UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING File No. 2014-CFPB-0002 In the matter of: PHH CORPORATION, PHH MORTGAGE CORPORATION, PHH HOME LOANS, LLC, ATRIUM INSURANCE CORPORATION, AND ATRIUM REINSURANCE CORPORATION.	)

RESPONDENTS' RENEWED OBJECTION TO THE ORDERS TAKING OFFICIAL NOTICE AS CLARIFIED BY THE ORDER DATED OCTOBER 22, 2014

Pursuant to 12 C.F.R. § 1081.303, Respondents PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation (collectively, "Respondents"), renew their objections to the Orders issued by the Tribunal on September 23 and 25, 2014, Documents 188-89 ("Notice Orders"), as now clarified by the Order dated October 22, 2014.

ARGUMENT

I. RESPONDENTS RENEW THEIR OBJECTION TO THE ADMISSION OF POST-HEARING EVIDENCE NOT PROFFERED BY ENFORCEMENT COUNSEL

In their prior motion, Respondents demonstrated why it is improper and contrary to the Bureau's Rules of Practice for Adjudication Proceedings ("Rules") for the Tribunal to take official notice of "material facts" without providing Respondents notice and "an opportunity to disprove such noticed fact." 12 C.F.R. § 1081.303(c).[1] The Tribunal agreed with Respondents'

[1] At this point, only Respondents are entitled to object to the Tribunal's Orders taking official notice as Enforcement Counsel have made no objection and, having failed to do so, they have

valid and timely objection, and has now identified ten facts of which it intends to take "official notice." In spite of the Tribunal's elucidation of the ten facts, however, Respondents continue to object to an administrative process that fails to provide proper notice of the claim or claims that they are defending against.

In its October 22 Order, the Tribunal rejected Respondents' argument that it is improper for the Tribunal to take official notice when "Enforcement did not request it." According to the Tribunal, nothing in Rule 303(c) "establishes" such a requirement. Respondents believe that the Tribunal's sole focus on Rule 303(c) misses the point. When it published its final Rules, the Bureau made plain that Enforcement Counsel "shall bear the burden of proving the ultimate issue(s) of the Bureau's claims at the hearing." 77 Fed. Reg. 39058, 39079 (June 29, 2012). The Bureau's "claims" are set out in the Notice of Charges. Rule 200(b) provides, in pertinent part, that the Notice of Charges "must set forth . . . [a] statement of matters of fact and law showing that the Bureau is entitled to relief." It is axiomatic that the Notice of Charges is to give Respondents "notice" of the "charges" against them. The Rules further provide for the amendment of the Notice of Charges either before the hearing is commenced with the hearing officer's leave, or the respondent's consent, Rule 202(a), or amendments are allowed to "conform to the evidence" if the issue(s) are "tried at the hearing" and the evidence at the "hearing" is not objected to. Rule 202(b).[2]

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waived their opportunity to do so. *See, e.g.*, Rule 303(e) ("Failure to object to admission of evidence or to any ruling constitutes a waiver of the objection.").

[2] When it promulgated its Rules, the Bureau explained that "[b]y requiring written consent or leave of the hearing officer to amend pleadings, the revised section encourages parties to plead their case fully, as opposed to reserving claims and defenses for last minute amendments." 77 Fed. Reg. at 39069.

The "hearing" in this matter ended on June 4, 2014. *See, e.g.*, October 22 Order; Notice Orders. Further, there is no question that the "hearing record" in this matter was closed on July 14, 2014. Order dated July 14, 2014 (Docket 171). Accordingly, pursuant to Rule 202 ("Amended Pleadings"), there is no basis to permit the proffer of new "evidence" even if such evidence is proffered by the Tribunal itself. To hold otherwise would eviscerate the due process protections the Bureau claims it built into its Rules governing adjudicative proceedings. Indeed, nowhere in its analysis does the Tribunal explain how the administrative adjudication process can comport with due process where evidence is being proffered by the Tribunal after the hearing record is closed.

