UNITED STATES OF AMERICA
CONSUMER FINANCIAL PROTECTION BUREAU

In the Matter of:

National Asset Advisors LLC and National Asset Mortgage LLC

COMBINED PETITION TO SET ASIDE OR MODIFY SEPTEMBER 8, 2016 CIVIL INVESTIGATIVE DEMANDS ISSUED TO NATIONAL ASSET ADVISORS LLC AND NATIONAL ASSET MORTGAGE LLC

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TREATISES

OTHER AUTHORITIES

I. INTRODUCTION

The Consumer Financial Protection Bureau ("CFPB") issued a Civil Investigative Demand ("CID") to both National Asset Advisors ("NAA") and National Asset Mortgage ("NAM") (collectively "NAA/NAM") on September 8, 2016. Because the CIDs issued to the companies are virtually identical, they respectfully submit this Petition as one document intended to address both CIDs.

The CFPB stated that it issued the CIDs pursuant to its investigative powers under the Consumer Financial Protection Act ("CFPA"), Truth in Lending Act ("TILA"), and Equal Credit Opportunity Act ("ECOA") because NAA/NAM offer or service "loans for the purchase of residential properties." But the CIDs are improper for three general reasons and the individual demands contained therein are improper for a multitude of reasons.

First, with regard to the general impropriety of the CIDs, the CFPB has no jurisdiction related to this subject matter. NAA/NAM does not offer any "loans" subject to the CFPA, TILA, or ECOA. Instead, they manage properties owned by other parties, service land-installment contracts, and/or enter into sales contracts with real estate purchasers. None of these activities are subject to the CFPA, TILA, or ECOA.

Second, the CFPB failed to provide NAA/NAM "fair notice" that they were subject to federal oversight, violating their due process rights. Land-installment contracts have always been subject to state oversight. No federal statute under the CFPB's jurisdiction has ever included oversight of land-installment contracts. Indeed, the Federal Trade Commission has stated over the course of the last 15 years that rent-to-own agreements (similar in many ways to land-installment contracts) are not subject to federally related credit guidelines under TILA or ECOA. Yet, without any enabling legislation or notice, the CFPB seems to now believe land-

installment contracts are subject to federal regulation. The CFPB has never issued any guidance that could remotely provide fair notice to NAA/NAM of its position.

Third, the CIDs are improper because they fail to define several key terms and they fail to account for how NAA/NAM actually do business. The CIDs ask for loan and mortgage application information when NAA/NAM offer neither. They also fail to define what "loan" even means, or how a loan would even apply to the instant investigation, which is problematic, especially given that land-installment contracts are not loans.

II. BACKGROUND

NAA is a South Carolina limited liability company formed in 2010 in order to provide asset management services to owners and investors who sell real estate using land installment contracts. NAM is a separate legal entity, but is also a South Carolina limited liability corporation which was formed in 2011. NAA currently provides asset management services for properties in various states, and ensures that the assets are properly maintained until they are sold. NAM is licensed in 24 states to originate and service land installment contracts for owners and investors.

Land installment contracts are an important part of the American housing market. It is a way for a family or individual who does not otherwise qualify for a mortgage loan to achieve the dream of homeownership. This includes individuals with bad credit or no credit history. As a result of the 2008 housing crisis, government-sponsored entity Fannie Mae was forced to foreclose on thousands of homes. Fannie Mae attempted to sell foreclosed homes directly to consumers, but it made the decision to pool a large number of these foreclosed, vacant homes and sell them to investors. NAA and NAM assist those investors with the management, marketing and sale of foreclosed, vacant houses. Because the majority of these houses are sold

for about $35,000 or less, traditional mortgage lenders and banks are not willing to make loans secured by these properties.

By using land installment contracts, NAA/NAM assist investors with creating an opportunity for families and individuals to buy a home at a low price that they can fix and build equity in. The benefits of home ownership for these vendees impact the community positively as well. Vacant homes are returned to productive use which prevents blight of the neighborhoods and falling property values, and tax revenue is generated for local government. Thus, the use of land installment contracts serves to help restore struggling neighborhoods and improve the local tax base.

