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

IN RE GREAT PLAINS LENDING, LLC; MOBILOANS, LLC; and PLAIN GREEN, LLC	)
2013-MISC-Great Plains Lending-0001	)

DECISION AND ORDER ON PETITION BY GREAT PLAINS LENDING, LLC; MOBILOANS, LLC; AND PLAIN GREEN, LLC TO SET ASIDE CIVIL INVESTIGATIVE DEMANDS

Great Plains Lending, LLC; MobiLoans, LLC; and Plain Green, LLC (collectively, "the Lenders") have petitioned the U.S. Consumer Financial Protection Bureau to set aside civil investigative demands issued to each of them. Their joint petition presents issues of federal authority over lenders whose businesses are affiliated in some manner with Indian tribes, and thus bears precedential value meriting more extended discussion. For the following reasons, the petition is denied. The Lenders are directed to comply with the CIDs within 21 calendar days of this Decision and Order.

STATEMENT OF FACTS

This matter arises from the Bureau's investigation into several online-lending entities that offer a variety of online small-dollar loan products, including payday loans, installment loans, and lines of credit. As part of the investigation, the Bureau issued CIDs to each of the Lenders on June 12, 2012. The CIDs contained a "Notification of Purpose" advising the Lenders that the Bureau's investigation sought to determine whether small-dollar online lenders or other unnamed persons have engaged in unlawful acts or practices relating to the advertising, marketing, provision, or collection of small-dollar loan products, in violation of Section 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Truth in Lending Act, the Electronic Funds Transfer Act, the Gramm-Leach-Bliley Act, or any other Federal consumer financial law.

On July 17, 2012, after requesting and receiving an extension of time, the Lenders filed this joint petition to set aside the CIDs. The Petition explains that the Lenders are limited liability companies organized and chartered under the laws of federally recognized Indian tribes. In particular, each lender was created by resolution of its respective tribe in or about 2011 and is wholly owned by that tribe. Great Plains was created by the Otoe-Missouria Tribe of Indians, located in Oklahoma; MobiLoans was created by the Tunica-Biloxi Tribe of Louisiana; and Plain Green was created by the Chippewa Cree Tribe of Rocky Boy's Reservation, located in Montana. Pet. at 2-6.

LEGAL DISCUSSION

As the Bureau explained in its Decision and Order on PHH Corporation's Petition to Modify or Set Aside Civil Investigative Demand, the Bureau will decline to set aside a CID so long as (1) the investigation is for a lawfully authorized purpose; (2) the information requested is relevant to the investigation; and (3) procedural requirements are followed. Decision and Order on PHH Corporation's Petition to Modify or Set Aside Civil Investigative Demand, No. 2012-MISC-PHH Corp-0001, at 5 (2012), *available at* http://files.consumerfinance.gov/f/201209_cfpb_setaside_phhcorp_0001.pdf.

The Lenders focus their main arguments on the first prong of this test, arguing that the Bureau's investigation is not for a lawfully authorized purpose because the Bureau lacks authority to issue CIDs to tribally-affiliated entities like them. They also contend that the CIDs do not provide adequate notice of the investigation's purpose and scope and make requests for information that are vague, overly broad, and unduly burdensome. Finally, the Lenders purport to incorporate by reference several arguments from another entity's petition to modify or set aside a separate CID. This Decision and Order addresses each argument in turn.

I. The Consumer Bureau Has Authority to Issue CIDs to the Tribally-Affiliated Lenders.

Turning to the Lenders' principal arguments that the Bureau lacks authority to issue CIDs to them because they are affiliated with Indian tribes, it is appropriate to begin by setting the threshold framework. When courts evaluate claims like these that challenge an agency's jurisdiction over the subject of an investigation, they often state that they will enforce a CID as long as "there is some plausible ground for jurisdiction, or to phrase it another way, unless jurisdiction is plainly lacking." *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1077 (9th Cir. 2001) (quotations omitted); *accord EEOC v. Randstad*, 685 F.3d 433, 442 (4th Cir. 2012). Without resting on this more deferential standard here, I will assess the jurisdictional claims simply on their merits. The Lenders raise two particular claims: (1) that the Consumer Financial Protection Act ("CFPA") does not authorize the Bureau to issue CIDs to tribally-affiliated lenders; and (2) that even if the CFPA does authorize the CIDs here, tribal sovereign immunity trumps that purported statutory authority.

