UNITED STATES OF AMERICA
CONSUMER FINANCIAL PROTECTION BUREAU

In the Matter of:

Harbour Portfolio Advisors LLC

PETITION TO SET ASIDE OR MODIFY SEPTEMBER 8, 2016 CIVIL INVESTIGATIVE DEMAND

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INTRODUCTION

Harbour Portfolio Advisors LLC ("Harbour" or "Company") manages a collection of partnerships that invest in foreclosed real estate and offer those same properties to consumers for purchase through an Agreement for Deed ("AFD").[1] In doing so, Harbour serves consumers and the public good by offering an opportunity for home ownership at affordable prices and thereby helping to rehabilitate abandoned properties. Harbour helps consumers pursue home ownership where that path might not otherwise exist.

The Company is aware that its industry has been the subject of negative media coverage in recent months. Harbour strives to comply with all applicable laws and regulations and to treat consumers fairly. To that end, it has cooperated with the Bureau's investigation to date in the hopes that it can demonstrate that these press reports are inaccurate.

Unfortunately, the staff appear intent on continuing their investigation of Harbour and have now issued an unduly burdensome Civil Investigative Demand ("CID") seeking nearly seven years of documents, data, and answers to written questions. However, as explained below, the CID is facially invalid because the AFDs provided by Harbour, and which are the subject of the CID, are not a consumer financial product or service. Accordingly, the CID seeks to investigate matters that are outside the Bureau's jurisdiction, and the CID should be set aside.

[1] Harbour itself does not market or service its AFDs. Third parties, National Asset Advisors and National Asset Mortgage do so on behalf of Harbour.

I. RELEVANT BACKGROUND

Harbour organized in 2010, at the nadir of the foreclosure crisis. At the time, access to conventional home financing had been significantly curtailed, yet at the same time there was a substantial inventory of relatively low-cost homes available through foreclosure sales. While foreclosed properties were available for purchase, many potential buyers lacked the funds for a cash purchase. Similarly, banks were (and are) unlikely to provide conventional mortgage loans on foreclosed homes that may have an appraised value of less than $100,000.

Harbour sought to create a bridge between willing buyers and available properties through AFDs. As defined in the Bureau's September 8, 2016, CID, an AFD is "a written agreement . . . to purchase a residential property . . . in exchange for a sum of money . . . according to the terms of a promissory note, whereby the Company agrees to deliver a deed to the Purchaser upon payment in full of the purchase price." AFDs are also known as "contracts for deed" or "land installment contracts."

According to its standard AFD, Harbour commits to conveying a clear and unencumbered title to the purchaser "if" she "make[s] the payments and perform[s] the covenants described" in the AFD.[2] As part of her obligations under the AFD, the purchaser pays a down payment, on average just over $1,000 and in the range of what the consumer would pay for first and last month's rent. The remaining balance of the purchase price is paid through monthly payments for the term of the contract. *Id.* at para. 2. The purchaser also agrees to pay

[2] *See, e.g.*, *Harbour Portolio Contract - Annotated, reprinted in* Alexandria Stevenson and Matthew Goldstein, *Documents on Land Contracts*, New York Times (February 20, 2016), http://www nytimes.com/interactive/2016/02/19/business/dealbook/document-documents-on-land-deeds html. In the last two years, Harbour has revised the contract to remove the arbitration clause and the requirement that the Purchaser bring the premises to a habitable condition within four months, but the payment structure of the contract as described herein remains the same.

property taxes and keep the property adequately insured during the term of the contract. *Id.* at para. 3-4. When consumers default under the terms of an AFD, Harbour's recourse is to "forfeit and terminate" the AFD. *Id.* at para. 7. In such a scenario, the consumer's down payment and prior payments may be retained by Harbour "in full satisfaction and liquidation of all damages." *Id.* The AFD does not obligate or require consumers to pay the full purchase price for the property.

Harbour has obtained these properties by purchasing "bulk" properties in pools created and sold by the Federal National Mortgage Association, commonly known as Fannie Mae. When Harbour purchased properties through these bulk sales, the portfolio typically included both habitable and uninhabitable properties. Fannie Mae controlled which properties were part of any pool as well as the location of the properties that comprised the pool. Harbour had to take not only the properties "as-is" but the entire pool as well – Harbour was not able to exclude any properties from the pool. As a general proposition, about 25% of properties in a pool were just empty lots or otherwise unlivable homes with no value. Harbour was thus required to purchase these essentially worthless properties along with others in the pool. Harbour takes a loss on these properties and does not attempt to sell them to consumers.

