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February 8, 2013

By Email and FedEx

Mr. Steven L. Antonakes
Acting Deputy Director
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, DC 20552

Re: Petition to Quash CID in the Matters of Great Plains Lending, LLC, Mobiloans, LLC, and Plain Green, LLC, File No. 2012-MISC-Great Plains Lending-0001

Dear Mr. Antonakes:

On July 17, 2012, Petitioners in the above-referenced matter[1] petitioned the Consumer Finance Protection Bureau to set aside its Civil Investigative Demands ("CIDs"). By accompanying letter, Petitioners requested that the petition, and the proceedings arising from it, be kept confidential to protect their business interests. On January 24, 2013, after not hearing from the Bureau for more than half a year, we received an email, followed up with a call, from Meredith Osborn, Melanie Hirsch, and Max Peltz. They gave us an ultimatum that they said was the result of your decision: withdraw our petition within five days or the proceedings will become public. We encouraged the Bureau on that phone call to rethink this position, and asked for a meeting with you to outline our concerns. On February 1, 2013, Ms. Osborn sent us a letter (attached) inviting us to file a written submission.

This letter responds to Ms. Osborn's request (and we request the same confidential treatment of this letter that we requested regarding our earlier petition). In responding to Ms. Osborn's request, we do not waive any concerns we have about the legality of the CIDs, including but not limited to the lack of authority for the Bureau to pursue any action against our clients in light of the January 25, 2013 decision of the U.S. Court of Appeals in *Noel Canning v. National Relations Labor Board*. Rather, we are merely documenting our position on confidentiality for you to consider at the appropriate time when the Bureau takes up these questions, and we continue to believe the CIDs do not comply with applicable law.

As set forth in detail below, there is "good cause" under the Bureau's regulations to maintain the confidentiality of these proceedings; to do otherwise would severely harm Petitioners' businesses

[1] The Otoe-Missouria Tribe of Indians (Great Plains Lending, LLC), the Tunica-Biloxi Tribe of Louisiana (MobiLoans, LLC), and the Chippewa Cree of Rocky Boy Montana (Plain Green, LLC).

and the Tribes themselves. Moreover, "good cause" exists – and a decision to the contrary would be subject to legal challenge – because the Bureau's proposed approach is unlawful. The Bureau proposes to punish investigated entities for choosing to exercise their right to challenge a CID. That violates both the Petition Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment. It neglects its responsibilities to tribal governments. And it is simply bad policy. Investigated entities should be able to freely exercise their statutory and rule-based rights to challenge the basis for a Bureau investigation without facing the prospect that their businesses will be harmed as a result. That interest is dramatically exacerbated in this case because the Petitioners have argued – on substantial legal grounds – that this agency simply has no authority to investigate them. We respectfully request the opportunity to meet with you at an appropriate time to discuss our concerns.

Background

The Bureau issued CIDs to the Petitioners on June 12, 2012. On July 17, Petitioners filed a joint petition to set aside the CIDs on the grounds, among others, that the Bureau's governing statute does not authorize the Bureau to issue CIDs to Indian tribes or arms of tribes. The petition included, in both its text and in its exhibits, confidential material relating to both sovereign and proprietary business information of the Petitioners. By letter submitted with that petition, Petitioners requested that confidential treatment be provided pursuant to 12 C.F.R. §§ 1080.6(g) and 1080.14.

The Bureau has not yet adjudicated the petition. Instead, on January 24, 2013, I received an email from Max Peltz of the Bureau asking my partner Stuart Altman and me to join him and two Bureau investigators, Melanie Hirsch and Meredith Osborn, for a telephone call. During that call, held later the same day, the Bureau staff members said you had asked them to relay to us that Petitioners' request for confidential treatment would be denied. They said they were calling pursuant to Bureau process to give Petitioners five days – until January 29 – to withdraw the petition. If we refused, they said, the denial of confidential treatment would issue and be made public, together with the petition itself. By contrast, if we agreed to withdraw the petition, no order would issue and the matter would remain nonpublic for the present time.