A. The CFPA Authorizes the Bureau to Issue CIDs to the Lenders.

The CFPA broadly authorizes the Bureau to issue a CID to "any person" the Bureau has reason to believe may have information relevant to a violation. 12 U.S.C. § 5562(c). The Act defines "person" to mean "an individual, partnership, *company*, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, *or other entity*." *Id.* § 5481(19) (emphasis added). The Lenders admit they are limited liability "companies," Pet. at 2, and no doubt they could be regarded also as "other entities," but the Lenders contend they are not "persons" subject to the Bureau's CID authority because they are affiliated with, and "arms" of, Indian tribes, Pet. at 8-19.

The Supreme Court has long established the appropriate framework for analyzing whether a federal statute applies to Indian tribes, individual Indians, and tribally-affiliated entities. More than a half-century ago, the Court concluded that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) (citing cases). The federal courts of appeal have uniformly applied this rule to individual Indians and to tribes and tribally-affiliated entities like the Lenders here. *See, e.g.*, *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007) (applying *Tuscarora* to casino owned and operated by tribe); *Fla. Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126 (11th Cir. 1999) (applying *Tuscarora* to tribe); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996) (applying *Tuscarora* to construction business wholly owned and operated by tribe); *EEOC v. Fond du Lac Heavy Equip. & Constr. Co., Inc.*, 986 F.2d 246 (8th Cir. 1993) (applying *Tuscarora* to company wholly owned by tribe); *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457 (10th Cir. 1989) (applying *Tuscarora* to tribal officials); *Smart v. State Farm Ins. Co.*, 868 F.2d 929 (7th Cir. 1989) (applying *Tuscarora* to business owned and operated by tribe); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) (applying *Tuscarora* to commercial farm wholly owned and operated by tribe).

The CFPA is subject to the *Tuscarora* presumption because it is a statute of general applicability, with its coverage extending to all "person[s]" and "other entities" who engage in offering or providing the consumer financial products and services regulated by the Act. *See id.* §§ 5481(6), 5531, 5536. This is so even though the CFPA contains exemptions, *see, e.g.*, 12 U.S.C. §§ 5517, 5519, for a statute need not be "universally applicable" to be considered "generally applicable." *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 998 (9th Cir. 2003) ("[F]ederal statutes that contain exemptions are nevertheless generally applicable."). And the CFPA's provision governing the issuance of CIDs has an even broader scope, authorizing the Bureau to issue a CID to "any person," whether or not a provider of financial products and services. 12 U.S.C. § 5562(c). Therefore, the CFPA presumptively applies to tribally-affiliated entities under the *Tuscarora* line of precedent.

To be sure, *Tuscarora*'s general rule is not absolute, and courts have established certain exceptions to ensure proper respect for tribal sovereignty. Although the courts of appeals have adopted four different frameworks to determine whether an exception to *Tuscarora*'s general rule applies in a given case, the Ninth Circuit set forth the most common framework in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, which the Second, Seventh, and Eleventh Circuits have embraced. *See Fla. Paraplegic*, 166 F.3d at 1129; *Reich*, 95 F.3d at 179; *Smart*, 868 F.2d at 932-33. Under this framework, *Tuscarora*'s general rule will not apply if:

> (1) the law touches exclusive rights of self-governance in purely intramural matters;
> (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or
> (3) there is proof by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations.

