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

IN RE GREAT PLAINS LENDING, LLC, MOBILOANS, LLC & PLAIN GREEN, LLC

2012-MISC-Great Plains Lending-0001

DECISION ON REQUEST FOR CONFIDENTIAL TREATMENT OF JOINT PETITION BY GREAT PLAINS LENDING, LLC, MOBILOANS, LLC, AND PLAIN GREEN, LLC[1]

This matter comes before the U.S. Consumer Financial Protection Bureau on a request by Great Plains Lending, LLC, Mobiloans, LLC, and Plain Green, LLC (together Petitioners) for confidential treatment associated with a petition to modify or set aside a civil investigative demand (CID) issued by the Bureau. As discussed below, the request for confidential treatment is denied because Petitioners have failed to demonstrate good cause for omitting their petition or the Director's order in response thereto from the public record. In addition, to provide more specific guidance to parties submitting similar confidentiality requests, the discussion below sets forth in detail the framework that will be applied in evaluating such requests and is therefore more extensive than may be typical of these orders.

STATEMENT OF FACTS

On June 12, 2012, the Bureau issued CIDs for answers to interrogatories and production of documents to each of the Petitioners. On July 17, 2012, after requesting and receiving an extension of time, Petitioners filed a joint petition to set aside the CIDs. Petitioners included a redacted version of their petition with their names and identifying information blocked out. In a cover letter accompanying the petition, Petitioners requested "confidential treatment of the Joint Petition pursuant to 12

[1] This order is issued by the Associate Director for Supervision, Enforcement, and Fair Lending pursuant to delegated authority.

C.F.R. §§ 1080.6(g) and 1018.14 [*sic*], and for advance notice, pursuant to 12 C.F.R. § 1070.46 , should the Bureau determine that it will disclose or release the Joint Petition or any response thereto by the Bureau."[2] Petitioners stated that they sought "confidential treatment of their identities because public disclosure of the existence of the investigation would harm their business interests." Petitioners also asserted that, because investigations "are generally non-public" (quoting 12 C.F.R. § 1080.14), petitions to set aside or modify a CID should similarly be non-public, "lest those under investigation be required to choose between keeping the investigation confidential and filing a petition."

On January 24, 2013, the Bureau notified Petitioners that it intended to issue a decision denying the confidentiality request and informed Petitioners that they could elect to withdraw their petition in advance of the confidentiality decision. Petitioners asked that they be allowed to make a further written submission supporting their request for confidential treatment of the petition. The Bureau granted their request, stating in a letter to Petitioners' counsel that they should explain in their supplemental submission "whether good causes exists under 12 C.F.R. § 1080.6(g) for confidential treatment" and "address the application of the standards for withholding materials from public disclosure established by the Freedom of Information Act amendments to the Administrative Procedure Act, 5 U.S.C. § 552" (FOIA).

On February 8, 2013, Petitioners submitted a letter brief in which they advanced new arguments and authorities in support of their request for confidential treatment of text in their petition and all attached exhibits. Petitioners also expressly asked that the Director's order on the petition be redacted along the same lines as the petition.

LEGAL DISCUSSION

Under the Bureau's regulations, "petitions [to modify or set aside a CID] and the Director's orders in response to those petitions 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). "Any showing of good cause must be made no later than the time the petition is filed." *Id.* Petitioners therefore bear the burden of showing good cause for confidential treatment under this regulation.

In evaluating whether a petitioner has shown good cause for confidential treatment of all or a portion of a petition to modify or set aside a CID, the Bureau will

[2] FOIA requires "[e]ach agency, in accordance with published rules, [to] make available for public inspection and copying," *inter alia*, "(A) final opinions . . . as well as orders, made in the adjudication of cases." 5 U.S.C. § 552(a)(2)(A).

generally employ the standards for withholding material from public disclosure established by the FOIA amendments to the Administrative Procedure Act (APA), 5 U.S.C. § 552, although in particular cases and consistent with 12 C.F.R. § 1080.6(g), the Bureau retains discretion to withhold all or portions of a petition from public disclosure when there is good cause and when the withheld information is not otherwise required by law to be disclosed.

