UNITED STATES OF AMERICA
CONSUMER FINANCIAL PROTECTION BUREAU

IN THE MATTER OF CIVIL
INVESTIGATIVE DEMAND
ISSUED TO ASSURANT, INC.

ASSURANT, INC.'S PETITION TO MODIFY OR SET ASIDE SEPTEMBER 22, 2015 CIVIL INVESTIGATIVE DEMAND

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Assurant, Inc. ("Assurant") respectfully petitions the Director of the Consumer Financial Protection Bureau ("the Bureau") for an order modifying or setting aside the Civil Investigative Demand issued to Assurant on September 22, 2015, including the Requests, Definitions, and Instructions ("the CID") consistent with the factual and legal objections raised herein.[1]

I. PRELIMINARY STATEMENT

The Bureau is investigating the wrong company for conduct over which the Bureau possesses incomplete authority, for reasons the Bureau has not meaningfully articulated. The Bureau also seeks attorney work-product and documents unnecessary to the investigation, which would impose an undue burden to compile. This Petition asks the Director to modify or set aside the CID to address these issues. Assurant also notes that the Bureau lacks potential enforcement authority over Assurant and its indirectly owned underwriting subsidiaries ("the Underwriters") inasmuch as: (i) the business of insurance is excluded from the Bureau's statutory jurisdiction; and (ii) the Bureau is prohibited from exercising enforcement authority over persons regulated by a state insurance regulator, including the Underwriters.

The Bureau's ostensible purpose in issuing its CID "is to determine whether mortgage servicers or other unnamed persons have engaged, or are engaging, in unlawful acts or practices in connection with the procurement, offering, and use of lender-placed insurance involving residential mortgage loans," and "to determine whether Bureau action to obtain legal or equitable relief would be in the public interest." The CID should be set aside because, at the outset, it is directed to Assurant, a publicly traded holding company that is not engaged in the procurement, offering, or use of LPI involving residential mortgage loans. As a half-dozen federal courts have recognized, it is the Underwriters – *not Assurant* – which are engaged in that business. The

[1] All capitalized terms not defined herein have the meanings ascribed to them in the CID.

Underwriters providing LPI to [redacted] include American Security Insurance Company ("American Security"), Standard Guaranty Insurance Company ("Standard Guaranty"), and Voyager Indemnity Insurance Company ("Voyager Indemnity"). The CID to Assurant should be withdrawn and redirected to these companies.

The CID suffers from other defects. Although the law requires it to do so, the CID does not advise Assurant of the nature of the conduct constituting the alleged violation that is under investigation or the provisions of law applicable to such violation, or even if Assurant itself is under investigation. The CID posits supposed "unlawful acts or practices in connection with" LPI without describing, as it must, what those "acts" and "practices" may be. This lack of specificity is compounded by the reference to two exceedingly broad sections of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("the Dodd-Frank Act"), Pub. L. No. 111-203, 124 Stat. 1376 (2010), and the *entire* Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. 2601 *et seq.* References to vague prohibitions on "unfair, deceptive, or abusive acts or practices" or violating "Federal consumer financial law," or to an entire multi-sectioned chapter of the United States Code, cannot constitute the required notice of the investigation's purpose. Nor can the Bureau cure this defect by asserting that the investigation's purpose can be made more specific through later communications to Assurant – the CID's validity must be measured against its written "Notification of Purpose," not by reference to extraneous evidence.

The Bureau also exceeds its investigative and potential enforcement authority in two significant respects. First, its CID seeks information and materials concerning LPI Flood, a form of insurance specifically excluded from the Bureau's jurisdiction and not otherwise regulated under a consumer law that the Bureau enforces, *e.g.*, RESPA. Second, the CID seeks information and materials concerning alleged violations the enforcement of which is barred by

the applicable three-year limitations periods found in RESPA and the Dodd-Frank Act. The Bureau may not investigate supposed violations it lacks legal authority to enforce. Indeed, it would be anomalous to conclude that an accusation, even if true, that could not support a valid enforcement action is nevertheless valid to support an investigation.

Several of the CID's individual Requests are objectionable for independent reasons:

- By seeking the identities of "all Persons who participated in responding to this CID," Interrogatory No. 1 seeks the disclosure of Assurant's attorneys' mental processes, including their selection of persons they believe possess relevant information.

- Interrogatory No. 2(c) and (g) seek disclosure of the names and descriptions of data fields for all Databases related to LPI and Outsourced Services, as well as the timeframe for which information in each data field is stored or maintained. There are literally *thousands* of data fields in the relevant Databases. While Assurant appreciates that the Bureau has agreed to "set aside" these two subparts for the time being, it should formally withdraw or modify them.