Coeur d'Alene, 751 F.2d at 1116 (internal quotations and alteration omitted). If any of these exceptions applies, then the law will not cover tribes or tribally-affiliated entities unless Congress expressly included them within the coverage of the statute. *Id.* But the Lenders are subject to the CFPA because none of the exceptions applies here.[1]

The first exception does not apply because subjecting the Lenders to the Bureau's investigation (or to a potential enforcement action) would not touch "exclusive rights of self-governance in purely intramural matters," which are "matters such as conditions of tribal membership, inheritance rules, and domestic relations." *Coeur d'Alene*, 751 F.2d at 1116. As courts have overwhelmingly held, this exception does not apply to commercial relations between a tribally-affiliated entity and non-Indians. *See, e.g.*, *Fla. Paraplegic*, 166 F.3d at 1127, 1129; *Reich*, 95 F.3d at 175, 179-81; *U.S. Dep't of Labor v. Occupational Safety & Health Review Comm'n*, 935 F.2d 182, 183, 184 (9th Cir. 1991); *Couer d'Alene*, 751 F.2d at 1114, 1116-17; *accord San Manuel Indian Bingo & Casino*, 475 F.3d at 1308, 1312-15. Thus, for example, courts have held that it does not interfere with a tribe's rights of self-governance in purely intramural matters to apply the Occupational Safety and Health Act to a tribal farm employing non-Indians and selling on the open market, *Coeur d'Alene*, 751 F.2d at 1114, 1116-17; to a commercial timber mill that employs many non-Indians and sells most of its goods to non-Indians, *Occupational Safety & Health Review Comm'n*, 935 F.2d at 183, 184; or to a tribal construction business that hires non-Indians and is building a casino on reservation land that will operate in interstate commerce, *Reich*, 95 F.3d at 175, 179-81. Similarly, it does not interfere with a tribe's rights of self-governance in purely intramural matters to apply the Americans with Disabilities Act to restaurant and entertainment facilities run by a tribe and operating in interstate commerce, *Fla. Paraplegic*, 166 F.3d at 1127, 1129; or to apply the National Labor Relations Act to a tribal commercial enterprise with mostly non-Indian employees and customers, *San Manuel Indian Bingo & Casino*, 475 F.3d at 1308, 1312-15.

As in those cases, applying federal law here would not impede tribal self-governance in purely intramural matters. Instead, the Bureau seeks to apply the CFPA to the Lenders'

[1] Although this Order relies on the *Coeur d'Alene* framework, application of the other frameworks would not lead to a different conclusion. The Tenth Circuit framework declines to apply the *Tuscarora* rule when the federal law conflicts with a tribe's treaty-protected right. *EEOC v. Cherokee Nation*, 871 F.2d 937, 938 n.3 (10th Cir. 1989). That point is not at issue here. The Eighth Circuit applies the *Tuscarora* presumption unless applying federal law to the tribal entity would affect "a specific right reserved to Indians," such as the "right to self-governance" on "intramural matter[s]." *Fond du Lac*, 986 F.2d at 248-49. Similarly, the D.C. Circuit inquires whether applying the federal law to the tribal entity would "imping[e] upon protected tribal sovereignty," and if not then determines whether the statutory text "reasonably encompass[es]" the tribal entity to which the law is sought to be applied. *San Manuel Indian Bingo & Casino*, 475 F.3d at 1311. These two approaches also do not lead to a materially different analysis than that provided in the text below. Moreover, as the D.C. Circuit has recognized, a tribe's "claim of sovereignty is at its weakest" where, as here, the tribe "goes beyond matters of internal self-governance and enters into off-reservation business transaction[s] with non-Indians." *Id.* at 1312-13.

commercial dealings with non-Indians on the open market. In particular, the Bureau has reason to believe that the Lenders are making loans to non-Indians over the internet, and it seeks to investigate those lending practices for compliance with Federal consumer financial law.