Importantly, NAA/NAM do not typically have an ownership interest in the properties. They provide a service for businesses (not consumers) that may have an ownership in the properties.

Finally, one critical feature of the land-installment contracts is that people can surrender their equitable interest and walk away without any further obligations. NAA/NAM do not seek to collect on remaining payments on behalf of the owners of the properties.

III. STANDARD OF REVIEW

The Supreme Court has 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." *United States v. Morton Salt Co.*, 338 U.S. 632, 652.

"[W]here it is clear that an agency either lacks the authority to investigate or is seeking information irrelevant to a lawful investigatory purpose, a court must set such inquiry aside." *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs*, 2016 U.S. Dist. LEXIS 53644, *5 (D.D.C. Apr. 21, 2016) (internal citations omitted); *see Morton Salt*, 338 U.S.

at 652 ("[A] governmental investigation . . . may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power.").

IV. LAW AND ARGUMENT

A. The CFPB Lacks Jurisdiction.

As the D.C. District Court succinctly stated, the central question here is this: "Did the CFPB have the statutory authority to issue the CID in question?" *Id.*

In the Notification of Purpose here, the CIDs state that the CFPB believes it has jurisdiction to investigate NAA/NAM under the Consumer Financial Protection Act ("CFPA"), Truth in Lending Act ("TILA"), and Equal Credit Opportunity Act ("ECOA").

However, just as the D.C. District Court recently concluded, the CFPB does not have jurisdiction to issue a CID to NAA/NAM. Thus, the CIDs are improper.

The CFPA allows the CFPB to regulate "consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. § 5491(a). Consistent with 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).

The 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 CFPB cannot accuse just any person of a violation of Federal consumer financial law. Its jurisdiction only extends to "covered persons" (or their service providers)—i.e., a person who offers a consumer financial product or service. Neither NAM nor NAA is a "covered person" under the CFPA.

The instant CIDs contain the following Notification 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 Notification of Purpose directed to "loans," the CIDs themselves were intended to serve the purpose of investigation of AFDs.[1] The CIDs define an "Agreement for Deed" or "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 CIDs also define other key terms – "applicant," "application," and "purchaser" – in reference to AFD transactions as opposed to "loan" or "credit" transactions.

[1] 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 CFPB seeks to investigate AFDs, which are not "loans" subject to the CFPB'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 CFPB does not have statutory authority to investigate AFDs.

The CIDs make clear that the staff believes NAA/NAM offer a "consumer financial product or service" because NAA/NAM are somehow "extending credit and servicing loans," subjecting NAA/NAM to the CFPA, TILA, and ECOA.[2] That belief is mistaken.

Accordingly, the CFPB's authority to investigate NAA/NAM hinges on whether the NAA/NAM offer, or are a service provider of, a "consumer financial product or service" or whether either extends "credit" or "loans." For the reasons described below, NAA/NAM do not offer or act as a service provider for AFDs and the AFDs are neither "loans" nor "credit." Rather, they are equivalent to residential leases or rent-to-own transactions, which are not covered consumer financial products or services.

1. AFDs Do Not Involve Extending Credit or Servicing Loans.

The threshold question is whether an AFD is "credit" under the CFPA, TILA, or ECOA. In short, an AFD is not "credit" within any recognized meaning of the CFPA, TILA, and ECOA. 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." 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.

The ECOA, which is implemented by Regulation B, makes it unlawful 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) (emphasis added). That Act, similar to the

[2] 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").

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 (emphasis added). 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 these laws define "credit," they are both consistent in delineating 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." (Emphasis added.)

That is, AFDs would be considered "credit" if they provided 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, purchases associated with AFDs are not associated with deferred debt. In fact, no "purchase" occurs until a consumer has completed all payments required under the AFD. The typical AFD document itself clearly demonstrates this by stating that the Vendor shall convey title only when a Vendee (purchaser) "make[s] the payments and perform[s] the covenants described" in the AFD.

The CIDs' own definition of "AFD" also supports this conclusion, 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 CIDs 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. Equating an AFD with a debt instrument would require reshaping the square peg of an executory contract to fit into a round hole intended to fit promises to pay secured debts through promissory notes. The two things just do not equate.

