

**UNITED STATES OF AMERICA**  
**Before the**  
**CONSUMER FINANCIAL PROTECTION BUREAU**

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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. )

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**MEMORANDUM IN SUPPORT OF OBJECTION, MOTION FOR  
RECONSIDERATION OR, IN THE ALTERNATIVE, REQUEST FOR  
CLARIFICATION OF THE ORDERS TAKING JUDICIAL NOTICE**

Pursuant to 12 C.F.R. §§ 1081.205 and 303(e), respondents PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation (collectively, “Respondents”), file this memorandum in support of its Objection, Motion for Reconsideration or, in the alternative, Request for Clarification of the Orders issued by the Tribunal on September 23 and 25, 2014. Documents 188-89 (“Notice Orders”). As grounds for their objection and request for clarification, Respondents state as follows:

1. This matter was the subject of an administrative hearing that was conducted over a nine-day period between March 24, 2014, and June 4, 2014.
2. On July 7, 2014, the Tribunal issued an Order notifying the parties that, absent a request to supplement the record, it would issue an Order closing the hearing record. Document 168.
3. On July 14, 2014, the Tribunal issued an Order formally closing the Administrative Record (“Record”). Document 171.

4. On September 23, 2014, pursuant to Rule 303(c), the Tribunal issued an Order taking judicial notice of the Securities and Exchange Commission's ("SEC") "public official records" as to PHH Corporation, and specifically of PHH Corporation's Forms 10-K and 10-K/A for the years 2008 through 2013. Document 188.

5. Similarly, on September 25, 2014, again pursuant to Rule 303(c), the Tribunal issued an Order taking judicial notice of the SEC's "public official records" as to Genworth Financial, Inc., Radian Group Inc., The PMI Group, Inc. and Arch Capital Group Ltd. (collectively, the "MIs"), including Genworth's Form 10-K for the year ended December 31, 2012. Document 189.

6. Rule 303(c), which appears in the "Hearings" section of the Bureau's Rules of Practice for Adjudication Proceedings ("Rules"), provides:

*Official notice.* Official notice may be taken of any material fact that is not subject to reasonable dispute in that it is either generally known or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. If official notice is requested or is taken of a material fact not appearing in the evidence in the record, the parties, upon timely request, shall be afforded an opportunity to disprove such noticed fact.

§1081.303(c).

7. It is improper, and contrary to the Bureau's Rules, to take judicial notice after the Record has been closed and the case submitted for a recommended decision. First, Rule 304(c) is clear: once the Record is closed, the Hearing Officer's discretion to permit or order correction of the Record is only as permitted by paragraph (b) of that section, which allows, under limited circumstances, correction to the official transcript. §§ 1081.304(b)-(c). Furthermore, such corrections "shall not be ordered by the hearing officer except upon notice and opportunity for the hearing of objections." § 1081.304(b). Supplementation by the Tribunal after the Record has been closed, however, is not permitted by the Rules. Second, Respondents were provided with

no prior notice of the Tribunal's consideration of such documents, nor were they afforded an opportunity to object to the admissibility of such filings and receive a ruling on the record, as envisioned and required by Rule 303(e)(1): "Objections to the admissibility of evidence must be timely made and rulings on all objections *must appear on the record.*" § 1081.303(e)(1) (emphasis added). As such, Respondents object to the taking of judicial notice of PHH Corporation's and the MI's SEC filings at this late date. Fundamental fairness requires notice and an opportunity to be heard. Respondents were not afforded notice of the Tribunal's action and they have not been afforded a full and fair opportunity to respond to the additional information the Tribunal now considers from the identified SEC filings.

8. Respondents further object on the grounds that there was not any request by Enforcement Counsel to take judicial notice of PHH Corporation's SEC filings or the majority of documents subject to judicial notice in the September 25 Order. "Enforcement counsel shall have the burden of proof of the ultimate issue(s) of the Bureau's claims at the hearing." § 1081.303(a). Because Enforcement Counsel did not request the Tribunal to take judicial notice of these SEC filings,<sup>1</sup> nor did they make any attempt to include such materials in the Record in response to the Tribunal's July 7 Order regarding its closing, permitting such materials into the Record at this time is inappropriate, contrary to the Bureau's Rules of Practice, and prejudicial to Respondents.

9. In the event the Tribunal overrules Respondent's objection to its decision to take judicial notice of the SEC filings, Respondents request that the Tribunal clarify the reason it has decided to take judicial notice of the identified materials and allow Respondents the opportunity to respond. Since Respondents are unaware of any request by Enforcement Counsel to take this

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<sup>1</sup> Respondents concede that Enforcement Counsel alluded to seeking judicial notice of a single SEC filing by Genworth Financial, Inc., in their Post Hearing Brief. Enf. Br. at 53 & n.18 (Aug. 8, 2014) (Document 177). Enforcement Counsel, however, did not, to Respondents' knowledge, seek judicial notice of any other document referenced in the Tribunal's Notice Orders.

action, without clarification by the Tribunal, Respondents are being denied the opportunity to “disprove such noticed fact.” § 1081.303(c). While PHH Corporation stands behind its SEC filings, the lack of any justification for such judicial notice, as would have been afforded Respondents had the request been made by Enforcement Counsel, runs the risk of the Tribunal misinterpreting the materials and/or prevents Respondents from identifying any subsequent material change in circumstances, which may be relevant depending on the reasons for the Tribunal’s decision to take judicial notice of such materials.

### **CONCLUSION**

The CFPB’s commentary to the Final Rules contains numerous statements regarding the “fairness” of its rules governing adjudications. *See, e.g.*, 77 Fed. Reg. at 39058 (“In drafting the final rule, the Bureau endeavored to create an adjudicatory process that provides for the expeditious resolution of claims while ensuring that parties who appear before the Bureau receive a fair hearing.”); *id.* at 39061 (the hearing officer’s powers “are intended to further the Bureau’s goals of an expeditious, fair, and impartial hearing process.”); *see also* Rule 101 (“the Bureau’s policy is to conduct such adjudication proceedings fairly and expeditiously.”). In taking judicial notice of materials after the hearing, and after the Record in this case was closed is contrary to the Bureau’s Rules. The Tribunal’s decision to enlarge the Record in this manner is prejudicial to Respondents and they ask that the Notice Orders be withdrawn. In the alternative, and without waiver of their objection, Respondents request that the Tribunal identify the reason(s) it is taking judicial notice of the SEC filings, that it identify the specific portions of those materials upon which it intends to take judicial notice, and that it afford Respondents an opportunity to respond to the Tribunal’s action.

Dated: September 29, 2014

Respectfully submitted,

WEINER BRODSKY KIDER PC

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**RULE 205 CERTIFICATION**

Pursuant to Rule 205(f), counsel for Respondents certifies that they have conferred with counsel for the Enforcement Division in a good faith effort to resolve the issues raised by this Motion and have been unable to resolve the matter by agreement.

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**CERTIFICATION OF SERVICE**

I hereby certify that on the 29th day of September, 2014, I caused a copy of the foregoing Objection, Motion for Reconsideration or, in the alternative, Request for Clarification to the Orders issued by the Tribunal on September 23 and 25, 2014, and supporting memorandum 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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