The Lenders contend that applying the CFPA to them interferes with their respective tribes' sovereign authority to regulate the Lenders' financial activities. Pet. at 16-17. But they do not contend that these financial activities are purely intramural, and in any event, as the Second Circuit has explained, this argument would rely on "too grandiose a concept of tribal sovereignty." *Reich*, 95 F.3d at 178. Tribal rights of self-governance do not "preempt[] the application of a federal regulatory scheme which is silent on its application to Indians." *Id.* at 179. Indeed, the Lenders' argument proves too much, as it would mean that applying *any* federal statute to a tribally-affiliated entity would interfere with self-governance if the tribe might choose to regulate that entity's activity itself. *See id.* at 179, 181; *accord Smart*, 868 F.2d at 935 (explaining that this exception does not apply whenever a law "merely affects self-governance as broadly conceived" because "[a]ny federal statute applied to an Indian on a reservation or to a Tribe has the arguable effect of eviscerating self-governance since it amounts to a subordination of the Indian government. But Indian Tribes are not possessed of absolute sovereignty.").

The Lenders also wrongly contend that this case is "on all fours" with the situation that the Eighth Circuit confronted in *Fond du Lac*. Pet. at 18. On the contrary, that court held that it would interfere with the tribe's right of self-government to apply the Age Discrimination in Employment Act to a "dispute [that] involve[d] a strictly internal matter" between a member of the tribe and a tribal employer on reservation land that had denied employment to the tribe member. *Fond du Lac*, 986 F.2d at 248-49. The Bureau, by contrast, seeks to apply the CFPA to the Lenders' commercial dealings with non-Indians on the open market, which does not interfere with tribal rights of self-governance in purely intramural matters. The other cases cited by the Lenders are as or more inapposite.

The second *Couer d'Alene* exception likewise does not apply. The Lenders have not suggested that subjecting them to the Bureau's investigation would abrogate any rights guaranteed by Indian treaties, and the Bureau is not aware of any such treaty-protected rights.

The third exception does not apply because there is no "proof by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations." *Coeur d'Alene*, 751 F.2d at 1116 (internal quotations and alteration omitted). The Lenders cite nothing from the CFPA's legislative history to indicate congressional intent to exclude tribally-affiliated entities from the Bureau's jurisdiction. Instead, they offer three arguments based on the statutory text, none of which is persuasive.

First, the Lenders contend that Congress expressed its intent to exclude tribes from the definition of "person" by defining "States" to include federally recognized Indian tribes, while not expressly including states or tribes in the definition of "person." Pet. at 12-14. But regardless of whether these definitions could suggest that tribes *themselves* are not persons (a point that need not be addressed here), they do not suggest that a commercial entity *affiliated*

with a tribe is not a "person" where the entity otherwise falls within the definition of "person," as is true here. *See* 12 U.S.C. § 5481(19) (comprising both "companies" and "other entities").

Second, the Lenders point to the general presumption that the term "'person' does not include the sovereign." Pet. at 14-16 (quoting *Vt. Agency of Natural Res. v. United States*, 529 U.S. 765, 780 (2000)). But the Lenders are not themselves the sovereign; they are companies that have commercial dealings on the open market and at most claim to have some sort of affiliation with a sovereign. In any event, this presumption does not override *Tuscarora*'s presumption, for if it sufficed as "proof . . . that Congress intended [a] law not to apply to Indians on their reservations," *Couer d'Alene*, 751 F.2d at 1116, then the third exception essentially would tautologically swallow the *Tuscarora* rule.

Third, the Lenders cite the interpretive canon that ambiguities in statutory text must be resolved in favor of Indians. Pet. at 16. But as the D.C. Circuit has explained, this interpretive canon does not apply to resolve ambiguities in "a statute of general application," but rather only in statutes or provisions that "Congress enacted specifically for the benefit of Indians or for the regulation of Indian affairs." *San Manuel Indian Bingo & Casino*, 475 F.3d at 1312.

For all these reasons, none of the *Couer d'Alene* exceptions applies, and *Tuscarora*'s general rule therefore controls: The CFPA applies to tribally-affiliated entities like the Lenders, which are "person[s]" as to which the CFPA authorizes the Bureau to issue CIDs.