FOIA is a comprehensive, practical, and widely used statutory framework. Bureau regulations already employ FOIA standards in relation to requests by third parties for business information provided to the Bureau. 12 C.F.R. § 1070.20. It is also the standard used by the Federal Trade Commission[3] (FTC) and the Commodities Futures Trading Commission[4] in similar circumstances. Furthermore, if a petitioner chooses to challenge a decision on their request for confidentiality, a court might consider FOIA standards in deciding that action. *Cf. FTC v. Owens-Corning Fiberglass Corp.*, 626 F.2d 966, 970-71 (D.C. Cir. 1980) (referencing FOIA standards in action concerning confidentiality of information produced pursuant to subpoenas). Application of FOIA standards to requests for confidentiality of petitions and orders would also avert potential inconsistencies where information in a petition or order deemed confidential under a standard different from FOIA would nonetheless be susceptible to disclosure upon the submission of a FOIA request.

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 the Bureau determines that there exists other good cause to withhold all or a portion of the petition from public disclosure and the withheld information is not otherwise required by law to be made public. *See* 12 C.F.R. 1080.6(g).

This Decision examines Petitioners' request under the FOIA standard that the Bureau intends to employ in evaluating such requests. The relevant FOIA exemption is Exemption 4, which permits agencies to withhold otherwise public information when that information is "commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).[5]

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[3] 16 C.F.R. § 4.9(c) (Federal Trade Commission standards for handling requests for confidential treatment *inter alia* for petitions to limit or quash compulsory process and the rulings thereon which mirrors the FOIA framework).

[4] 17 C.F.R. § 145.9 (FOIA framework for requests for confidential treatment filed with Commodities Futures Trading Commission).

[5] Exemption 4 also includes "trade secrets." 5 U.S.C. § 552(b)(4). A trade secret is "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Pub. Citizen Health Research Grp. v.*

Although a submitter of potentially confidential commercial or financial information should be given an opportunity to provide the agency with its views on whether that information qualifies as "commercial or financial" under Exemption 4 and the possible harm that would be caused by disclosure, the agency is "required to determine for itself whether the information in question should be disclosed." *Lee v. FDIC*, 923 F. Supp. 451, 454 (S.D.N.Y. 1996); *accord* Exec. Order No. 12,600, 52 Fed. Reg. 23,781 (1987) §§ 4-5, reprinted at 5 U.S.C.A. § 552, notes (predisclosure notification procedures for confidential commercial information); 12 C.F.R. § 1070.20 (Bureau regulations implementing Exec. Order No. 12,600). Here, Petitioners have not established that information or documents contained in the petition fall within the protections of Exemption 4, and the Bureau's own examination of the facts presented by Petitioners has disclosed no basis for such confidential treatment.

In determining whether information qualifies as "commercial" within Exemption 4, courts have construed "commercial" broadly, giving the term its ordinary meaning. *See Nat'l Ass'n of Home Builders v. Norton,* 309 F.3d 26, 38 (D.C. Cir. 2002). "Commercial information need not be limited to information that 'reveal[s] basic commercial operations,' but may include any information in which the submitter has a 'commercial interest,' such as business sales statistics, research data, overhead and operating costs, and financial conditions." *COMPTEL v. FCC*, 910 F. Supp. 2d 100, 115 (D.D.C. 2012) (citing *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983)). Courts have admonished, however, that "[n]ot every type of information provided to the government by an entity engaged in commerce falls within [FOIA Exemption 4]." *British Airports Auth. v. U. S. Dep't of State*, 530 F. Supp. 46, 49 (D.D.C. 1981) (citing *Getman v. NLRB*, 450 F.2d 670, 673 (D.C. Cir. 1971)). The D.C. Circuit has noted that "information is 'commercial' under this exemption if, 'in and of itself,' it serves a 'commercial function' or is of a 'commercial nature.'" *Nat'l Ass'n of Home Builders*, 309 F.3d at 38 (citing *Am. Airlines, Inc. v. Nat'l Mediation Bd.*, 588 F.2d 863, 870 (2d Cir. 1978)). A D.C. district court held that material that included "the *name*" of a business "simply cannot be said to be information that falls within the ordinary meaning of the terms 'commercial' or 'financial.'" *British Airports Auth.*, 530 F. Supp. at 49 (emphasis added).

Accordingly, the Bureau concludes that Petitioners' business names are not the type of information that courts have held to be "commercial" under this standard. Further, the fact that Petitioners have received a Bureau CID is not information that "in and of itself serves a commercial function" or is "of a commercial nature."

Food & Drug Admin., 704 F.2d 1280, 1288 (D.C. Cir. 1983). Petitioners have not asserted and there is no basis to conclude that the petition contains trade secrets.