In its October 22 Order, the Tribunal accuses Respondents of "mischaracterize[ing]" Rule 304. According to the Tribunal, because Rule 304 "pertains to closure of the 'hearing record,' not the entire record," the Tribunal is permitted to supplement the "record" by taking "official notice" of purported "material facts" not suggested or offered by Enforcement Counsel. Respondents respectfully disagree. In unsuccessfully opposing Respondents' effort to enforce Rule 303(c), Enforcement Counsel cited *West Virginia Public Services Commission v. D.O.E.*, 681 F.2d 847 (D.C. Cir. 1982). In that action, the court held that it was a violation of the Administrative Procedure Act to rely on evidence not presented at the hearing:

> ***It is a meaningless gesture to afford such a hearing if the agency does not consider itself confined to the evidence adduced therein***. If the circumstances require that the agency take official notice of material facts, it must afford an opportunity for the parties to present information "which might bear upon the propriety of noticing the fact, or upon the truth of the matter to be noticed." C. McCormick, Law of Evidence § 333, at 771 (2d ed. 1972). In fact, the APA requires that when an agency decision rests on official notice, a party be given "on timely request, … an opportunity to show the contrary." 5 U.S.C. § 556(e) (1976). No such opportunity, which could have come only after the order was issued, since official notice was first taken in the opinion, was afforded in this case.

681 F.2d at 864, n.89 (emphasis added). Respondents renew their objection to the Tribunal's post-hearing supplementation of the record in this manner.

Respondents further assert that if it is deemed necessary to have additional evidence in the record, then the only proper avenue would be to "re-open" the now-closed "hearing record." Indeed, that is the process that is contemplated by Rule 400(e). However, the obvious hurdle to such an action is that it would require a demonstration of "good cause." Since that has not been shown, then no such additional evidence can be proffered after the close of the hearing record.

The Tribunal's stated basis for rejecting Respondents' argument is that, to hold otherwise, "the parties would not be able to file posthearing briefs, among other documents." October 22 Order at 1.[3] Respondents again respectfully disagree. While Respondents are not sure what the Tribunal is referring to by the filing of "other documents," at least with respect to the filing of post-hearing briefs, such filings are specifically provided for by Rule 305. Further, post-hearing briefs are not "evidence," but rather the arguments of the parties as to what result should be reached based on the evidence adduced at the hearing.[4]

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[3] The Tribunal's decision to take official notice of certain facts cited by Respondents in their post-hearing brief is welcomed by Respondents, but such facts do not stand on the same footing as those proffered by the Tribunal. These facts were previously proffered by Respondents in January 2014 in connection with the briefing on their initial dispositive motion, and the context for which the facts were being proffered was clearly identified. *See* Statement of Undisputed Facts in Support of Respondents' Motion to Dismiss dated January 31, 2014, Docket No. 19, at ¶¶ 20-25. More specifically, the Consent Orders entered in Florida went to Respondents' estoppel argument, and the supervisory orders entered in connection with the operations of Triad Guaranty Insurance Corporation, The PMI Group, and Republic Mortgage Insurance Company supported PHH Mortgage Corp.'s and PHH Home Loans, LLC's decisions not to conduct business with these particular entities.

[4] The Tribunal's citation to *In re Cendant Corp. Litigation*, 264 F.3d 201 (3d Cir. 2001), and its comment that "it is possible that certain facts in the officially noticed EDGAR filings are not true," is curious. October 22 Order at 2. As an initial matter, any implication that this litigation involved any PHH "predecessor" entity is incorrect. As the Third Circuit's decision makes plain, the issue involved the formation of Cendant Corporation in December 1997 through the merger of CUC International, Inc., and HFS Incorporated. *Id.* at 221. In April 1998, Cendant

II. SIMPLY IDENTIFYING PURPORTED MATERIAL FACTS WITHOUT CONTEXT DOES NOT SATISFY DUE PROCESS

The mere identification of certain purported "material facts" without any context is insufficient for purposes of Rule 303(c), and Respondents renew their blanket objection to this admission of any such "material facts."