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.[3]

During the Meet and Confer, the staff asserted the view that AFDs are in fact 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

[3] 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 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.").

definitions of credit include interest as an element of the definition;[4] credit depends upon whether there is a debt for 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).[5]

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. Simply calling an agreement a mortgage does not make it so. In fact, AFDs predate the development of the modern residential mortgage transaction.

Further, the term "mortgage" simply refers to a security interest in property. A mortgage is not a credit instrument. A mortgage provides security for a credit transaction, but it is simply a lien. This conclusion is supported by the CFPB'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

[4] 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).

[5] Similarly, that an AFD may include a "promissory note" is immaterial. The CIDs define 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.

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."[6]

During the Meet and Confer, the staff did not raise any other basis for jurisdiction or any laws beyond those specifically referenced in the CIDs' statement of purpose (CFPA, TILA, and ECOA). Although not raised by the staff, we note that the CFPB's Regulation X, 12 CFR 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 CFR Part 1024.2 (emphasis added.)

Highlighting another deficiency to the CFPB's claim of jurisdiction, Regulation X also 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 CFR Part 1024.2. If AFDs were "credit," there would be no need for a separate paragraph to define these contracts as "federally regulated mortgage loans."

The last point bears close examination. Congress could have included land contracts (AFDs) within the purview of "credit," and the CFPB's jurisdiction, but chose not to. Instead, federal law governs this type of land sale if, and only if, the AFD is funded by proceeds of loan. That is not the case here.

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[6] 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.

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 very clearly supports the conclusion that an AFD is <u>not</u> credit under TILA.

It would be unreasonable, and unsupported by any reasonable view of the law to conclude that an AFD is a "federally related mortgage loan" under Regulation X. That finding must be supported by facts demonstrating "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 CFR Part 1024.2. The 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, the AFDs at issue are neither "credit" nor "federally related mortgage loans" within the meaning of RESPA and Regulation X.

2. AFDs Are Similar To A Residential Lease Or Rent-To-Own Transaction, Neither of Which Constitute "Credit."

Because property ownership transfers, through an AFD, only upon completion of all payments, and because consumers may walk away at any time, without any obligation to perform under the AFD, the Vendees 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."

a. 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).[7]

The Seventh Circuit is the only federal appellate court that has addressed the applicability of the ECOA to residential leases, 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).

[7] 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 considered a "credit transaction," because such terms establish that the debt obligation is *contemporaneous* with the lessee's possession.

b. Rent-to-Own

The instant 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.") In that past year, the FTC also confirmed that RTO transactions are not

covered by TILA. *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, the AFDs at issue here do not meet the definition of "credit" under the 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 CFPB's authority to investigate NAA/NAM. This deficiency cannot be cured, and the CIDs should be set aside.

B. NAA/NAM Failed To Receive Fair Notice

The U.S. Supreme Court has held that federal agencies must provide "fair warning" or "fair notice" of required or prohibited conduct. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012); *FCC v. Fox TV Stations, Inc.*, 132 S. Ct. 2307 (2012).

Here, NAA/NAM did not receive fair notice that its business activities are subject to federal regulation. Specifically, NAA/NAM did not receive fair notice because the CFPA, TILA, or ECOA and their regulations do not define "credit" or "consumer financial product or service" to include land-installment contracts or AFDs.

In fact, the FTC has held for over 15 years that rent-to-own contracts, which are similar to AFDs, do not fall within the scope of TILA or ECOA. Despite these consistent statements from the FTC, the CFPB has taken no steps to provide fair notice to NAA/NAM regarding their obligations, if any, under federal law. There has never been any formal or informal guidance or rulemaking concerning AFDs by any federal agency, even after the passage of the CFPA.

C. CIDs Are Improper.

The CIDs' Notification of Purpose states that the CFPB has authority under the CFPA, TILA, and ECOA to issue the CIDs along with "any other federal statute." The catch-all of "any other federal statute" is insufficient to provide notice to NAA/NAM as to what federal statutes the CFPB believes it has authority under to issue the CIDs. *See* 12 U.S.C. § 5562(c)(2); 12 C.F.R. § 1080.5 (Each CID must "state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such a violation.").