The AFDs that Harbour offers consumers come with many favorable features. Consumers' monthly payments are fixed for the term of the contract, regardless of interest rate or fluctuations in the market, and without any balloon payments or up-front fees. The AFDs do not penalize consumers for paying early. The Company designs its monthly payments to be affordable, generally setting payments at less than half of comparable rental rates for the location, so that consumers can afford the payment and potentially benefit when home values go up. Across the entire pool of homes under AFD to consumers, the average sales price charged

by Harbour is $36,000, resulting in a monthly payment of less than $320, on average. Today, these homes have an average value of $58,000, meaning that consumers who continue to pay and ultimately purchase the home will have gained substantial value.

Harbour is proud of its record of serving consumers. Harbour has assisted numerous families in obtaining a home where that opportunity might not otherwise exist. The prices it offers for purchase are available to all consumers, regardless of race, sex, or national origin. All AFD applications are subject to careful evaluation. Harbour considers the consumer's income and expenses in assessing her ability to pay. On average, Harbour's customers have a "debt to income" ratio of 24%, well below the 43% debt-to-income threshold for mortgages.[3]

And, where purchasers do struggle to pay according to the terms of the contract, Harbour has robust loss mitigation procedures designed to work with consumers to keep them in their home. If, after all efforts to assist the consumer have failed, the consumer is unable to pay and vacates the property, Harbour cannot and does not seek to collect on remaining payments. Harbour often takes a substantial loss in this situation due to the costs involved in taking the property back and because consumers who fail to pay often leave the home in worse condition. Thus, Harbour profits when consumers succeed, not when they fail.

[3] Consumer Financial Protection Bureau, *What is a debt-to-income ratio? Why is the 43% debt-to-income ratio important?* Ask CFPB http://www.consumerfinance.gov/askcfpb/1791/what-debt-income-ratio-why-43-debt-income-ratio-important.html (last visited on September 23, 2016).

II. PROCEDURAL HISTORY

Over the past several months, the *New York Times* ran a series of articles about AFDs, which were largely negative and primarily focused on some of the troubled history of AFDs.[4] The articles also dubbed AFDs to be "loans" and reported that the Bureau had assigned enforcement staff to investigate the products at the urging of consumer advocates.

Harbour received an initial CID for an investigational hearing on May 11, 2016. This CID requested testimony on a wide number of topics, covering virtually every aspect of Harbour's operations. Although Harbour questioned the Bureau's authority to investigate AFDs, it agreed to cooperate and provided the requested testimony over the course of a full day. Harbour hoped that, in providing background information, the Bureau would recognize that it lacks jurisdiction over AFDs.

Following the hearing on September 8, 2016, Harbour received the instant CID demanding a massive amount of documents, data, and information. Given the incredible burden associated with this CID, and the information already available to the Bureau from the company's hearing testimony, it is necessary at this time to address the Bureau's lack of jurisdiction to investigate Harbour. Harbour's AFDs have long been regulated under state law and Harbour welcomes the opportunity to work with appropriate government authorities to provide more clarity and specificity for this industry. But the CID is not the appropriate mechanism for such a discussion.

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[4] Matthew Goldstein and Alexandria Stevenson, *Market for Fixer-Uppers Traps Low-Income Buyers*, New York Times (Feb. 20, 2016), http://www nytimes.com/2016/02/21/business/dealbook/market-for-fixer-uppers-traps-low-income-buyers.html; The Editorial Board, *The Racist Roots of a Way to Sell Homes*, New York Times (April 29, 2016), http://www nytimes.com/2016/04/29/opinion/the-racist-roots-of-a-way-to-sell-homes html; Matthew Goldstein and Alexandria Stevenson, *'Contract for Deed' Lending Gets Federal Scrutiny*, (May 10, 2016), http://www nytimes.com/2016/05/11/business/dealbook/contract-for-deed-lending-gets-federal-scrutiny.html.

Counsel for Harbour conducted a Meet and Confer with the staff on September 14, 2016, where it reiterated its concern that the Bureau lacks jurisdiction over this matter. Counsel further explained that, even if the Bureau had jurisdiction over AFDs, the CID is overly broad and unduly burdensome. The staff rejected Harbour's position, and we timely filed this Petition.[5]

SUMMARY OF ARGUMENT

The Bureau's authority to investigate Harbour rests on the notion that AFDs are a "consumer financial product or service" and more specifically, "credit." Credit, however, requires a deferred debt or the purchase of property and its deferred payment. Yet Harbour's AFDs and the very terms of the CID establish that no purchase occurs (and no title transfers) unless and until the customer makes a final payment. Up until that point, the customer may walk away from the AFD, and Harbour's only remedy is to cancel the AFD and retain the prior payments as compensation. Consumers have no obligation to pay the full purchase price. These critical facts remove AFDs from the realm of "credit" and make AFDs more akin to residential leases or rent-to-own transactions, which are not covered by definitions of "credit" under Federal consumer financial law. The Bureau therefore lacks authority to investigate Harbour's AFDs.