- Request for Documents No. 2 demands production of a copy of each contract and "service level agreement" between Assurant and any client related to the provision of LPI or Outsourced Services. This Request is an overly expansive investigation of unnamed persons on the suspicion that some of them may have violated unspecified aspects of the federal consumer financial laws. Moreover, complying with that Request would impose an undue burden, including notifying counterparties that the contract had been subpoenaed. The Bureau should modify this Request to permit a sampling of these highly confidential contracts and "service level agreements," not *every* such document.

Finally, although the Bureau has granted a limited extension of time in which to respond to Request for Written Report No. 2, the CID should be further modified to afford Assurant certain procedural rights to complete productions and responses to the various other Requests within a reasonable period of time, and on a rolling basis.

II. RELEVANT BACKGROUND

A. LPI's Role In Homeownership.

LPI is a bulwark of the American residential mortgage industry. All originators of and investors in residential mortgages, including Fannie Mae and Freddie Mac, require mortgage

servicers to ensure that insurance coverage is in place at all times. That requirement is reflected in standard form mortgage instruments, which require borrowers to maintain adequate, continuous hazard insurance on their mortgaged property for the life of the loan. If the borrower fails to maintain adequate, continuous hazard insurance, the lender may purchase insurance on the borrower's behalf and then seek reimbursement from the borrower.

For a variety of reasons, some borrowers do not adequately or continuously maintain the required insurance. Accordingly, mortgage servicers engage specialized insurance companies to provide hazard insurance on mortgaged properties when no other coverage is in place. LPI's most critical feature is that it ensures continuous, automatic coverage as of the date a borrower-purchased policy lapses or is canceled, enabling servicers to meet the requirements of Fannie Mae and Freddie Mac and private investors who purchase and securitize loans in the secondary mortgage market. Without the safety net of LPI, mortgage loan interest rates would rise and mortgage lenders would make fewer loans.

A typical LPI arrangement involves a series of program agreements whereby an LPI insurer agrees to provide coverage for a mortgage servicer's portfolio whenever acceptable coverage is not in place. LPI coverage automatically incepts at the moment prior coverage lapses, and issues regardless of the condition of the property or other individual circumstances that could affect the issuance or price of borrower-purchased coverage. Borrowers may replace the LPI with the insurance of their choice at any time.

Because they are "on the risk" at the moment prior coverage lapses, LPI insurers typically monitor the status of insurance coverage on properties where the mortgage indebtedness is serviced by one of their customers. This tracking is both required by many LPI

program agreements and essential to assess portfolio risk to manage capital levels, obtain reinsurance, set claim reserves, and determine claim and other insurance processing needs.

B. Assurant And The Underwriters.

Assurant is a publicly traded holding company that does not engage in insurance operations or business of its own. Declaration of Jessica M. Olich dated October 6, 2015 ("Olich Decl.") ¶¶ 4, 7-11, attached hereto as Exhibit A. Insurance operations are instead carried out by the Underwriters, a series of indirectly owned insurance company subsidiaries within the holding company structure, including American Security, Standard Guaranty, and Voyager Indemnity, among others. *Id.* ¶¶ 5-6. Assurant itself neither offers nor provides consumer financial products or services of any kind, and its assets consist primarily of the capital stock of its subsidiaries. *Id.* ¶ 7. It does not provide Outsourced Services. *Id.* ¶ 10. A more detailed description of Assurant's corporate status, limited operations, and underwriting affiliates is set forth in the accompanying Olich Declaration.

The Underwriters are engaged in the business of insurance and often carry out their business operations, including LPI and Outsourced Services, under the registered trade name "Assurant Specialty Property," an operating and financial reporting segment of Assurant. *Id.* ¶¶ 5-6. Assurant has a separate corporate existence from the Underwriters and is not involved in their daily decisionmaking or operations. *Id.* ¶ 9. The Underwriters manage all LPI activities, including underwriting, rates, coverages, and availability. Depending on the servicer's needs, the Underwriters also manage certain Outsourced Services, including document tracking and follow-up, inbound and outbound insurance customer service, elements of escrow administration, loss draft administration, and hazard insurance line set-up.

C. State LPI Regulation.

Like borrower-purchased insurance, LPI is heavily regulated at the state level, including rate and policy form reviews and approvals where applicable. State insurance regulators license agents, review insurance products and premium rates (including LPI products and rates where applicable), and routinely examine insurers' financial solvency. State regulators also generally perform market conduct examinations in response to specific consumer complaints or regulatory concerns and monitor the resolution of consumer complaints against insurers.