Petitioners also claim that documents attached as exhibits to the petition – a tribal resolution creating one of the payday lending entities; operating agreements for two of the entities; one entity's charter; another entity's articles of organization; and an excerpt from the limited liability act of one of the tribes – constitute "commercial" information within Exemption 4. Petitioners assert that these documents contain proprietary and commercial information about the companies' origins, formation, business structure, and management and that the documents themselves and any references to them in the body of the petition should be withheld from public disclosure under Exemption 4.

The Bureau disagrees. None of these documents include any operational details, business plans, strategic plans, or any other information that serves a commercial function or is commercial in nature. They contain only the most elemental information about the companies' organization, such as the composition of the board of directors, the general authority and responsibilities of officers, directors, and tribal councils, recitations regarding the entities' powers and immunities, and statements that the entities are wholly owned by the tribes and purport to be arms of the tribes. This is not the type of information that courts have construed to be "commercial" under Exemption 4. *Cf. Dow Jones Co. v. FERC*, 219 F.R.D. 167, 176 (C.D. Cal. 2002) (information relating "to business decisions and practices regarding the sale of power, and the operation and maintenance of the generation units" held to be "commercial" under Exemption 4).[6] Petitioners cite no case holding that information about a company's origin, formation, and basic structure is commercial information under Exemption 4.

Even if, arguendo, any of the information identified by Petitioners is commercial, there must be a further showing to satisfy Exemption 4: the information must be "privileged or confidential," and Petitioners' information is neither.[7] The Bureau has been unable to identify any privilege that might attach to Petitioners' identities, their association with an investigation, or their formation and basic

[6] Other examples where courts have found information and documents to be "commercial" include the following: documents assessing the commercial strengths and weaknesses of the U.S. lumber industry, the industry's requirements for achieving a competitive lumber market, and a description of the competitive challenges facing domestic lumber companies, *Baker & Hostetler v. U.S. Dep't of Commerce,* 473 F.3d 312, 319 (D.C. Cir. 2006); reports describing in detail operations of nuclear power plants, *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 830 F.2d 278, 281 (D.C. Cir. 1987); and "[i]nformation regarding oil and gas leases, prices, quantities and reserves," *Merit Energy Co. v. U.S. Dep't of the Interior*, 180 F. Supp. 2d 1184, 1188 (D. Colo. 2001).

[7] "'Privileged' information is generally understood to be information that falls within recognized constitutional, statutory, or common law privileges." *Gen. Elec. Co. v. Dep't of Air Force*, 648 F. Supp. 2d 95, 101 (D.D.C. 2009)(citing *Washington Post Co. v. U.S. Dep't of Health & Human Servs.,* 690 F.2d 252, 267-268 & n. 50 (D.C. Cir. 1982)).

structure, and Petitioners have made no such argument. Information from a submission to the government pursuant to a compulsory process may be deemed "confidential" if disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *United Technologies Corp. v. U.S. Dep't of Defense*, 601 F.3d 557, 563 (D.C. Cir. 2010).[8] Substantial harm to Petitioners' competitive position "should not be taken to mean simply any injury to competitive position," but should "be limited to harm flowing from the affirmative use of proprietary information by *competitors*." *Pub. Citizen Health Research Grp. v. FDA*, 704 F.2d 1280, 1291 & n.30 (D.C. Cir. 1983) (emphasis in original). "[C]onclusory and generalized allegations of substantial competitive harm cannot support an agency's decision to withhold requested documents." *In Defense of Animals v. U.S. Dept. of Agriculture*, 656 F. Supp. 2d 68, 73 (D.D.C. 2009) (citing *Pub. Citizen Health Research Grp.*, 704 F.2d at 1291).[9]

Petitioners claim that public disclosure of the fact that they have been served with Bureau CIDs would harm their reputations, injure their business interests and governmental programs, erode consumer confidence in their operations, hamper access to capital, cause a drop in business, and likely increase default rates by borrowers.[10] The Bureau does not agree. Courts have held that such conclusory recitations of remote prospects of competitive injury are insufficient. *See, e.g.*, *Gen. Elec. Co. v. U.S. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1403 (7th Cir. 1984) (competitive harm likely done by release of document "too speculative to bring exemption 4 into play."); *Hodes v. HUD*, 532 F. Supp. 2d 108, 118-19 (D.D.C. 2008) (finding that HUD improperly invoked Exemption 4 when it failed to "provide any

[8] It should be noted that when information is submitted to the government voluntarily, several courts have adopted a more lenient test for determining "confidentiality." Under that test, the party seeking to prevent disclosure must only show that the material "is of a kind that would customarily not be released to the public by the person from whom it was obtained." *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992). That standard is not applicable here; where the information has been provided in connection with a subpoena, courts are clear that the applicable test is substantial competitive harm. *See, e.g.*, *Gavin v. SEC*, Civil No. 04–4522, 2007 WL 2454156, at *6-7 (D. Minn. Aug. 23, 2007).