We urged the Bureau to rethink this position on confidentiality, and on the evening of January 28, Max Peltz let us know that the January 29 deadline had been vacated. On February 1, 2013, we were invited to file this submission regarding confidentiality.

Discussion

During each of our calls with the Bureau, we requested an opportunity to meet with you before the Bureau's deadline runs, and I am reiterating that request now. I believe a meeting would be useful because the position the agency is staking out is both unlawful and bad policy. The Constitution forbids government agencies from punishing those who attempt to exercise their rights to petition the government or seek judicial review. And yet that is exactly what the Bureau's announced policy does. We encourage the Bureau to reconsider its proposed approach, both as a matter of good government and policy, and because its approach would severely burden the exercise of our clients' rights. Under its existing rules, the Bureau is supposed to keep investigations non-public, 12 C.F.R. § 1080.14, and the Bureau should treat this petition confidentially by finding that Petitioners have shown "good cause" to do so. 12 C.F.R. § 1080.6(g). To the extent there is any dispute about the

meaning of §§ 1080.6(g) and 1080.14, the Bureau is obligated to construe its regulations to avoid constitutional difficulty.

1. The Bureau's regulations.

The Bureau's regulations make clear that "Bureau investigations generally are non-public. Bureau investigators may disclose the existence of an investigation to potential witnesses or third parties to the extent necessary to advance the investigation." 12 C.F.R. § 1080.14. That foundational rule of confidentiality makes good sense. After all, the Bureau, like other similar agencies, presumably will investigate a variety of entities and individuals, and many of those who are investigated will turn out to be totally innocent of wrongdoing. And yet their reputations, and their businesses, could be seriously harmed if the existence of an investigation becomes public.

Indeed, the Bureau recognized as much in written comments issued at the time of its final rulemaking. In response to a commenter who pointed out "the potential reputation risk to an entity if an investigation is disclosed to the public," the Bureau wrote:

> Section 1080.14 of the Interim Final Rule provides that investigations generally will not be disclosed to the public, but permits Bureau investigators to disclose the existence of an investigation when necessary to advance the investigation. *The Interim Final Rule does not contemplate publicizing an investigation, but rather disclosing the existence of the investigation to, for example, a potential witness or third party* with potentially relevant information * * * . This limited exception sufficiently balances the concerns expressed by the commenter with the Bureau's need to obtain information efficiently.

Bureau of Consumer Financial Protection, RIN 3170-AA03, *Rules Relating to Investigations, Comments on Final Rulemaking* at 23-24 (2012) (emphasis added). The Bureau thus recognized the reputational and commercial risk that comes with publicizing investigations. And the Bureau made clear that even in the exceptional case where it *would* reveal information about an investigation, it would not do so to the public at large, but only to those with a connection to the case.

At the same time, the Bureau adopted a regulation providing that petitions to set aside a CID, and the Bureau's responses, "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). Presumably relying on that regulation, the Bureau has explained on its website that "[a]lthough we do not generally comment on confidential law enforcement investigations, we're committed to telling the public what we can, when we can, about our work to protect consumers. That's why our rules relating to investigations say that when someone challenges a Civil Investigative Demand and the Director responds, these are generally public records. We will generally post them on our website when we can." Consumer Financial Protection Bureau, *Enforcing Consumer Protections by Gathering Information for Investigations*, Sept. 21, 2012, *available at* http://www.consumerfinance.gov/blog/enforcing-consumer-protections-by-gathering-information-for-investigations/. And it has now taken the position in this case that Petitioners must either withdraw their petition to set aside the CIDs or face the prospect that the proceeding – in full unredacted form – will become public in short order. Moreover, the Bureau

asserts that Petitioners must make this choice *before receiving a ruling on the merits*. We have consistently asked Bureau personnel for information regarding the Bureau's rationale for its decision, but they have refused to provide any information whatsoever. The Bureau will inflict on Petitioners the reputational harm that comes with a public investigation, even though Petitioners have argued that the Bureau lacks the authority to investigate them at all and that claim has not yet been adjudicated on any level. That punitive approach goes beyond even the requirements of the Bureau's own regulations. Section 1080.6(g) does not displace § 1080.14. And even if § 1080.6(g) contemplates making a petition part of the public record, it does not require the unredacted version of the Petition (or the Bureau's unredacted disposition) to be part of the public record. The Bureau can easily satisfy concerns about the public's right to know by issuing its disposition without naming names.