And even if the Bureau had authority here, the CID itself is extraordinarily broad, and unduly burdensome, requesting information over a seven-year period, concerning matters that have no connection to a consumer financial product or service, and requiring a mere thirty-days for compliance, a deadline which would be unrealistic for even the largest institutions subject to the Bureau's authority. The CID, if not set aside, should be modified to reflect the realities of

[5] The Meet and Confer Certification required by 12 C.F.R. § 1080.6(e)(1) is attached as Exhibit A.

the burdens a four-person company would face in responding to a "kitchen-sink" CID such as the one at issue here.

ARGUMENT

I. STANDARD OF REVIEW

The recognized standard in determining whether a CID should be quashed or limited in scope or breadth was adopted by the Supreme Court in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). Although the Court enforced the decree in *Morton Salt Co.*, it recognized that "a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power." *Id.* at 62. Accordingly, the Court instructed that agency subpoenas or CIDs should not be enforced if it is determined that they demand information that is (a) not "within the authority of the agency," (b) "too indefinite," or (c) not "reasonably relevant to the inquiry." *Id.*

The standard outlined in *Morton Salt Co.* has been consistently applied by the courts. The U.S. Court of Appeals for the D.C. Circuit recognized in *SEC v. Arthur Young & Co.*, "the gist of the protection is the requirement . . . that the disclosure shall not be unreasonable. Correspondingly, the need for moderation in the subpoena's call is a matter of reasonableness. 584 F.2d 1018, 1030 (D.C. Cir. 1978). The subpoena request must not be so overbroad as to reach into areas that are irrelevant or immaterial." *Id.* at 1028. Where it is clear that an agency lacks the authority to investigate or is seeking information irrelevant to a lawful investigatory purpose, a court must set such inquiry aside. *See Morton Salt Co.*, 338 U.S. at 652; *CFPB v. Accrediting Council for Independent Colleges and Schools*, --F. Supp. 3d--, No. 15-mc-1838-

RJL, 2016 WL 1625084, at *1 (D.D.C. Apr. 21, 2016) (denying CFPB's petition to enforce CID, because the agency did not have authority to issue it).

II. THE CFPB DOES NOT HAVE STATUTORY AUTHORITY TO ISSUE THE CID.

The CID fails under *Morton Salt Co.* because it seeks to investigate matters that are not within the authority of the agency. The Consumer Financial Protection Act ("CFPA") tasks the Bureau with regulating "consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. § 5491(a). To facilitate this purpose, the CFPB may issue CIDs to any person believed to be in possession, custody, or control of information "relevant to a violation," which is "an act or omission that, if proved, would constitute a violation of Federal consumer financial law." *Id.* § 5562(c)(1), § 5561(5). These CIDs must "state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." *Id.* § 5562(c)(2). But the Bureau cannot accuse just any person of a violation of Federal consumer financial law. Its jurisdiction only extends to "covered persons" (or their service providers), that is, a person who offers a consumer financial product or service. Accordingly, the Bureau's authority to charge Harbour with violations of Federal consumer financial law, and even its authority to investigate Harbour, begins and ends with whether the Company offers a "consumer financial product or service."

The CID's statement of purpose and the required specifications are critical to this inquiry. The CID issued to Harbour contains the following statement of purpose:

> The purpose of this investigation is to determine whether investment firms or other unnamed persons have been or are engaging in unlawful acts or practices relating to the marketing, offering, servicing, or collection of *loans for the purchase of residential properties, or similar products or*

> *services*, in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531, 5536, the Truth in Lending Act, 15 U.S.C. §1601 et seq., the Equal Credit Opportunity Act, (ECOA), 15 U.S.C. §§ 1691-1691f, any of their implementing regulations, or any other Federal consumer financial law. The investigation also seeks to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

Despite the statement of purpose ostensibly directed to "loans," the CID itself is focused on AFDs.[6] The CID defines an AFD as:

> a written agreement entered into by the Company with a person who agrees, among other things, to purchase a residential property owned by the Company in exchange for a sum of money, payable to the Company according to the terms of a promissory note, whereby the Company agrees to deliver a deed to the Purchaser upon payment in full of the purchase price.

The CID also defines other key terms – "applicant," "application," and "purchaser" – in reference to AFD transactions as opposed to "loan" or "credit" transactions.