B. Tribal Sovereign Immunity Does Not Protect the Lenders from the CIDs.

The Lenders next contend that tribal sovereign immunity protects them from the Bureau's CIDs. Pet. at 20. But every court of appeals to address the issue has agreed that Indian tribes, like individual States, do not enjoy immunity from suits by the federal government. *See Karuk Tribe Hous. Auth.*, 260 F.3d at 1075; *Fla. Paraplegic*, 166 F.3d at 1134; *Reich*, 95 F.3d at 182; *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 383 (8th Cir. 1987). *See also* William C. Canby, Jr., *American Indian Law* 88 (3d ed. 1998) ("Tribes are not immune from suits by the United States."); *cf. West Virginia v. United States*, 479 U.S. 305, 311 (1987) ("States have no sovereign immunity as against the Federal Government.").

The Lenders disagree, but offer no plausible grounds to overcome this settled point. They contend that, unlike the States, the tribes were not present at the Constitutional Convention and so did not surrender their sovereign immunity. For this point, they cite *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775 (1991), but that case involved claims of immunity by a state against a tribe rather than claims of immunity by a tribe against the federal government. On the latter point, the Supreme Court has not relied on an argument about who was or was not in attendance at the Constitutional Convention; instead, it has held that the U.S. government exercises superior sovereign powers as against the Indian tribes, by virtue of their status as "domestic dependent nations." *Red Lake Band*, 827 F.2d at 382-83 (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1, 15-17 (1831)) ("[I]t is an inherent implication of the superior power exercised by the United States over the Indian tribes that a tribe may not interpose its sovereign immunity against the United States."); *United States v. White Mountain Apache Tribe*, 784 F.2d 917, 920 (9th Cir.

1986) ("The Tribe's own sovereignty does not extend to preventing the federal government from exercising its superior sovereign powers."); *cf. also Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153-54 (1980) ("tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States" and is divested when it would be "inconsistent with the overriding interests of the National Government").

The Bureau is an agency of the federal government. The tribes therefore cannot assert sovereign immunity against it. Nor can purported "arms" of the tribe, as the Lenders style themselves, whether or not the actual facts would support that characterization.[2]

II. The CIDs Request Relevant Information and Comply with Procedural Requirements.

The Lenders also contend that the CIDs should be set aside because they do not provide adequate notice of the purpose and scope of the Bureau's investigation and make requests that are vague, overly broad, and unduly burdensome. Pet. at 23-25. These claims are baseless and must be rejected.

The CIDs provide adequate notice of the purpose and scope of the Bureau's investigation. The CFPA simply requires a CID to "state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." 12 U.S.C. § 5562(c)(2); *accord* 12 C.F.R. § 1080.5. This does not require a detailed narrative, and it is "well settled that the boundaries of an [agency] investigation may be drawn 'quite generally.'" *FTC v. O'Connell Assocs., Inc.*, 828 F. Supp. 165, 171 (E.D.N.Y. 1993) (quoting *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992)).

The CIDs that the Bureau sent to each Lender easily meet the notice-of-purpose requirement. Each CID stated in its "Notification of Purpose" that the investigation was initiated "to determine whether small-dollar online lenders or other unnamed persons have engaged or are engaging in unlawful acts or practices relating to the advertising, marketing, provision, or collection of small-dollar loan products, in violation of" section 1036 of the CFPA, the Truth in Lending Act, the Electronic Funds Transfer Act, the Gramm-Leach-Bliley Act, or any other Federal consumer financial law, and "to determine whether Bureau action to obtain legal or equitable relief would be in the public interest." Courts regularly enforce CIDs with statements of purpose that have comparable breadth and specificity. For example, the D.C. Circuit upheld a

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[2] It is worth noting that even if it were somehow determined that the Bureau lacks jurisdiction over Indian tribes or is subject to tribal sovereign immunity, it would still have jurisdiction to investigate factual issues as to whether the tribal affiliation of the Lenders justifies treating them the same as tribes for purposes of statutory coverage and sovereign immunity. Where a CID recipient offers a "fact-based" challenge to the agency's jurisdiction, the CID should be enforced unless jurisdiction is "plainly lacking." *See Karuk Tribe*, 260 F.3d at 1076-77. The Lenders' claim that they are arms of their respective tribes is just such a "fact-based" challenge. *See Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1181 (10th Cir. 2010) (listing six facts relevant to whether an entity is an "arm" of a tribe that shares the tribe's immunity).