2. Petitioners' request for confidential treatment is supported by good cause.

There is ample "good cause" in this case to keep the petition, and its accompanying documents, confidential. 12 C.F.R. § 1080.6(g).

a. First and foremost, "good cause" is present here because Petitioners will suffer irreparable harm if the Bureau denies their request for confidential treatment and makes the investigation public. *Cf. Davis* v. *Duncan Energy Partners L.P.*, 801 F. Supp. 2d 589, 596 (S.D. Tex. 2011) (noting that courts routinely find "good cause" for purposes of granting expedited discovery when there is a showing of irreparable harm). Such a disclosure will severely injure Petitioners' reputation. Petitioners' consumer finance and lending operations will be tarnished by the pall of an ongoing investigation. *See GTE Sylvania, Inc.* v. *Consumer Prod. Safety Comm'n*, 404 F. Supp. 352, 372 (D. Del. 1975) (noting that the "irreparable nature of injury to commercial reputations has been widely recognized"). Just as important, Petitioners as federally recognized Indian tribes will be tarnished, a unique harm not only within their communities but also to their relationships and dealings with other governments. And Petitioners will suffer those injuries despite the fact that there is no showing that they have engaged in wrongdoing of any kind.

Every federal agency that conducts investigations – either civil or criminal – recognizes the harm caused to an individual or entity when it is disclosed that this individual or entity is subject to investigation. There are similarities between the investigatory powers of the Bureau and those of a grand jury. The Supreme Court has long recognized that "by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule." *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218-19 (1979). Like grand jury secrecy, confidential treatment before the Bureau is "as important for the protection of the innocent as for the pursuit of the guilty." *United States* v. *Johnson*, 319 U.S. 503, 513 (1943).

In addition to reputational harm, Petitioners will suffer irreparable injury to their business interests and governmental programs if the investigation is made public. The market in which Petitioners operate is highly competitive, and great "competitive disadvantages * * * would result from" the publication of the petition. *Nat'l Parks & Conservation Ass'n.* v. *Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Such publicity will erode consumer confidence in Petitioners' operations, hamper access to capital, and cause a drop in business. Petitioners also likely would see an uptick in the rate of default on loans issued to consumers, as those consumers seek to capitalize on the impact of the investigation. That financial harm is especially significant here because each lending entity here is an arm of a federally recognized Indian tribe, wholly owned and operated by its tribe to generate

revenue that supports governmental services for tribal members. A decline in business revenue will hurt tribal members who depend on that stream of money to provide basic services like fire and police protection.

The undeniable harm that would flow from public disclosure clearly qualifies as good cause under the Bureau's regulations. Indeed, the justification for confidential treatment is especially strong here because of Petitioners' unique position. Unlike typical CID recipients, Petitioners have a powerful argument that they are simply beyond the Bureau's enforcement authority. There can be no good cause to impose irremediable injury on Petitioners, their tribal enterprises, and the members of their respective tribes unless and until the Bureau's authority over them is established.

b. The Bureau's letter of February 1, 2013 indicates that "good cause" under 12 C.F.R. § 1080.6(g) also can be shown in other cases where nondisclosure falls within a stated exemption to the general rule of disclosure established by the Freedom of Information Act, 5 U.S.C. § 552. Because no request under FOIA has been made to our knowledge, these standards are of course only partial guides, and we understand that millions of government documents are not exempt from FOIA but are nonetheless not made public until a valid request under the statute has been made.