The CID makes clear that the staff believes Harbour offers a "consumer financial product or service" under the CFPA because it believes Harbour is "extending credit and servicing loans" within the meaning of 12 U.S.C. § 5481(15)(i).[7] However, for the reasons described below, Harbour's AFDs are neither "loans" nor "credit." Rather, they are equivalent to residential

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[6] Although the stated purpose is to investigate practices relating to "loans" for the purchase of residential properties, the CID definitions and specifications make clear that the Bureau seeks to investigate AFDs, which are not "loans" subject to the Bureau's jurisdiction. The statement of purpose appears to acknowledge this infirmity, by adding the phrase "or similar products or services," but this attempt cannot cure the fundamental jurisdictional problem – the Bureau does not have statutory authority to investigate AFDs.

[7] The term "financial product or service" also includes "collecting debt *related to any consumer financial product or service*." 12 U.S.C. § 5481(A)(15)(x). As discussed above, this activity is not relevant here because AFDs are not a consumer financial product or service. In addition, AFDs are not "leases of . . . real property that are the functional equivalent of purchase finance arrangements" because the Bureau has not prescribed required standards defining them as a "financial product or service." *See id.* at § 5481(15)(A)(ii)(III) (activity "subject to standards prescribed by the Bureau").

leases or rent-to-own transactions, which are not covered consumer financial products or services.

A. AFDs do not involve extending credit or servicing loans.

The threshold question is whether an AFD is "credit" under the CFPA or any of the statutes cited in the statement of purpose. While the CFPA does not define the term "loan," it defines "credit" to mean "the right granted by a person to a consumer to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment for such purchase." We presume that the term loan is subsumed under the definition of "credit," because the plain meaning of a "loan" is to borrow money – that is, create debt -- and defer repayment of the debt. In addition to the CFPA, the CID's statement of purpose specifically cites the Truth in Lending Act ("TILA") and Equal Credit Opportunity Act ("ECOA"), and the CID specifications obviously seek information relating to those laws (while assuming that AFDs are credit).

The ECOA, which is implemented by Regulation B, makes it unlawful, *inter alia*, for "any creditor to discriminate against any applicant with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract)." 15 U.S.C. § 1691(a). The ECOA, similar to the CFPA, defines the term "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor." The TILA, which is implemented by Regulation Z, imposes extensive requirements of disclosure to be made by creditors in connection with "consumer credit transactions." 15 U.S.C. § 1631. The TILA defines "credit" as "the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." *Id.* at § 1602(f).

While there are minor word differences in how each of these laws define "credit," each defines it as the right granted to a consumer "to defer payment of debt or to incur debts and defer its payment" – and in the case of the CFPA and ECOA – "to purchase property or services and defer payment for such purchase." Stated differently, AFDs would be "credit" if they provide the consumer the right to defer payment of a debt for the purchase of property or services already purchased. *See Ollie v. Waypoint Homes, Inc.*, 104 F.Supp.3d 1012, 1014 (N.D. Cal. 2015).

That is not the case here. First, no "purchase" occurs until a consumer completes all payments required under the AFD. The AFD document itself clearly demonstrates this by stating that Harbour shall convey title only when a purchaser "make[s] the payments and perform[s] the covenants described" in the AFD. Sample Contract at para. 1. The CID's own definition of "AFD" also supports this point, defining an AFD as a "written agreement entered into by the Company with a person who agrees . . . *to purchase* a residential property owned by the Company . . . whereby the Company agrees *to deliver a deed* to the Purchaser *upon payment in full* of the purchase price." (Emphasis added.) The CID also defines a "Purchaser" as "any person who *entered into* an Agreement for Deed with the Company." (Emphasis added.)

Thus, as defined by the CID and the terms of the agreement itself, an AFD does not provide the consumer with the right to defer payment of a debt for the purchase of property or services already purchased. An AFD is not a credit transaction, but rather a contemporaneous exchange of payment at the beginning of each month in return for the consumer's ability to occupy the property for that period. *See Ollie*, 104 F.Supp.3d at 1014. There is no purchase and no transfer of title unless and until the consumer meets the terms of the AFD.[8]

[8] In a related context, state courts, evaluating similar arrangements to AFDs, have found that they are not "loans" under state mortgage lending statutes. *See State v. Willan*, 2011-Ohio-6603, ¶ 40, *rev'd on other grounds by*, 994

During the Meet and Confer, the staff stated the view that AFDs are an extension of credit. Specifically, the staff suggested that the AFD's mention of "interest" made AFD's credit under relevant authority. However, nothing in the CFPA, TILA, or the ECOA definitions of credit include interest as an element of the definition;[9] credit depends upon whether there is a debt or the purchase of property and the deferral of its payment. Courts have also held that the substance of a transaction controls whether it is "credit," not whether it mentions terms that are typically associated with credit. *See Ollie*, 104 F. Supp. 3d at 1016 (use of the terms "credit" and "creditworthiness" in lease agreement did not render agreement to be "credit" under the ECOA); *Shaumyan v. Sidetex Co.*, 900 F.2d 16, 19 (2d Cir.1990) (language stating "THIS IS A CONSUMER CREDIT CONTRACT" did not make investment contract "credit" under the ECOA).[10]