A. Respondents Do Not Understand the Relevance of Genworth's Regulatory Issues to the Notice of Charges.

The clearest example of the vagueness of this process is the Tribunal's identification of the following purported "material fact":

> As of December 31, 2011, Genworth exceeded the maximum risk-to-capital ratio of 25:1 established under North Carolina law and enforced by the North Carolina department of insurance. As of December 31, 2011 and 2010, Genworth's risk-to-capital ratio was approximately 32.9:1 and 23.8:1, respectively. However, effective January 31, 2011, the North Carolina department of insurance granted Genworth a revocable two-year waiver of compliance with its risk-to-capital requirement.

October 22 Order at 2-3.

As an initial matter, Respondents note that the Tribunal refers to "facts" in its October 22 Order. Rule 303(c) specifically refers to the taking of official notice of "material facts."

"announced that it had discovered 'accounting irregularities' in certain units of the former CUC." *Id.* For the period between April 30, 1997, and February 1, 2005, PHH Corp., was a wholly-owned subsidiary of Cendant. *See, e.g.*, PHH Corp.'s 2009 10-K, filed March 2, 2009. Accordingly, any assertion that any PHH "corporate predecessor" was involved in any way in the securities litigation cited by the Tribunal is inaccurate. Further, the Tribunal misses the point. As explained herein, the ability of a party to respond to newly proffered "material facts," which is the only type of information of which "official notice" can be taken, depends on more than just the identification of the fact or facts themselves. Finally, the reference to Cendant Corp.'s prior litigation is disconcerting. Neither Respondents, nor Enforcement Counsel, have asserted that any of the information in any of the EDGAR filings – at least as they relate to Respondents – is "not true." The Tribunal's deliberate notation that Cendant was "PHH's corporate predecessor" suggests that it believes there may be information in Respondents' SEC filings that is "not true." If that is the case, then it is incumbent on the Tribunal to identify what information it is relying on that has caused it to be concerned with the SEC filings of either PHH Corp. or Cendant Corp.

Accordingly, Respondents presume that each of the 10 facts the Tribunal has now identified in response to Respondents' objection are "material" to the Tribunal.[5]

As it relates to Genworth's "risk-to-capital ratios" during the period from 2010 and 2011, and the "revocable two-year waiver of compliance" purportedly issued by the North Carolina Department of Insurance, Respondents do not understand how or why this purported fact is "material" or "relevant" to anything in the Notice of Charges filed by the Bureau. Indeed, while Enforcement Counsel specifically identified a witness from Genworth, David Tubolino, who purportedly had knowledge of "Genworth's captive mortgage reinsurance arrangement with Atrium; Genworth's dealings with Respondents; the use of captive reinsurance in the MI industry; and Genworth's decision to participate in captive mortgage reinsurance arrangements," they decided not to call him at the hearing, the record of which is now closed. *See* Enforcement Counsel's Witness List, dated March 10, 2014. Second, during this timeframe, 2010 and 2011, the reinsurance agreement between Genworth and Atrium Re was in runoff and no new loans were being put into reinsurance books.

In sum, the mere identification of this purported "material fact" does not give Respondents sufficient notice of what use the Tribunal intends to make of it so as to deprive Respondents of a full and fair opportunity to respond to it as required by due process. For example, if the Tribunal believes it is material and relevant that Genworth failed to comply with state "risk-to-capital" requirements, then Respondents believe that it may be relevant that other Mortgage Insurers ("MIs") were under similar stress. If the Tribunal believes that Genworth's prior relationship with Atrium (and subsequently Atrium Re), had some effect on Genworth's "risk-to-capital ratios" then Respondents want the opportunity to respond to such an assertion

[5] Of course such facts are not "material" to Enforcement Counsel's case-in-chief or rebuttal since they were not proffered by Enforcement Counsel prior to the closing of the hearing record.

and perhaps demonstrate that Genworth benefitted from its relationship with Atrium. Or it is entirely possible that the Tribunal may be using this purported fact to support a theory of which Respondents are entirely unaware. What is true is that it is simply impossible for Respondents to ascertain how or why this purported "material fact" is relevant; accordingly, Respondents are being denied a full and fair opportunity to respond to it.[6]

Moreover, the Rules specifically provide that "[e]vidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues; . . ." Rule 303(b)(2). Once again, until Respondents understand the point of the taking of official notice of this fact, they cannot ascertain whether the fact should be excluded because of "unfair prejudice or confusion of the issues."