The information disclosed by Petitioners falls squarely within Exemption 4 to the general rule of disclosure established by the Freedom of Information Act amendments to the Administrative Procedure Act, 5 U.S.C. § 552. Exemption 4 protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The petition contains confidential proprietary and commercial information – information that is '"of a kind that would customarily not be released to the public by the person from whom it was obtained,"' *Judicial Watch, Inc.* v. *U.S. Dep't of Justice*, 306 F. Supp. 2d 58, 67 (D.D.C. 2004) (citation omitted). The petition contains considerable information related to the origin, formation, and business structure of Petitioners' commercial enterprises, both in the text as well as in the accompanying exhibits. This information is quintessentially "commercial." *See Nat'l Ass'n of Home Builders* v. *Norton*, 309 F. 3d 26, 38 (D.C. Cir. 2002) (noting that commercial is given its "ordinary" meaning). And such information, if disclosed, amounts to a tutorial on the structure and management of tribal lending entities for potential competitors. It is exempt from disclosure under FOIA and its confidentiality should be protected here. *See Judicial Watch, Inc.*, 306 F. Supp. 2d at 68-69 (finding that "company business plans" containing financial plans were properly withheld).

The information provided by Petitioners to the Bureau also falls within Exemption 7(A) to FOIA's general rule of disclosure. Exemption 7(A) permits an agency to withhold "records or information compiled for law enforcement purposes, but only 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. § 552(b)(7)(A). Documents compiled as a part of ongoing SEC and FTC investigations are routinely withheld from disclosure based on Exemption 7(A). *See, e.g.*, *Carter, Fullerton & Hayes* v. *Fed. Trade Comm'n*, 601 F. Supp. 2d 728, 740 (E.D. Va. 2009); *Gavin* v. *U.S. Sec. & Exch. Comm'n*, No. 04-4522, 2007 WL 2454156, at *3-5 (D. Minn. Aug. 23, 2007); *Judicial Watch, Inc.*, 306 F. Supp. 2d at 75-76 (D.D.C. 2004). A Bureau investigation is akin to an investigation by the SEC, and the same considerations for non-disclosure under Exemption 7(A) – namely, the ability to enforce federal law through the agency's investigative function without fear of interference through disclosure – is shared by the Bureau. While Petitioners vehemently dispute the Bureau's authority to investigate a sovereign Indian tribe, it is clear that the Bureau has the authority

to investigate other non-sovereign entities. Any documents compiled for this purpose fall within the disclosure protections of Exemption 7(A).

3. The Bureau's approach is unlawful.

Good cause for continued confidentiality likewise exists here, and the Bureau should reconsider its proposed approach, because to interpret the "good cause" provision of 12 C.F.R. § 1080.6(g) as the Bureau has proposed to do would violate the Due Process and Petition Clauses of the U.S. Constitution.

Federal courts across the country have long held that "[d]ue process prohibits an individual from being punished for exercising a protected statutory or constitutional right," including the right to seek judicial review or otherwise appeal from a government decision. *United States* v. *Poole*, 407 F.3d 767, 774 (6th Cir. 2005). That is so because "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *United States* v. *Goodwin*, 457 U.S. 368, 372 (1982) (citation omitted). Nor is the rule limited to the criminal context. Courts have held, in reliance on *Goodwin* and similar precedent, that "due process requires that a person subject to enforcement of a statutory or administrative scheme be permitted to test the validity of that scheme through judicial review." *Louisiana Pacific Corp.* v. *Beazer Materials & Servs., Inc.*, 842 F. Supp. 1243, 1252 (E.D. Cal. 1994) (citations omitted). "Thus, an administrative scheme which, through substantial penalty provisions, chills an affected party's right to seek judicial review is unconstitutional." *Id.* That is exactly what is occurring here.

