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,	**ENFORCEMENT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION REQUESTING A LIST OF DOCUMENTS WITHHELD BY ENFORCEMENT COUNSEL**
ATRIUM INSURANCE CORPORATION, and ATRIUM REINSURANCE CORPORATION	

Respondent's motion requesting a list of withheld documents is moot because Enforcement Counsel did not withhold any documents required to be produced under 12 C.F.R. § 1081.206(a).

BACKGROUND

1. Rule 206

Administrative Adjudication Rule 206(a) requires that the Office of Enforcement make available for inspection and copying documents that we obtained from persons not employed by the Bureau in connection with the investigation that led to the filing of the Notice of Charges against PHH and its subsidiaries.[1] The contrapositive is that Rule 206 does not require Enforcement

[1] 12 CFR § 1081.206(a).

Counsel to produce its internal documents and documents connected with investigations of other subjects.

Rule 206(c) provides that the hearing officer may require the Office of Enforcement to produce a list of documents or categories of documents that fall within 206(a) but were withheld pursuant to Rule 206(b)(i-v). Automatic production of such a list is not compulsory. Notwithstanding, if Enforcement Counsel withholds intra-governmental documents described at (b)(iii) we must provide Respondents notice that these were withheld (no such documents were withheld in this instance).

Rule 206(d) requires the Office of Enforcement to "commence" making documents available to a respondent for inspection and copying not later than seven days after service of the Notice of Charges. The rule does not state when the production must be completed. Rule 206(g), however, provides that if Enforcement Counsel acquire information that they intend to rely upon at a hearing after making the 206(a)(1) disclosures they shall supplement its disclosures to include such information.

2. Relevant History of this Matter's Document Production

On February 5, 2014, five days after serving its Notice of Charges against Respondents, Enforcement Counsel delivered to Respondents' counsel a partial production of its investigative file.[2] While awaiting entry of a protective order, which was necessary before Enforcement Counsel could produce certain third party records, Respondents requested by letter that Enforcement Counsel provide a log of withheld documents, among other things. Enforcement Counsel

[2] Rather than making documents available for inspection and copying and requiring Respondents to be responsible for the cost of photocopying pursuant to Rule 206(f), Enforcement Counsel delivered electronic documents.

responded by agreeing to comply with subsection 12 C.F.R. § 1081.206(c) as written (*i.e.* we would provide any log if ordered to do so by the hearing officer).

On March 4, 2014, one business day after entry of an appropriate Protective Order, Enforcement Counsel produced to Respondents a hard disk drive containing the approximately 206 Gigabytes of documents and data obtained from investigative demands and other responses from third parties. Enforcement Counsel produced these documents as they received them and did not extract or redact documents for privilege or relevancy.

That same week, on March 8 and 11, 2014, Enforcement Counsel made supplemental productions of, respectively, its own electronic communications with third parties, and a set of third party documents inadvertently excluded from the March 4 production. On March 13, 2014, Enforcement Counsel made a supplemental production of consent order reports submitted in paper to the Associate Director for the Office of Enforcement, which Respondents specifically requested. On March 20 and 24, 2014, Enforcement Counsel made supplemental productions of notes of interviews for witnesses designated on our witness list. Several of the interviews had not occurred prior to Enforcement Counsel's initial document production on March 4, 2014.

For the sake of transparency with this tribunal, Enforcement Counsel submit that we did not produce several categories of materials because they do not fall under the prescriptions of Rule 206(a). First, we did not produce materials obtained from third parties that relate exclusively to other investigations. Second, we did not produce unreadable media. Enforcement Counsel received from the Department of Housing and Urban Development (HUD) one hard disk drive and a few CDs that are identified as "corrupted" or "missing" information. We understand that the media contained documents related to HUD's captive reinsurance investigations, but we have no records of the specific contents of the hard drive; the four empty disks were labeled as containing aggregate

financial summaries and actuarial information of 6 mortgage insurance companies. Because we could not read these disks, the documents are not a part of the investigative file that led to the institution of proceedings against PHH and Atrium. Likewise, we did not produce information that may have been sought by HUD or its investigative partners, but that never transferred to the Bureau.

In addition, we did not produce internal emails, memos, and compiled documents that reflect attorney mental impressions, attorney work product, or were duplicates compiled for law enforcement purposes by Enforcement Counsel or HUD investigators. As discussed more later, these are internal documents that fall outside the Rule 206(a) definition of documents obtained from "persons not employed by the Bureau."