The staff also suggested during the Meet and Confer that AFDs were "credit" because they were "mortgages" under TILA. Again, the Bureau must satisfy the necessary elements of the definition of credit in order to establish that AFDs meet its requirements. Further, the term

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N.E.2d 400 (Ohio 2013*), cert. granted, judgment vacated*, 134 S. Ct. 1873 (2014), *and judgment reinstated*, 41 N.E.3d 366 (Ohio 2015), *and rev'd*, 41 N.E.3d 366 (Ohio 2015)). In the *Willan* decision, the defendant held back twenty percent of the purchase price and consumers paid the balance over time through installments. The defendant retained a second mortgage on the property. Under these facts, the court recognized that the defendant had not made a "loan" because it "did not lend money to any of the homebuyers in exchange for its second mortgage." *Id.* A loan, the court held, "involves the advancement of cash by the lender to, or on behalf of, the borrower." *Id.* Other courts have also reached the same conclusion. *10 E. Realty, LLC v. Inc. Vill. of Valley Stream*, 12 N.Y.3d 212, 907 N.E.2d 274 (2009) (retaining a mortgage on property due to unpaid balance of purchase price was not a "loan" under New York law); *Bayview Loan Servicing, LLC v. Martinez*, No. 05-14-00835, 2016 WL 825670 (Ct. App. Tex. March 3, 2016) (finding that contract for deed was "neither a loan of money…nor an absolute obligation that [the purchaser] repay.").

[9] Regulation Z does include "interest" in the definition of a "finance charge." 12 C.F.R. § 1026.4(a). However, whether a "finance charge" has been imposed depends on whether the charge is "incident to or a condition of the extension of **credit**." *Id.* (emphasis added).

[10] Similarly, that an AFD may include a "promissory note" is immaterial. The CID defines AFD as an agreement to purchase property for a sum of money "whereby the Company agrees to deliver a deed to the Purchaser upon payment in full of the purchase price." Likewise, Harbour's AFD is clear that there is no transfer of title unless and until the consumer makes all required payments.

"mortgage" simply refers to a security interest in property. This is supported by the Bureau's own definition of a "residential mortgage transaction" under Regulation Z, 12 C.F.R. § 1026.2(a)(22), which defines a mortgage solely in relation to a "security interest." As we have explained above, there is no transfer of title (and therefore no need for a security interest) in the property under an AFD unless and until a consumer pays the full purchase price. Moreover, the TILA only applies to an "individual or business that offers or extends *credit*." 12 C.F.R. § 1026.1(c) (emphasis added). Even if an AFD somehow were a "mortgage," it is not subject to TILA unless it is "credit."[11]

During the Meet and Confer, the staff did not raise any other basis for jurisdiction or any laws beyond those specifically referenced in the CID statement of purpose (CFPA, TILA, and ECOA). Although not raised by the staff, we note that the CFPB's Regulation X, 12 C.F.R. Part 1024, implementing the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601, defines the term "federally related mortgage loan" in part by reference to whether the loan is made by a "creditor" as defined by TILA, 15 U.S.C. §1602(g) -- in pertinent part, a "person who regularly extends consumer *credit*." 12 C.F.R. § 1024.2 (emphasis added.) In a separate paragraph, Regulation X provides that "any installment sales contract, land contract, or contract for deed on otherwise qualifying residential property is a federally related mortgage loan if the contract is funded in whole or in part by proceeds of a loan made by any maker of mortgage loans specified in paragraphs (1)(ii)(A) through (D) of this definition." 12 C.F.R. § 1024.2. If

[11] As explained by the Official Comment to Section 1026.2(a)(22), the term "residential mortgage transaction" is significant for five provisions in Regulation Z, each of which require an extension of *credit*:

- Section 1026.4(c)(7)—exclusions from the finance charge.
- Section 1026.15(f)—exemption from the right of rescission.
- Section 1026.18(q)—whether or not the obligation is assumable.
- Section 1026.20(b)—disclosure requirements for assumptions.
- Section 1026.23(f)—exemption from the right of rescission.

AFDs were "credit," there would be no need for a separate paragraph to define these contracts as "federally regulated mortgage loans." In fact, the definition of "federally related mortgage loan" in Regulation X distinguishes between "loans" made by a "creditor" (paragraph 1(D) of the definition) and "any installment sales contract, land contract, or contract for deed" (paragraph 2). Therefore, Regulation X supports the conclusion that an AFD is not credit under TILA.