[9] Information may also be deemed confidential if its disclosure would "impair the Government's ability to obtain necessary information in the future." *Nat'l Parks*, 498 F.2d at 770. Here, there is no basis on which to conclude that the disclosure of any of the contents of the petition would impair the Bureau's ability to obtain necessary information in the future. This is usually an interest invoked by the Government to prevent disclosure, *see Nat'l Parks & Conservation Ass'n*, 498 F.2d at 770, and at least one circuit has held that this interest can *only* be raised by the Government. *See Hercules Inc. v. Marsh*, 839 F.2d 1027, 1030 (4th Cir. 1988).

[10] Although Petitioners make these assertions in support of a finding of good cause under 12 C.F.R. § 1080.6(g), their claims will be analyzed under the standards applicable to Exemption 4 of FOIA. Nevertheless, for the same reasons cited herein, the Bureau does not find that Petitioners' allegations of reputational and commercial harm constitute separate good cause under section 1080.6(g).

specific information" to substantiate a competitive harm claim). In particular, the mere fact that Petitioners would suffer embarrassment as a result of their associations with law enforcement investigations is not the type of "harm" that justifies confidentiality. *See Pub. Citizen Health Research Grp.*, 704 F.2d at 1291 n.30 ("Competitive harm should not be taken to mean simply any injury to competitive position, as might flow from . . . the embarrassing publicity attendant upon public revelations concerning, for example, illegal or unethical payments to government officials or violations of civil rights, environmental or safety laws."); *Gen. Elec. Co.*, 750 F.2d at 1402 ("[T]he competitive harm that attends any embarrassing disclosure is not the sort of thing that triggers exemption 4.").

Applying the "confidentiality" requirement of Exemption 4 to the petition exhibits, which are currently not public, Petitioners contend the documents and information they contain "amount[] to a tutorial on the structure and management of tribal lending entities for potential competitors." However, the formation documents to which Petitioners refer are generic in nature and contain no specific business, strategic, or operational plans or structures that "could be used by their competitors for commercial gain" in a manner likely to cause substantial competitive injury. *See In Def. of Animals*, 656 F. Supp. 2d at 79-80 (citing *Pub. Citizen Health Research Grp.,* 704 F.2d at 1291). In *In Defense of Animals*, the court found that evidence presented by the party opposing disclosure was "unaccompanied by any assessment of the likelihood that the particular information . . . are data that competitors would be able to use for commercial advantage, rather than benign data" and concluded that it was "an insufficient basis upon which to conclude that there is a likelihood of substantial competitive injury in this case." *Id.* at 80. Here, there is no basis upon which to conclude that Petitioners' generic formation documents contain information that could be used by their competitors for commercial gain in a manner likely to cause substantial competitive injury to Petitioners. *See also Gen. Elec. Co. v. U.S. Nuclear Regulatory Comm'n*, 750 F.2d 1394, 1403 (7th Cir. 1984) (competitive harm likely done by release of document "too speculative to bring exemption 4 into play."). *Cf. SMS Data Prods. Group, Inc. v. U.S. Dep't of the Air Force*, No. 88-0481, 1989 WL 201031, at *4 (D.D.C. Mar. 31, 1989) (information held to be "confidential" under Exemption 4 included "currently unannounced and future products, proprietary technical information, pricing strategy, and subcontractor information").[11]

[11] Other cases where courts have held that the disclosure of information was likely to cause substantial harm to the competitive position of the person from whom the information was obtained include the following: detailed financial information, such as a company's assets, liabilities, and net worth, *see Nat'l Parks*, 547 F.2d at 684; a company's actual costs, break-even calculations, profits, and profit rates, *see Gulf & W. Indus. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979); data describing a company's workforce that would reveal labor costs, profit margins, and competitive vulnerability, *see Westinghouse Elec. Corp. v. Schlesinger*, 392 F. Supp. 1246, 1249 (E.D. Va. 1974); royalty rate information, *Pub. Citizen Health Research Grp. v. National Institutes of Health*, 209 F. Supp. 2d 37, 47 (D.C. Cir. 2002); and market share, type of product, and volume of sales, *see Sharkey v. FDA*, 250 F. App'x 284, 289-90 (11th Cir. 2007).