Enforcement counsel does not possess any other information from third parties that it withheld on the bases of Rule 206(b)(1)(i-v). Specifically, Enforcement counsel did not withhold any documents obtained from another governmental entity on the basis that it is either not relevant or provided on the condition that the information not be disclosed per Rule 206(b)(1)(iii).

ARGUMENT

The Motion to Compel a Withheld Document List should be denied as moot because Enforcement counsel did not withhold any documents it obtained from persons not employed by the Bureau in connection with the investigation that led to the filing of the Notice of Charges against PHH and its subsidiaries.[3] While we did withhold internal records and records related to investigations of other subjects, these documents do not fall within the ambit of Rule 206(a)(1) and (a)(2). With regard to materials falling under Rule 206(b)(1)(ii), the commentary to Rule 206 explains that "internal documents prepared by persons employed by the Bureau," including "any

[3] 12 CFR § 1081.206(a).

notes, working papers, memoranda or other similar materials, prepared by an attorney or under an attorney's direction in anticipation of litigation," do "*not fall within the purview of paragraphs (a)(1) and (a)(2).*" 77 Fed. Reg. 39071 (emphasis added). Additionally, "[a]ccountants, paralegals, investigators, and consulting experts who work on an investigation do so at the direction of the Director, and associate director, or another supervisory attorney, and their work product is therefore not subject to the affirmative disclosure obligation." Id. The commentary further explains that "the Bureau has retained this provision of the SEC Rules to make clear that *such work product is not subject to the affirmative disclosure obligation.*" 77 Fed. Reg. 39071 (emphasis added). And since the Consumer Financial Protection Act transferred all the powers, duties, and employees that were vested in the Secretary of HUD relating to RESPA to the Bureau,[4] Rule 206 also excludes HUD's internal documents and documents obtained in its investigation of other subjects.[5]

Even if Rule 206(a) were read to include internal records and records of other investigations, the motion should also be denied as moot because Rule 206(c) is satisfied when the Office of Enforcement produces a list of categories of documents withheld pursuant to Rule 206(b)(i-v). Enforcement Counsel has supplied such a categorical listing above. *Supra*, at 3-4.

This categorical description should be sufficient under the Rule because requiring from Enforcement Counsel a list of documents that don't meet the affirmative disclosure requirements of

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[4] 12 USC § 5581(b)(7)(B); 12 USC § 5584(a)(6)

[5] Moreover, under 12 U.S.C.§1828(x) HUD's transfer of records to the Bureau is not a waiver of its law enforcement privilege. 12 U.S.C.§1828(x) ("The submission by any person of any information to the Bureau of Consumer Financial Protection… shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such Bureau, agency, supervisor, or authority.")

Rule 206 would impermissibly disclose other confidential investigations,[6] Enforcement Counsel's investigation methods, and its attempts to develop factual and legal theories.[7] Unlike in federal court—where discovery must be requested and limited to information relevant to any party's claim or defense[8]—if we were required to describe all records not included in the subject's investigative file, information that most courts would deem irrelevant and inadmissible would be incidentally included. Moreover, creating such a list would be burdensome and a waste of time.

In sum, Enforcement Counsel opposes Respondents' motion because it is moot, baseless, and calls for a burdensome task that would be a waste of Enforcement Counsel's time.

DATED: April 16, 2014

Respectfully submitted,

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[6] Under 12 C.F.R. § 1080.14, Bureau investigations generally are non-public and documentary materials the Bureau receives pursuant to a Civil Investigative Demand are subject to the rules at Part 1071. Specifically, 12 C.F.R. § 1070.4 provides such materials are confidential information that should only be disclosed under limited circumstances.

[7] Both the Federal Rules and precedent strongly support that the rules protecting against disclosures of the mental impressions, conclusions, opinions, or legal theories of an attorney implies absolute protection. *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 733-34 (4th Cir. 1974) ("[N]o showing of relevance, substantial need or undue hardship should justify compelled disclosure of an attorney's mental impressions, conclusions, opinions, or legal theories. This is made clear by [Rule 26(b)(3)'s] use of the term 'shall' as opposed to 'may.'" The court reasoned that the modifying clause operates as an absolute, and not a qualified, limitation on the production of such materials.)

[8] Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense…")

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Enforcement Counsel

Certificate of Service

I hereby certify that on this 16th day of April 2014, I caused a copy of the foregoing "Enforcement Counsel's Opposition to Respondents' Motion Requesting a List of Documents Withheld by Enforcement Counsel" to be filed with the Office of Administrative Adjudication and served by electronic mail on the following persons who have consented to electronic service on behalf of Respondents:

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