B. The Purported "Material Facts" Related to Respondents That Could Possibly be Relevant are Already in the Record.

The following facts identified by the Tribunal that relate to Respondents that could possibly be relevant are already in the record; accordingly, "official notice" of such facts is unnecessary. Specifically, the following facts identified by the Tribunal are already in the record in a substantially similar form:

- Both PHH Mortgage and PHH Home Loans originate mortgage loans. *See* PHH's NORA Submission, ECX 653, at 4.
- PHH Home Loans is a joint venture between PHH Corporation, through its subsidiaries, and Realogy, with PHH Corporation controlling 50.1% of PHH Home Loans and Realogy 49.9%. *Id.* at 4, n.3.
- Substantially all PHH loans that are originated for sale are sold, and historically have been sold, pursuant to programs sponsored by Fannie Mae, Freddie Mac, or the

[6] Curiously, Enforcement Counsel have remained quiet regarding the Tribunal's supplementation of the "record" further evidencing that they, like Respondents, are completely unaware of the relevance of the ten purported "material facts" which the Tribunal intends to make part of the administrative record in this matter.

Government National Mortgage Association. *Id.* at 4 ("During 2010, for example, 95% of PHH Mortgage's loans were sold to, or were sold pursuant to, programs sponsored by Fannie Mae, Freddie Mac or Ginnie Mae, and the remaining 5% were sold to private investors."); *but see* PHH Corp. 2012 Annual Report at 3[7] ("During 2012, 85% of our mortgage loans were sold to, or were sold pursuant to, programs sponsored by Fannie Mae, Freddie Mac or Ginnie Mae and the remaining 15% were sold to private investors."); *id.* ("Substantially all of our loans are sold to, or pursuant to programs sponsored by, Fannie Mae, Freddie Mac, or Ginnie Mae and therefore would be exempt from the risk-retention requirements under the current proposal.").

- PHH Corporation conducted its reinsurance business through Atrium Insurance Corporation and Atrium Reinsurance Corporation, which were wholly-owned corporate vehicles. PHH Corp. 2012 Annual Report at 21 ("In addition, we are registered as an insurance holding company in the state of New York as a result of our wholly owned subsidiary, Atrium Insurance Corporation."); *id.* at 39 ("Our Mortgage Servicing segment also includes the results of our reinsurance activities from our wholly owned subsidiary, Atrium Reinsurance Corporation."); NORA Submission, ECX 653 at 9 ("Atrium Insurance Corporation ('Atrium') is a New York corporation and a wholly-owned subsidiary of PHH Corporation."); *id.* at 11 ("On November 12, 2009, PHH Corporation formed Atrium Reinsurance Corporation ('Atrium Re'), a Vermont corporation that is a wholly-owned subsidiary of PHH Corporation.").

Because these purported "material facts" already appear in the record, "official notice" of them is not necessary. With respect to the remaining purported material fact relating to Respondents that "PHH Corporation has the exclusive right to use the Century 21, Coldwell Banker, and ERA brand names in marketing PHH mortgage loan products through PHH Home Loans and other arrangements that PHH has with Realogy" – Respondents renew their objection based on relevance and materiality. While Respondents have located language similar to the cited statement in at least one of PHH Corporation's annual filings, the relevance of this relationship is not known. According to a review of the hearing transcript, the terms "Realogy," "Century 21," "Coldwell Banker," and "ERA," appear only one place in the transcript – the questioning of Mr.