Moreover, an AFD is not a "federally related mortgage loan" under Regulation X unless "the contract is funded in whole or in part by proceeds of a loan made by any maker of mortgage loans specified in paragraphs (1)(ii)(A) through (D) of this definition." 12 C.F.R. § 1024.2. Harbour's AFDs are not funded by proceeds of a loan by any of the definition's specified makers of mortgage loans; they are not (A) made by a lender that is regulated by or whose deposits are insured by the Federal Government; (B) made, insured, or guaranteed by HUD or other agency of the Federal Government; (C) intended to be sold to Fannie Mae or similar entities; or (D) made by a "creditor" under the TILA. Therefore, Harbour's AFDs are neither "credit" nor "federally related mortgage loans" within the meaning of RESPA and Regulation X.

B. AFDs are akin to a residential lease or rent-to-own transaction, neither of which constitute "credit."

Because ownership transfers only upon completion of all payments and because consumers may otherwise walk away at any time, they are essentially paying rent for the monthly use of a property, making an AFD equivalent to a residential lease or a rent-to-own transaction, neither of which constitute "credit."

1. Residential Leases

Courts have consistently determined that residential leases do not constitute credit transactions subject to the ECOA. *See Laramore v. Ritchie Realty Management Co.*, 397 F.3d

544, 547 (7th Cir. 2005); *Ollie*, 104 F.Supp.3d at 1014; *Portis v. River House Associates*, 498 F.Supp.2d 746, 750 (M.D. Pa. 2007); *Head v. N. Pier Apartment Tower*, No. 02 C 5879, 2003 WL 22127885 (N.D. Ill. Sept. 12, 2003); *but see Ferguson v. Park City Mobile Homes*, No. 89 C 1909, 1989 WL 111916 (N.D. Ill. Sept. 18, 1989) (unpublished opinion holding that ECOA was "broad enough" to cover lease of a mobile home lot, but providing little analysis and noting that counsel had failed to provide any case authority to limit the ECOA).[12]

The Seventh Circuit is the only circuit court that has addressed the applicability of the ECOA to residential loans, holding that it does not apply:

> We hold that a typical residential lease does not involve a credit transaction. The typical residential lease involves a contemporaneous exchange of consideration—the tenant pays rents to the landlord on the first of each month for the right to continue to occupy the premises for the coming month. A tenant's responsibility to pay the total amount of rent due does not arise at the moment the lease is signed; instead a tenant has the responsibility to pay rent over roughly equal periods of the term of the lease. The rent paid each period is credited towards occupancy of the property for that period (i.e., rent paid November 1 is credited towards the right of a tenant to occupy the premises in November). As such, there is no deferral of a debt, the requirement for a transaction to be a credit transaction under the Act.

Laramore, 397 F.3d at 547 (footnote omitted).

[12] In *Brothers v. First Leasing*, 724 F.2d 789, 795 (9th Cir. 1984), the Ninth Circuit held the ECOA applies to *consumer leases*, i.e., leases for the use of personal property covered by the Consumer Leasing Act. The court noted that it was "unclear" that the ECOA, when first enacted, applied to consumer leases. *Id.* at 793. The court concluded, however, that amendments to the Truth in Lending Act, another title of the Consumer Credit Protection Act extending TILA's disclosure requirements to consumer leases, suggested the same should be done to the ECOA. That same reasoning does not apply to leases involving *real property* because they are not covered by the Consumer Leasing Act. *See Laramore*, 397 F.3d at 547.

Similarly, in *Liberty Leasing Co. v. Machamer*, 6 F.Supp.2d 714, 717 (S.D. Ohio 1998), the court held that an equipment lease involving monthly payments was not a "credit transaction" under the ECOA because the financial obligation was *contemporaneous* with possession of the equipment. As explained by the court, the "relevant inquiry is *whether the incremental payments constitute a contemporaneous exchange of consideration for the possession of the leased goods.* Where the leasing agreement, or applicable law, provides for such a contemporaneous exchange, then the lessee cannot be said to "defer [the] payment of [a] debt" within the meaning of ECOA. *Id.* (citations omitted). In *Liberty Leasing*, the terms of the equipment lease obligated the lessees to make monthly payments in exchange for the use of the equipment. The lessees were not obligated to pay the total lease amount in all circumstances under the lease agreement. The agreement provided that in the event of a default by the lessee, the lessor had the right to lease the equipment to another party in an effort to mitigate damages and, in that event, the lessee would have been liable only for "any accrued and unpaid rent" through the date that the lessor obtained possession of the equipment. "Thus, it cannot be said, as a matter of law, that the lessees necessarily incurred a debt for which payment was deferred because, under at least one of the remedial scenarios . . . the lessees' financial obligation, or debt for the total lease price, would have been extinguished upon the surrender of possession of the equipment; i.e., the lessees' financial obligation was *contemporaneous* with possession of the equipment." *Id.*