CID issued "to determine whether [a company] may be engaged in unfair or deceptive acts or practices including but not limited to false or misleading representations made in connection with the advertising, offering for sale and sale of its services relating to the promotion of inventions or ideas and to determine whether Commission action to obtain redress of injury to consumers or others would be in the public interest." *Invention Submission Corp.*, 965 F.2d at 1087-88 (alterations omitted). Another court concluded that an FTC resolution authorizing a CID "to determine whether unnamed consumer reporting agencies or others are or may be engaged in acts or practices in violation of Section 5 of the Federal Trade Commission Act and of the Fair Credit Reporting Act" properly defined the scope of the investigation. *O'Connell Assocs.*, 828 F. Supp. at 170-71 (alterations omitted); *see also Hyster Co. v. United States*, 338 F.2d 183, 184-86 (9th Cir. 1964) (approving CID with similar statement of purpose); *Gold Bond Stamp Co. v. United States*, 325 F.2d 1018, 1018 (8th Cir. 1964) (approving CID with similar statement of purpose).

The fact that the CIDs' Notifications of Purpose refer to "any other Federal consumer financial law," in addition to the four specific statutes they cite, does not render them impermissibly broad. The quoted phrase is a term defined in the statute with clear boundaries. *See* 12 U.S.C. § 5481(14). The Lenders cite *In re Sealed Case (Administrative Subpoena)*, 42 F.3d 1412 (D.C. Cir. 1994), but that case involved an asserted investigatory purpose far broader than the asserted purpose here, referring to "other wrongdoing, as yet unknown," which is an unlimited area rather than a realm defined by statute. *Id.* at 1418. And even in that case, though disapproving of this undefined language, the court did enforce the subpoena to the extent that it sought information relevant to permissible purposes that the subpoena also listed. *See id.* at 1420. Thus, even if it were impermissible to seek information relevant to potential violations of "any other Federal consumer financial law" (which it is not), the CIDs here would still be generally valid to uncover violations of the specified laws, and the CIDs accordingly are enforceable in full.

The Lenders have not met their burden to show that the CIDs make requests that are vague, overly broad, or unduly burdensome. Anyone challenging a CID on these grounds must "*prove*[] the inquiry is unreasonable because it is overbroad or unduly burdensome." *FDIC v. Garner*, 126 F.3d 1138, 1143 (9th Cir. 1997) (emphasis added). For example, as the Bureau has explained elsewhere, "the subject 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." Decision and Order on PHH Corporation's Petition to Modify or Set Aside Civil Investigative Demand, No. 2012-MISC-PHH Corp-0001, at 6 (2012) (quoting *FTC v. Markin*, 391 F. Supp. 865, 870-71 (W.D. Mich. 1974), *aff'd*, 532 F.2d 541 (6th Cir. 1976)). The Lenders have offered no such detail to support their claims.

Nonetheless, the Lenders are welcome to continue to discuss, and to seek to resolve, issues about the scope and burden of individual interrogatories and document requests with the Bureau's enforcement team.