Furthermore, the requests are unclear. For example, the CIDs contain many requests related to "loans." But the CIDs never define "loans" and nothing that the parties may provide (or Harbour) would relate to what may traditionally constitute "loans."

D. The CIDs Are Overbroad and Unduly Burdensome

During the Meet and Confer, the CFPB staff indicated it would be receptive to certain changes to the CIDs to reduce any potential burdens on NAA/NAM. But as discussed above, the CFPB's lack of jurisdiction presents a threshold issue to resolve. NAA/NAM makes the arguments below to preserve them as grounds for objection.

1. The CIDs' Seven-Year Coverage Period Is Overbroad.

The CIDs seek information from January 1, 2010 through August 31, 2016. This seven-year period far exceeds applicable statutes of limitation under the CFPA, ECOA, and TILA,[8] and it also exceeds the CFPB's transfer date. Where it has jurisdiction, the CFPB claims it is not constrained by statutes of limitation. Petitioners do not agree with that analysis. Nevertheless, the date of information exceeds the applicable period for which the CFPB could hold NAA/NAM liable. The burden of producing stale information outweighs the benefit to the investigation and the request is unduly burdensome.

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

NAA/NAM's burden in responding to a seven-year CID is significant. During the Meet and Confer, the staff stated that it would be just as easy for NAA/NAM to produce data for one year versus seven years. That conjecture is not supported by any facts, and is an oversimplification of the efforts that would be required to respond to the CIDs. In terms of the volume of documents and data produced alone, having a seven-year period significantly increases the costs to NAA/NAM, as every document produced must be reviewed for responsiveness and privilege, then processed by a vendor to correspond to the CFPB's rigorous production standards. Further, NAA/NAM must complete interrogatory responses for 14 interrogatories with numerous subparts for NAA and 20 interrogatories with numerous subparts for NAM. 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 NAA/NAM's small staff to respond increase exponentially.

Accordingly, assuming that NAA/NAM has jurisdiction over this matter, which it does not, the CID's Applicable Period for Responsive Materials should be limited to a reduced period of time, such as January 1, 2014, through the date of compliance with the CIDs.

2. ***The CIDs Are Unclear and Duplicative.***

The CIDs are wholly inconsistent with how NAA/NAM actually conducts business and many CID terms remain undefined. Many of these inconsistencies relate to the CFPB's attempt to shoehorn jurisdiction, but still present a heavy burden upon NAA/NAM to prepare responses on the off-chance the CFPB is found to have jurisdiction. Throughout the CIDs, they refer to "loans" and "mortgage loan applications" even though NAA/NAM's activities relate to AFDs, not loans and mortgage applications. Further, terms like "loan," for example, remain undefined. In other instances, the CIDs also ask for information about underwriting, a term that is also

undefined. NAA/NAM does not perform underwriting functions consistent with any known definition of the word.

The CIDs also ask for information about applicants' race or ethnicity (which NAA/NAM does not ask for), down payment, FICO score used, loan-to-value ratio, combined loan-to-value ratio to decide on the loan, underwriting flag, and underwriting override. It is clear that the CFPB's requests are stock requests used for banks. NAA/NAM is not a bank and does not typically offer loans of any type. The information requested by the CFPB would typically be found on a URAR (FNMA Form 1003) in a mortgage loan transaction. There is no requirement for NAA/NAM to obtain that information,[9] as it is not germane in an AFD transaction. NAA/NAM cannot respond to CIDs that do not even relate to its business activities.

Further, the CIDs are duplicative. The CFPB issued two separate CIDs to NAA and NAM. In the Meet and Confer, CFPB staff indicated that the CIDs were very similar but had a few differences. That fact would require NAA/NAM to respond to two separate CIDs even though the NAA as an entity that amounts to a asset manager, which is nowhere remotely close to the CFPB's jurisdiction.

