Request at 5. In support of its privacy argument ECSI relies on cases evaluating statutory and regulatory regimes very different from that of 12 C.F.R. § 1080.6(g). As the court in *John Doe* acknowledged, § 1080.6(g) is part of a regulatory regime in which a petitioner's affirmative action of filing a petition to modify or set aside a CID subjects the petition to public disclosure. *See John Doe Co. No. 1*, 195 F. Supp. 3d at 21. In contrast, ECSI relies on cases in which there is no such presumption of disclosure. For example, ECSI cites *In re Sealed Case*, but that case

[14] ECSI also suggests that the Bureau has "no identifiable interest" in making ECSI's petition public. Request at 4. This again misses the point of § 1080.6(g). The general rule favoring disclosure of petitions does not require the Bureau to identify a specific interest each time it discloses a petition filed under § 1080.6, especially when that rule is consistent with the "general policy favoring disclosure of administrative agency proceedings." *Schreiber*, 381 U.S. at 293.

concerned a clear statutory mandate that prohibited the Federal Election Commission ("FEC") from making investigations public without express written consent of the investigated party. 237 F.3d 657, 667 (D.C. Cir. 2001). In light of that statutory command, the court analogized the standard for disclosure of FEC investigations to that of grand jury proceedings, which are presumptively secret under Federal Rule of Criminal Procedure 6(e)(6). *Id.* No such presumption applies to petitions filed under 12 C.F.R. § 1080.6. Similarly, ECSI relies on *GTE Sylvania Inc. v. Consumer Prod. Safety Comm'n*, but the agency in that case was statutorily required "to take reasonable steps to assure accuracy" before disclosing the information at issue. 404 F. Supp. 352, 366 (D. Del. 1975). Again, no such statutory requirement applies to materials disclosed under § 1080.6(g).

ECSI's claim of potential financial and reputational harm is similarly unavailing.[15] ECSI claims that it has "significant commercial and privacy interests that must be protected from public disclosure" but offers no further details, facts, or other support for this claim. Request at 6. As the Bureau has previously stated, such conclusory and speculative recitations are insufficient to make the showing of harm necessary to warrant confidential treatment under § 1080.6(g). *See In re Great Plains Lending*, 2012-MISC-Great Plains Lending-0001, at 5-6. *See also, e.g., Gen. Elec. Co. v. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1403 (7th Cir. 1984) (rejecting "speculative" assertion of competitive harm arising from release of single document); *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983) ("Conclusory and generalized allegations of substantial competitive harm, of course, are unacceptable."); *Hodes v. Dep't of Hous. & Urban Dev't*, 532 F. Supp. 2d 108, 118-19 (D.D.C. 2008) (party seeking to withhold document must "demonstrate with sufficient specificity that substantial competitive harm . . . would result from disclosure"). As the Bureau has also stated previously, such speculative risk is identical to the risk every recipient of a Bureau CID faces. *See In re Zero Parallel* at 11. If such purported risk were alone sufficient to demonstrate good cause, the presumption of disclosure under 12 C.F.R. § 1080.6(g) would be meaningless. *See id.*; *see also In re Great Plains Lending*, 2012-MISC-Great Plains Lending-0001, at 8.

CONCLUSION

For the foregoing reasons, ECSI's petition to set aside or modify the CID and its request for confidentiality are denied.[16] Within ten calendar days of this Decision and Order, ECSI is

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[15] Although ECSI make this claim of harm in support of a showing of good cause under 12 C.F.R. § 1080.6(g), its claims will be analyzed under the standards applicable to Exemption 4 of FOIA, which permits agencies to withhold otherwise public information when that information that is "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). For the same reasons cited herein, the Bureau does not find that ECSI's claims of financial and reputational harm constitute separate good cause under § 1080.6(g).

[16] ECSI requests that if the Bureau denies its request for confidential treatment that it be given advance notice of this determination pursuant to 12 C.F.R. § 1070.46(b). Request at 2. As the Bureau has previously stated, § 1070.46(b) applies only when the Director has decided to disclose confidential information. *See In re Great Plains Lending*, 2012-MISC-Great Plains Lending-0001, at 11 n.15. The provisions of § 1070.46(b) do not apply where, as here, the

directed to produce all responsive documents, items, and information within its possession, custody, or control that are covered by the CID. The company is welcome to engage in further discussions with the Bureau's Enforcement team about any suggestions for further modifying the CID, which may be adopted by the Assistant Director for Enforcement or his Deputy as appropriate.

This Decision and the accompanying Petition and Request will be published on the Bureau's website no fewer than five business days after service of the Decision on the petitioner.

Richard Cordray

Richard Cordray, Director

September 8, 2017

Bureau has determined that the information at issue is not entitled to confidential treatment. *See id.*; *see also In re Zero Parallel* at 1 n.2. Consistent with its general practice, the Bureau has provided advance notice to ECSI of the denial of its request for confidential treatment prior to releasing the information at issue to the public. *See id.*