This is exactly the case here. The AFD provides that, "*if* Purchaser shall *first* make the payments and perform the covenants hereinafter described," the Seller "agree(s) *to convey* and assure to the Purchaser . . . a good and sufficient deed [in the property]." (Emphasis added.) The Purchaser agrees to pay for the property by (1) paying a non-refundable down payment prior to the release of the contract and (2) monthly payments thereafter until the whole sum has been

paid. Title does not transfer to the Purchaser unless and until the whole sum has been paid. As provided in paragraph 7, if the Purchaser fails to make any payments or to perform any of the covenants, the Seller has the option to terminate the contract, in which case the Purchaser forfeits all payments made; "and such payments may be retained by the Seller *in full satisfaction and liquidation of all damages sustained*." (Emphasis added.) As provided in paragraph 8, upon the Seller exercising its right of termination, the Purchaser becomes a "month to month" tenant and agrees to surrender the property without demand. As provided in paragraph 9, the Purchaser shall then pay rent so long as he is in possession and has not been evicted or surrendered the property. There is nothing in the AFD that obligates the consumer to pay the full purchase price and the agreement is terminable without penalty at any time by the consumer. As explained in *Liberty Leasing*, an agreement that provides for "remedial scenarios" whereby a lessee's financial obligation would be extinguished (i.e., surrender of possession) cannot be a "credit transaction," because such terms establish that the debt obligation is *contemporaneous* with the lessee's possession.

2. Rent-to-Own

Harbour's AFDs are also comparable to rent-to-own ("RTO") transactions, which are also not "credit." The Third Circuit's decision in *Ortiz v. Rental Management, Inc.*, 65 F.3d 335 (3d Cir. 1995) is illustrative of why RTO transactions do not meet this definition. There, the plaintiff entered into an RTO contract to purchase furniture. Her agreement provided that she could terminate the RTO contract at any time and that her prior payments would be retained by the defendant as its sole remedy. Ortiz challenged that the RTO contract constituted a "credit sale" under the TILA and that the defendant had violated the statute by not providing the appropriate disclosures. Regulation Z, the TILA's implementing regulation, defines a credit sale

to include leases that result in ownership for no or nominal consideration, unless the lease was "terminable without penalty at any time by the consumer." 12 C.F.R. § 226.2(a)(16); 12 C.F.R. § 1026.2(a)(16). The court found that Ortiz's RTO contract was "terminable without penalty" and accordingly *not* credit. 65 F.3d at 341. Ortiz's loss of her prior payments (what she described as lost "equity" in the property) were not a penalty because a penalty requires assessment of *additional charges* imposed upon termination of the agreement. *Id. See also In re Hanley*, 135 B.R. 311, 314 (C.D. Ill. 1990) (holding that rent-to-own payments were not subject to TILA because the contract was terminable at any time by the consumer, without penalty).

The RTO contract in *Ortiz* and *Hanley* bears the same key features as Harbour's AFDs. Consumers wishing to purchase a property through AFD may cease making payments at any time, and the Company's only recourse is to terminate the contract and retain the payments made. The consumer has no additional obligation. The Bureau's counterpart in consumer protection, the Federal Trade Commission, has also recognized that RTO does not qualify as "credit" under TILA. *See Examining Rental Purchase Agreements and the Potential Role for Federal Regulation: Hearing on H.R. 1588 Before the Subcomm. on Consumer Credit of the H. Comm. on Fin. Servs.* 112 Cong. 45 (2011) (prepared statement of Charles Harwood, Deputy Director, Bureau of Consumer Protection, Fed. Trade Comm'n.) ("Currently, RTO transactions are not specifically covered by federal laws that govern credit or lease transactions, namely, the TILA and the CLA, and there is no specific statute that applies to RTO transactions. Federal legislation that would specifically regulate RTO transactions has been proposed many times in the past.") The FTC also confirmed that RTO transactions are not covered by TILA earlier this year. *See* Federal Trade Commission, *Rent-to-Own: Costly Convenience*, Consumer Information Blog (March 2015), https://www.consumer.ftc.gov/articles/0524-rent-own-costly-convenience

("Most *rent-to-own transactions* are **not** regulated by federal lending and leasing laws that set disclosures and certain consumer protections.").

Accordingly, as a matter of law, Harbour's AFDs do not meet the definition of "credit" under controlling statutes and, in fact, more closely resemble leasing and RTO arrangements that courts have expressly declared *not* to be credit. This is fatal to the Bureau's authority to investigate Harbour. This is an infirmity that cannot be set aside or cured, and the CID should be set aside.