The Bureau also finds that none of the other FOIA exemptions apply to Petitioners' request for confidential treatment of their identities or formation documents. Those other exemptions cover classified information, internal agency personnel rules and practices, information exempted by other statutes, inter or intra-agency memoranda or letters, personnel and medical files, supervisory information, and geological and geophysical information. 5 U.S.C. § 552(b)(1)-(3), (5)-(6), (8)-(9).[12]

Section 1080.6 grants the Bureau discretion to keep information confidential that is not otherwise required by law to be disclosed even if it does not fall under a FOIA exemption. There may be extraordinary or unusual factual circumstances that would justify such an exercise of the Bureau's discretion. However, Petitioners have not identified any such good cause for withholding their identities or formation documents, nor does the Bureau find any. Petitioners point only to the potential for harm to their reputation and business interests if the information were disclosed. However, if the mere assertion of such harm were sufficient good cause for withholding a petitioner's name under section 1080.6, the public record of the Bureau would be restricted in virtually every case, in contravention of that section's the general rule that petitions to modify or set aside are public.

In addition to their FOIA arguments, Petitioners assert that in 12 C.F.R. § 1080.14 and official commentary, the Bureau has "recognized the reputational and commercial risk that comes with publicizing investigations." While section 1080.14(b) provides that "Bureau investigations generally are non-public," it does not follow, as Petitioners' contend, that section 1080.14 compels the redaction of investigation subjects' names from petitions and orders in order to protect them from asserted reputational injury. The general language of section 1080.14 must be read in light of the specific prescription in 12 C.F.R. § 1080.6 that "petitions and the Director's orders in response to those petitions are part of the public records of the Bureau" absent good cause. *See also* FOIA, 5 U.S.C. § 552(a)(2) (requiring that federal agencies make final opinions and orders publicly available).

Furthermore, Petitioners' argument is based on the incorrect premise that section 1080.14 provides for generally non-public investigations in order to protect investigation subjects from reputational harm. There are multiple reasons for not

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[12] Petitioners raise FOIA Exemption 7(A) as a further basis upon which to grant their request for confidentiality. That exemption, which is a discretionary privilege belonging to the Bureau, covers "records or information compiled for law enforcement purposes . . . to the extent that the production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C.A. § 552(b)(7)(A). That exemption is thus not applicable here.

publicizing investigations – principally, to protect the integrity of investigations and safeguard the identity of witnesses and whistleblowers. Section 1080.14 is therefore not in conflict with the publication of unredacted petitions and orders.[13]

Petitioners also assert that the Bureau's procedures for deciding confidentiality requests violate their constitutional rights, are contrary to the practices of other federal agencies, and are bad policy. As described above, the Bureau gave Petitioners advance notice that their initial confidentiality request would be denied on the merits. The purpose of this advance notice was to give Petitioners an opportunity, before publication of the petition and Director's order, to withdraw their petition or seek any available judicial review.

Petitioners contend that this procedure violates their constitutional rights to due process and to petition government. Petitioners incorrectly recast the Bureau's procedure as an ultimatum: either withdraw the petition or the Bureau will publicly disclose its investigation. Petitioners argue that this procedure violates their due process rights because they are unable to obtain a ruling on the merits of their petition without incurring reputational harm from the public disclosure of the investigation. They contend that this procedure also amounts to retaliation for conduct protected by the Petition Clause.

The Bureau disagrees with this characterization of its procedures. The advance notice procedure is designed as an added protection to CID recipients seeking confidential treatment. This is an exception to the default rule, under the Bureau's regulations, that petitions will be part of the public record. Before any information is released publicly, the CID recipient has the option of either withdrawing its petition or seeking judicial review in order to prevent public disclosure. This procedure in no way deprives Petitioners of due process or penalizes them for filing a petition with the Bureau. The alternative – that the Bureau issues its decision denying the confidentiality request without prior notice to Petitioners – would provide fewer, not greater, protections.