While the Bureau's own regulations provide that Petitioners have the right to challenge the issuance of the CIDs, *see* 12 C.F.R. § 1080.6, the Bureau has undermined that right. Specifically, the Bureau has sought to force Petitioners into withdrawing the petition *before receiving a ruling on the merits* by threatening to disclose the petition and request for confidential treatment unless they drop their challenge. *See Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972) (noting that officials cannot exact a waiver as an end-round "to produce a result which it could not command directly") (internal citations omitted); *see also Vance* v. *Barrett*, 345 F. 3d 1083, 1093 (9th Cir. 2003) (finding prison officials violated prisoners' due process rights by firing them from their prison jobs when the prisoners refused to waive their protected rights). Petitioners face devastating reputational and financial harm if they refuse to withdraw the petition and the investigation is made public. And that threat arose only when Petitioners questioned the Bureau's authority to investigate them. Had Petitioners remained silent, there would be zero risk that the Bureau's investigation would be public at this juncture.

The Bureau suggests on its website that it makes petitions to quash public because it wants to "tell[ ] the public what we can, when we can, about our work to protect consumers." CFPB Website, *supra*. While Petitioners understand the Bureau's desire for transparency, that goal does not require release of an *unredacted* Petition and an *unredacted* Bureau disposition. The public has a far greater interest in what the Bureau is investigating than it does in arcane legal disputes over the Bureau's authority. And yet the Bureau proposes to publicize the latter and not the former. There only appears to be one logical rationale for the difference in treatment: The Bureau wants to discourage challenges to its authority by "punish[ing] a person because he has done what the law plainly allows him to do" – file a petition to set aside the CIDs. *Goodwin*, 457 U.S. at 372. The Bureau's actions violate due process.

Publicizing the petition as a penalty for Petitioners' refusal to withdraw it would also amount to unconstitutional retaliation for conduct protected by the Petition Clause of the First Amendment, which protects the right to "petition the Government for a redress of grievances." U.S. Const. amend. I. As the Supreme Court has explained, "the right to petition extends to all departments of the Government," including administrative agencies. *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972). And when an agency official retaliates against a company in an attempt to halt its constitutionally protected conduct, he or she is liable for the harm caused by that retaliation. *See Holzemer* v. *City of Memphis*, 621 F.3d 512, 520 (6th Cir. 2010); *see generally Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

Without question, Petitioners have the right to seek review of the CIDs. *See* 12 C.F.R. § 1080.6. The Bureau's attempt to silence Petitioners' challenge to its authority clearly constitutes retaliation. It makes no difference that Petitioners are corporate entities seeking in part to protect their business interests; "the Petitioning clause of the First Amendment does not pick and choose its causes." *Van Deelen* v. *Johnson*, 497 F.3d 1151, 1156 (10th Cir. 2007); *see also Gable* v. *Lewis*, 201 F.3d 769, 772 (6th Cir. 2000) (business had viable petition clause claim when government employee retaliated against business for filing complaint with agency); *Holzemer*, 621 F.3d at 521-25 (same and collecting cases).

The dangers of allowing a procedure that punishes the Petitioners for exercising their rights is heightened where, as here, the Bureau's processes lack procedural safeguards and impartiality. The fact that the Associate Director both rules on the confidential-treatment requests and supervises the underlying investigation creates an appearance of conflict. Similarly, investigators are permitted repeated ex parte contact with the decisionmaker, both as to the confidential-treatment request and as to the merits, without disclosure to Petitioners or opportunity to respond. That is one-sided and stacks the deck against Petitioners.

4. The Bureau's approach is inconsistent with other agency practice.

The dubious legality of the Bureau's proposed approach no doubt explains why other similarly situated agencies have not adopted it. In 2009, for example, the Federal Energy Commission issued an order acknowledging that "premature disclosure" of an investigation "could adversely affect the reputation of the subject" without "staff having conducted sufficient discovery to reach a preliminary finding that the subject may have violated a Commission requirement." Fed. Energy Reg. Comm'n, PL10-2-000, *Order Authorizing Secretary to Issue Staff's Preliminary Notice of Violations* 3 (2009), *available at* http://www.ferc.gov/whats-new/comm-meet/2009/121709/M-1.pdf. Consequently, the Commission announced a policy whereby disclosure of an investigation would occur only after it sent a "preliminary findings letter" to the subject, and the subject "had an opportunity to respond" to that letter. *Id.* The policy "balances the need to protect the subject's confidentiality in the early stages of an investigation with the public interest of promoting additional transparency during investigation." *Id.*