III. Arguments Incorporated by Reference Are Not Properly Raised and Lack Merit.

Finally, the Lenders purport to "incorporate[]" five arguments that another CID recipient makes in a separate petition to set aside a separate CID. This is procedurally improper. Courts generally refuse to consider incorporated-by-reference arguments because they "unnecessarily complicate the task of" the decision-maker. *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 624 (10th Cir. 1998). Incorporation requires the decision-maker "to unearth [the] arguments lodged here and there . . . , to recognize and disregard any arguments that are now irrelevant, and to harmonize the arguments in the various documents." *Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448, 452 (6th Cir. 2003). For these reasons, the Bureau will not consider incorporated-by-reference arguments. A petitioner "must make all arguments accessible to the [Bureau], rather than ask [it] to play archaeologist" with the referenced materials. *DeSilva v. DiLeonardi*, 181 F.3d 865, 867 (7th Cir. 1999).

Because the Bureau has not previously announced that it will disallow incorporation by reference, however, I will briefly address the incorporated arguments, all of which lack merit. Two of them simply duplicate arguments that the Lenders have already made in their Petition – that the Notifications of Purpose in the CIDs are insufficient, and that the Bureau lacks authority over Indian tribes – and that have been rejected here. Another opines that, given the scope of this investigation, it would be "more appropriate" and "more efficient" to conduct an examination rather than an investigation. But the controlling statutory framework affords the Bureau, rather than a regulated entity, the discretion to decide how best to deploy the Bureau's resources. And to the extent that the Lenders suggest that the scope of the CIDs' inquiry is simply too broad for an investigation, that contention fails for the reasons discussed above.

The next incorporated argument challenges individual requests as not reasonably related to violations of Federal consumer financial law. It is particularly problematic to incorporate this argument by reference, as it refers to requests made in a different CID to a different entity that involve distinct circumstances. In any event, the Lenders bear the "burden to show that the information [sought] is irrelevant," *Invention Submission Corp.*, 965 F.2d at 1090; they have made no such showing; and the courts will accept an agency's appraisal of relevancy unless it is "obviously wrong." *Id.* at 1089.

Finally, the Lenders object to requests for information from before July 21, 2011, on the ground that the Bureau lacks authority over violations that occurred before that date. But since the transfer of authority to the Bureau on July 21, 2011, *see* 75 Fed. Reg. 57,252 (Sept. 20, 2010), the Bureau has had authority over violations of federal consumer financial law that occurred both before and after July 21, 2011. In any event, the Bureau's authority over pre-transfer-date violations is beside the point here: It unquestionably has the authority to obtain information about pre-transfer-date conduct, for that conduct could bear on post-transfer-date violations. *Cf.* Decision and Order on PHH Corporation's Petition to Modify or Set Aside Civil Investigative Demand, No. 2012-MISC-PHH Corp-0001, at 7-8 (2012) (explaining that a CID may seek information "extending outside the applicable limitations period," for that information "'may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue'") (quoting *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977)). It is

thus appropriate for the Bureau to act within its authority by seeking such information through the CIDS at issue here.

CONCLUSION

For the foregoing reasons, the Lenders' petition to modify or set aside the CIDs issued to them is denied. In rejecting the jurisdictional claims they raise based on their status as tribally-affiliated entities and their claims of tribal sovereign immunity, the Bureau intends and expresses no disrespect to the status of the Indian tribes themselves. Indeed, the Bureau continues to engage with tribal governments pursuant to its Policy for Consultation with Tribal Governments, which provides guiding principles for its relationships, its communications, and its ongoing work with the tribes. Nonetheless, all commercial businesses (whether they are chartered financial institutions or their non-bank competitors) remain subject to the same evenhanded federal oversight and authority as their competitors in the consumer financial marketplace under the CFPA, which Congress incorporated as a core principle of the statutory scheme. In order to carry out its responsibilities to protect consumers, the Bureau must exercise its proper authority to gather information in order to monitor and ensure compliance with Federal consumer financial law. Therefore, within 21 calendar days of this Decision and Order, the Lenders are directed to produce all responsive documents, items, and information within their possession, custody, or control that are covered by the CIDs. The Lenders are also welcome to engage in further discussions with the Bureau's enforcement team about further suggestions for modifications to the CIDs, which the Office of Enforcement may adopt if deemed appropriate.

Richard Cordray

Richard Cordray, Director

September 26, 2013