What's more, the information sought in the CIDs mostly relates to Harbour. To the extent it has jurisdiction over Harbour, it should first collect documents and information from Harbour and then determine what, if any, information it needs from NAA/NAM. Because of this, the CFPB should withdraw its CIDs to NAA/NAM or stay their enforcement until a Court determines the threshold jurisdictional question.

[9] The Home Mortgage Disclosure Act of 1975 (28 U.S.C. §2801) applies only to mortgage transactions, not AFDs. The CFPB's requests for HMDA-type data either indicates its confusion with the entirety of the process or a 'shot in the dark' to bootstrap HMDA's obligations to AFDs.

3. The CIDs Contain Unreasonable Production Deadlines.

The CFPB issued two CIDs that include a total of 34 interrogatories, two voluminous written reports, and 27 broad document requests. Yet, the CFPB has demanded compliance within 30 days. Given the time length and scope, such a request of information and documents would take months to produce, even for a large bank that the CFPB is accustomed to dealing with. But NAA/NAM combined only have less than 55 employees. NAA/NAM has no way of meeting the CFPB's compliance deadline. Accordingly, if a final decision is made granting CFPB jurisdiction over NAA/NAM, NAA/NAM requests 180 days to comply with the CIDs.

V. CONCLUSION

The CFPB issued CIDs to NAA and NAM claiming it had jurisdiction under the CFPA, TILA, and ECOA. Land-installment contracts and AFDs have historically been subject only to state law and state regulation. No federal statute, including the CFPBA, covers land-installment contracts and AFDs. The CFPB (or any other agency) has not issued any guidance or regulations that remotely indicate land-installment contracts and AFDs are subject to federal regulation. Congress could have extended federal regulation to land-installment contracts and AFDs, but chose not to. The CFPB has no jurisdiction here.

Further, the CIDs issued to NAA and NAM are improper because they are overly broad and unduly burdensome, as described above.

For these reasons and the reasons stated above, NAA and NAM respectfully request that the CIDs issued to NAA and NAM be set aside or modified according to the terms set forth in this Petition.

Respectfully submitted,

/s/ David K. Stein

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Counsel for Petitioners National Asset Advisors LLC and National Asset Mortgage LLC

EXHIBIT A

MEET AND CONFER STATEMENT

Counsel for the petitioner, National Asset Advisors ("NAA") and National Asset Mortgage ("NAM") (collectively "NAM"), has conferred with counsel for the Consumer Financial Protection Bureau (the "CFPB"), 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, David Stein, Drew Campbell, Jackie Mallett, and Ali Haque, counsel for NAA/NAM, conferred with James Meade, Je Yon Jung, and Zach Mason, counsel for the CFPB, by telephone concerning the CIDs and pursuant to 12 C.F.R. § 1080.6(c).

At that time, counsel for NAA/NAM requested that the civil investigative demand ("CID") be set aside due to the lack of jurisdiction, lack of due process, and that the requests were overly broad and unduly burdensome. Counsel also stated it would petition for an order to set aside the civil investigative demand if necessary. Counsel also asked the CFPB to set aside the CIDs pending resolution of Harbour Portfolio Advisors LLC's objections to a CID issued by the CFPB. The CFPB declined these requests.

As noted, during the Meet and Confer, counsel also contended that the CIDs are overbroad and unduly burdensome, even if the CFPB had jurisdiction over this matter. Individual objections were discussed with regard to the specific requests. Counsel indicated that it may be premature to discuss specific modifications given the threshold jurisdiction issues, but counsel still discussed its objections to the CIDs thoroughly to explain why they were improper.

/s/ David K. Stein
David K. Stein (Ohio # 0042290)
Counsel for Petitioners National Asset Advisors LLC and National Asset Mortgage LLC

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Petition to Set Aside or Modify September 8, 2016 Civil Investigative Demands Issued to National Asset Advisors LLC and National Asset Mortgage LLC* was filed and served via electronic mail this 2nd day of October, 2016, which provides notice to the following:

Bureau's Executive Secretary
ExecSec@cfpb.gov

Enforcement Director
Enforcement@cfpb.gov

/s/ David K. Stein
David K. Stein (Ohio # 0042290)