Moreover, the authorities Petitioners cite in support of their due process argument are inapposite. They concern due process violations where penalties for

[13] In the official commentary cited by Petitioners, the Bureau rejected a commenter's recommendation that the Bureau revise section 1080.14 to mandate that Bureau investigations remain confidential in light of "the potential reputation risk to an entity if an investigation is disclosed to the public." *See* Bureau of Consumer Financial Protection, RIN 3170-AA03, Rules Relating to Investigations, Comments on Final Rulemaking at 23-24 (2012). As discussed below, the FTC, which has rules similar to those of the Bureau, recently rejected a similar proposal to redact names and identifying information from petitions and keep that information confidential during the pendency of investigations. *See* 77 Fed. Reg. 52,924, 59,300 (Sept. 27, 2012) (citing 42 Fed. Reg. 64,135 (Dec. 22, 1977)).

seeking judicial review of the validity of an administrative scheme are so enormous that a party is effectively deprived of access to the courts. No such barriers to judicial review exist here. In *Louisiana Pac. Corp. v. Beazer Materials & Servs., Inc.*, 842 F. Supp. 1243, 1252 (E.D. Cal. 1994), the court held that "[g]overnment action violates due process not only when it completely denies the opportunity for judicial review, but also when the penalties for disobedience are so enormous that they intimidate a potential challenger from exercising its right of access to the courts." *Id.* at 1252 (citing *Ex parte Young,* 209 U.S. 123 (1908)).[14] The court explained that while "an administrative scheme which, through substantial penalty provisions, chills an affected party's right to seek judicial review is unconstitutional . . . , an administrative scheme satisfies due process if it allows good faith challenges to be brought without the risk of incurring substantial penalties." *Id.* (citing *Wagner Seed Co. v. Daggett,* 800 F.2d 310, 315 (2d Cir.1986)).

Petitioners have failed to demonstrate that publication of the fact that they were served with Bureau CIDs would amount to such a substantial penalty that would effectively preclude them from obtaining a ruling from the Director on the merits of their petition. Moreover, Petitioners have not shown how the Bureau has in any way impeded their access to judicial review. What Petitioners propose, in essence, is that the Bureau permit the filing of anonymous petitions – presumably based on the mere assertion of reputational harm. Petitioners have identified no constitutional authority that would compel such an entitlement.

Finally, Petitioners' assertion that the Bureau's procedures are contrary to the practices of other federal agencies is incorrect. The FTC recently reaffirmed its practice of publishing the identities of parties who have filed petitions to limit or quash. Like the Bureau's regulation, FTC Rule 4.9 provides that the public record of the FTC includes "[p]etitions to limit or quash compulsory process and the rulings thereon." 16 C.F.R. § 4.9(b)(4)(i).) The FTC considered and rejected a proposal to keep the names of petitioners confidential during the pendency of an investigation, explaining that it had "previously determined 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.'" 77 Fed. Reg. 52,924, 59,300 (Sept. 27, 2012) (citing 42 Fed. Reg. 64,135 (Dec. 22, 1977)).

[14] In order to deprive a party of its right to due process under this line of cases, the penalty for seeking judicial review must be substantial. *See Ex Parte Young,* 209 U.S. at 147 ("[T]he penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation."); *Brown & Williamson Tobacco Corp. v. Engman,* 527 F.2d 1115, 1119 (2d Cir. 1975) ("the prospect of debilitating or confiscatory penalties").

In resolving this request, the Bureau recognizes that its decision may assist in developing other parties' expectations about how the Bureau will handle requests for confidentiality. The discussion has thus been expanded to explain the legal framework and standards that the Bureau will apply when deciding such requests.

For the foregoing reasons, Petitioners' request for confidentiality is denied. In order to furnish Petitioners with an opportunity to consider its response to this Decision, notice is hereby given that neither this Decision nor the petition, nor any Decision and Order on the petition, shall be published until at least ten (10) calendar days from the date of this Decision.[15]

Steven L. Antonakes
Deputy Director and Associate Director
Supervision, Enforcement, and Fair Lending

September 12, 2013

[15] Petitioners incorrectly requested that the Bureau provide "advance notice, pursuant to 12 C.F.R. § 1070.46(b)" of a decision to deny their confidentiality request. Section 1070.46(b) applies only when the Director has decided to disclose confidential information. That rule does not apply to the disclosure of information that the Bureau has determined is not entitled to confidential treatment. Nonetheless, as a matter of general practice, the Bureau will typically provide advance notice of a denial of confidential treatment prior to releasing the information at issue to the public.