The Securities and Exchange Commission ("SEC") also eschews the Bureau's approach. The SEC regularly allows subpoena recipients to submit material with requests for confidential treatment in order to ensure that investigations remain nonpublic. *See* 17 C.F.R. § 203.5 ("Unless otherwise ordered by the Commission, all formal investigative proceedings shall be nonpublic.") *see* Securities and Exchange Commission News Room, Office of Public Affairs, *How Investigations Work*, available at http://www.sec.gov/news/newsroom/howinvestigationswork.html (stating that "[a]ll SEC

investigations are conducted privately"). Indeed, my colleague Mr. Altman has been practicing before the SEC for 20 years and has never seen a case where a subpoena recipient was forced to choose between challenging the subpoena and preserving confidentiality. Given that the Bureau relied on SEC rules in promulgating its own implementing regulations, the contrast is instructive. *See* Bureau of Consumer Financial Protection, RIN 3170-AA03, *Rules Relating to Investigations* 3 (2012). We have also surveyed other attorneys on the tribes' legal team who regularly appear before such varied agencies as the Federal Trade Commission, the Commodities Futures Trading Commission, and the Department of Justice and have never seen anything even approaching the Bureau's actions in this case.

5. The Bureau's approach makes for bad policy.

Finally, legalities aside, the Bureau's proposed approach is simply bad policy. Investigated entities should not be put in the position of choosing between confidential treatment of an investigation and the right to challenge a CID. That is especially so given a commercial climate where public knowledge of a mere investigation – without any proof of actual wrongdoing – can be deeply harmful to the investigation's target. And in the long run, the incentives this policy produces are not just unfair to the investigated entities. They harm the Bureau too. As a new agency, the Bureau should welcome petitions that, through the process of adjudication, will help clarify the reach of the agency's statutory authority. A process that penalizes such petitions ultimately retards development of the law.

Furthermore, if carried out, the Bureau's proposed action would set a dangerous precedent with regard to the federal government's interaction with sovereign Indian Nations and would breach the federal government's stated policies of deference and commitment to tribal self-governance and of conducting relations with Indian Nations on a government-to-government basis. *See Memorandum on Tribal Consultation,* 74 Fed. Reg. 57881 (Nov. 5, 2009). A denial of the Tribes' reasonable request for confidentiality would set a harsh tone and contravene decades of federal precedent and current federal policy.

Once again, we respectfully request an opportunity to discuss this with you in person before any action is taken. We would hope that such a meeting would eliminate the need for Petitioners to pursue their rights in an alternative forum.

Sincerely,

Neal Kumar Katyal /JDB

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cfpb Consumer Financial Protection Bureau

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February 1, 2013

VIA ELECTRONIC MAIL

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Re: Request for Confidential Treatment of Joint Petition by Great Plains Lending, LLC, Mobiloans, LLC, and Plain Green, LLC

Dear Mr. Katyal:

This letter responds to your January 25, 2013 oral request on behalf of Great Plains Lending, LLC, Mobiloans, LLC, and Plain Green, LLC (collectively, "the entities") to make a further written submission in support of the entities' request for confidential treatment of their joint petition to set aside the civil investigative demands served by the Consumer Financial Protection Bureau ("Bureau").

The entities may make such a further written submission in support of their request for confidential treatment of their petition. Any such submission must be filed with the Executive Secretary of the Bureau with a copy to the Assistant Director of the Division of Enforcement no later than February 8, 2013.

In their submission, the entities should explain whether good cause exists under 12 C.F.R. § 1080.6(g) for confidential treatment of their joint petition or the information contained in the petition. In making that showing, the entities should address the application of the standards for withholding material from public disclosure established by the Freedom of Information Act amendments to the Administrative Procedure Act, 5 U.S.C. § 552, to the petition or any such information.

Please contact me at (202) 435-7159 or meredith.osborn@cfpb.gov if you have any further questions.

Sincerely,

Meredith Osborn
Enforcement Attorney

Cc: Melanie Hirsch, Max Peltz