[7] *Available at* http://corporate.phh.com/phoenix.zhtml?c=187859&p=irol-SECText&TEXT=aHR0cDovL2FwaS50ZW5rd2l6YXJkLmNvbS9maWxpbmcueG1sP2lwYWdlPTg3NjA5ODImRFNFUT0wJlNFUT0wJlNRREVTQz1TRUNUSU9OX0VOVElSRSZzdWJzaWQ9NTc%3d.

Rosenthal by the Tribunal on March 26, 2014. Hearing Tr. 528. However, that discussion made no mention of the purported "exclusive right" to use "brand names in marketing PHH mortgage loan products through PHH Home Loans and other arrangements that PHH has with Realogy." More to the point, the term "Realogy" appears nowhere in Enforcement Counsel's 359 pages of post-hearing briefing or in their 12 additional pages of appendices. Once again, as with the Genworth regulatory issue regarding its risk-to-capital ratio, Respondents have no idea how or why this purported material fact is relevant to this proceeding, which involves private mortgage insurance reinsurance.

C. The Purported "Material Facts" Related to Non-Parties are Irrelevant.

Respondents object to the supplementation of the record with additional facts relating to non-parties to this action. Those purported material facts identified by the Tribunal are as follows:

- Genworth Financial, Inc. is the parent company of Genworth Mortgage Insurance Corporation (Genworth).
- CMG Mortgage Insurance Company (CMG) was a joint venture equally controlled by The PMI Group, Inc., and CUNA Mutual Insurance Society, part of CUNA Mutual Group.
- CMG provided mortgage insurance exclusively to credit unions.
- In January 2014, Arch Capital Group Ltd. completed its acquisition of CMG from The PMI Group, Inc. and CUNA Mutual Insurance Society.

October 22 Order at 2-3. While it is possible that the SEC filings of these various entities contain these statements, without context, Respondents are at a loss as to how or why such "material facts" are relevant to the Bureau's Notice of Charges, and on that ground, they continue to object to their admission. *See* Rule 303(b) (Evidence that is "relevant, material and

reliable" that is also "not unduly repetitive" is admissible; "irrelevant, immaterial, and unreliable evidence shall be excluded.").

In its October 22 Order wherein the Tribunal agreed with Respondents' position that notice and the opportunity to respond is required under Rule 303(c), the Tribunal noted that "not all facts contained in the officially noticed EDGAR filings are necessarily relevant." Respondents agree. Whether a particular "fact" is relevant depends on the basis for which it is being proffered. *See, e.g.*, Rule 401, Fed. R. Evid.[8] As the Advisory Committee Notes to Rule 401 explain: "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved?" Fed. R. Evid. 401 advisory committee's note. Because it is the Tribunal, and not Enforcement Counsel, which is proffering these facts, and the Tribunal has not explained how or why any one of the ten purported material facts it has identified is of any consequence, Respondents are being denied the ability to determine relevance or, for that matter, materiality. Thus, Respondents have not been afforded due process.

CONCLUSION

Respondents participated in good faith in the hearing that was conducted in connection with this matter. As part of their defense, Respondents responded to the issues raised by the Notice of Charges as well as to the evidence proffered by Enforcement Counsel at the hearing.

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[8] Rule 401 provides:

> Evidence is relevant if:
>
> (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
>
> (b) the fact is of consequence in determining the action.

Respondents do not believe the Rules of Practice for Adjudicative Proceedings permit the Tribunal to supplement the hearing record in this manner at this point in the proceeding and, for the reasons stated above, they renew their objections to the Tribunal's Orders taking official notice of the ten purported "material" facts identified in the October 22 Order. To be clear, Respondents object to the admission of all of the facts on grounds of relevance, materiality, undue prejudice and because taking official notice of these facts after the close of the hearing record and without providing any context violates Respondents' due process rights.

Dated: October 31, 2014

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on the 31st day of October, 2014, I caused a copy of the foregoing Respondents' Renewed Objection to the Orders Taking Official Notice as Clarified by the Order Dated October 22, 2014, to be filed with the Office of Administrative Adjudication and served by electronic mail on the following parties who have consented to electronic service:

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