III. THE CID IS OVERBROAD AND UNDULY BURDENSOME.

Even if the Bureau had jurisdiction over this matter (it does not), the CID should be modified for the reasons described below.[13]

A. The CID's nearly seven-year coverage is overbroad.

The CID explains that the "Applicable Period for Responsive Materials" runs from January 1, 2010, through the date of compliance with the CID. This nearly seven-year period well exceeds applicable statutes of limitation under the CFPA, ECOA, and TILA,[14] and it also exceeds the Bureau's transfer date. Where it has jurisdiction, Harbour understands that the Bureau may not be constrained by statutes of limitation or retroactivity concerns in conducting an investigation. Yet when the date of information so far exceeds the applicable period for which the Bureau could hold Harbour liable, the burden of producing stale information outweighs the benefit to the investigation and the request is unduly burdensome.

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[13] During the Meet & Confer, the staff indicated that it would be receptive to further discussion about the requests in this section. However, given the threshold nature of Harbour's jurisdictional dispute, further discussions would be premature. Harbour, therefore, advances these arguments in order to preserve these grounds for objection.

[14] *See* 15 U.S.C. § 1640(e); 15 U.S.C. § 1691(f); 12 U.S.C. § 5564(g).

Harbour's burden in responding to a seven-year CID is significant. During the Meet and Confer, the staff posited that it would be just as easy for Harbour to produce data for one year versus seven years. This is a severe oversimplification of the efforts required to respond to the CID. In terms of the volume of documents and data produced alone, having a seven-year Applicable Period for Responsive Materials significantly increases the costs to Harbour, as every document produced must be reviewed for responsiveness and privilege, then processed by a vendor to correspond to the Bureau's rigorous production standards. Further, Harbour must complete interrogatory responses for 12 interrogatories with numerous subparts. In each instance where its practices have changed, or it has produced a significant volume of documents that it must describe due to the specification, the time and burden for Harbour's small staff to respond increase exponentially.

Accordingly, assuming that Bureau has jurisdiction over this matter (which it does not), the CID's Applicable Period for Responsive Materials should be limited to January 1, 2014, through the date of compliance with the CID.

B. The CID contains individual requests that only relate to Harbour's purchase or ownership of residential properties.

The CID further requests documents and information that do not concern AFDs or any conceivable consumer financial product or service. Specifically, Harbour objects to the CID requesting information about Harbour's purchase or ownership of residential properties (Request for Written Report # 4, Request for Document/Data Request # 1, and Document Request # 16).

Harbour's purchase of property in bulk sale clearly does not involve credit, a loan, or any other type of consumer financial product or service. That Harbour may have later made some of the properties it purchased available for purchase through an AFD does not mean that every

purchase or bid, whether successful or not, qualifies for investigation by the Bureau. These requests should be stricken.

C. The CID contains unreasonable production deadlines.

Finally, although the CID contains 12 interrogatories, many with numerous subparts; four voluminous written reports; and 16 expansive document requests, full compliance is required within 30 days. For even a large company, such a request is unduly burdensome. Harbour has four employees. Even if every employee devoted her full attention to complying with the CID, and nothing else, Harbour would be unable to achieve full compliance within the specified timeframe. Harbour therefore requests ninety days to comply with the CID, from the date of any decision by the Director denying Harbour's petition.

CONCLUSION

Harbour, therefore, requests that the CID be set aside or modified according to the terms set forth in this petition.

Respectfully submitted,

Dated: September 28, 2016

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EXHIBIT A

MEET AND CONFER STATEMENT

Counsel for the petitioner, Harbour Portfolio Advisors LLC ("Harbour"), has conferred with counsel for the Consumer Financial Protection Bureau (the "CFPB" or "Bureau"), pursuant to 12 C.F.R. § 1080.6(c), in a good-faith effort to resolve by agreement the issues raised by the petition and has been unable to reach such an agreement.

On September 14, 2016, Lucy Morris and Allen Denson, counsel for Harbour, conferred with James Meade, Je Yon Jung, and Zach Mason, counsel for the Bureau, by telephone concerning the CID and pursuant to 12 C.F.R. § 1080.6(c). At that time, counsel for Harbour requested that the CID be set aside due to lack of jurisdiction and explained that if necessary it would petition for an order to set aside the civil investigative demand. The parties were unable to reach an agreement on whether the Bureau had jurisdiction, and on September 19, 2016, counsel for the Bureau formally notified Lucy Morris that the Bureau had rejected Harbour's request to set aside the CID.

During the Meet and Confer, Harbour also contended that the CID was overbroad and unduly burdensome, even if the Bureau were to have jurisdiction over this matter. But, given the

threshold jurisdictional issues, we explained that it was premature to discuss specific modifications of the CID.

Respectfully submitted,

Dated: September 28, 2016

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