The National Association of Insurance Commissioners ("the NAIC") is a voluntary association of the heads of insurance departments from the 50 states, the District of Columbia, and five territories. While the NAIC does not regulate insurers, it provides services to make certain interactions between insurers and state regulators more efficient. These services include providing detailed insurance data to help regulators understand insurance sales and practices, maintaining a range of databases useful to regulators, and coordinating state regulatory efforts by providing guidance, model laws and regulation, and information-sharing tools. Each of the Underwriters has been issued a company identification number by the NAIC, meaning that the Underwriter is a risk-bearing entity that has been issued a certificate of authority by the state insurance regulator in the jurisdiction in which the Underwriter is domiciled and regulated.[2]

The NAIC has coordinated state regulatory efforts on LPI by developing a model law for, and holding public hearings regarding, LPI. For example, in August 2012, the NAIC's Property and Casualty Insurance Committee and Market Regulation and Consumer Affairs Committee held a hearing to discuss the use of LPI and its effect on consumers. A series of coordinated

[2] American Security's NAIC company identification number is 42978, Standard Guaranty's is 42986, and Voyager Indemnity's is 40428.

multistate targeted market conduct examinations involving more than 40 states are currently underway. The NAIC's Market Actions Working Group will facilitate interstate communication and collaboration for these examinations. The examinations address not only the Underwriters' LPI business, but also those of their major marketplace competitors.

Individual states also have taken an active role in LPI oversight. For example:

- On October 3, 2011, the New York Department of Financial Services ("NYDFS") commenced an investigation of certain Underwriters, including American Security, regarding LPI. In connection with that investigation, Assurant and these Underwriters entered into a Consent Order with the NYDFS on March 21, 2013 ("New York Consent Order"),[3] whereby several of the Underwriters filed reduced rates for LPI and agreed to other remedial measures, including with respect to Outsourced Services. The NYDFS recognized that Assurant is a "holding company," not an insurer, and was "a party to [the] Consent Order solely for the purpose of binding" its insurance company affiliates.

- On October 7, 2013, American Security entered into a Consent Order with the Florida Office of Insurance Regulation ("Florida Consent Order"),[4] agreeing that it and its affiliated insurers would reduce their Florida LPI rates and modify certain business practices, including with respect to Outsourced Services.

- In 2012, after discussions with the California Insurance Commissioner, American Security voluntarily applied for a significant reduction in LPI rates that took effect on January 1, 2013.[5]

- Several states, including Indiana, Massachusetts, and Minnesota, have undertaken individual market conduct examinations related to LPI and Outsourced Services.

To provide the best and most accurately priced LPI coverage, beginning in 2012 the Underwriters made 49-state filings for a new LPI product, the Mortgagee's Interest Protection Program ("the MIP"), and associated premium rate filings. The MIP rates include a feature quantifying the percentage of premium associated with mortgage servicer affiliates receiving, or not receiving, commissions or ceded quota-share reinsurance premium. Among other things, the

[3] http://tinyurl.com/o3swafp

[4] http://tinyurl.com/qhxn5jf

[5] http://tinyurl.com/oema3ww

MIP rates include an Expense Modification Plan Credit representing a one-for-one percentage rate credit for commission percentages below 12.5%, up to a maximum of 12.5%, as well as a comparable maximum 12.5% reinsurance credit. Nearly every state and the District of Columbia has approved the filed rates for the new MIP product – no jurisdiction has rejected it. States began approving the MIP in 2012; by 2013 it had been approved in most states. American Security has not submitted the MIP for approval in California, opting instead to continue to use the existing LPI product, the Residential Mortgage Service Program, and the significantly reduced rates implemented in January 2013.

D. Prior Civil Litigation And Class Action Settlements.

In addition to state regulatory efforts, in recent years the Underwriters have modified their business practices in connection with several class action settlements of LPI-related litigation. [redacted]

[redacted]

These class settlements followed several large servicers' voluntary discontinuance of certain business practices related to LPI and Outsourced Services. [redacted]

E. The Bureau's Investigation And The CID.

The Bureau issued the CID to Assurant on September 22, 2015. The CID consists of five Interrogatories (several with multiple subparts), three Requests for Written Reports, and five Requests for Documents, primarily focused on but not limited to [redacted] LPI arrangements.

The CID's "Notification of Purpose Pursuant to 12 C.F.R. § 1080.5" generally describes its purpose as an inquiry "to determine whether mortgage servicers or other unnamed persons" engaged in "unlawful acts or practices in connection with the procurement, offering and use of lender-placed insurance involving residential mortgage loans." The Bureau purports to investigate potential violations of any "Federal consumer financial law," specifically referencing RESPA (in its entirety) and two broad sections of the Dodd-Frank Act, 12 U.S.C. §§ 5531, 5536. Assurant requested that the Bureau elaborate on the investigation's purpose, but the Bureau's stated position has been that the "Notification of Purpose" speaks for itself.

Assurant and its counsel met and conferred with the Bureau in a good-faith effort to resolve by agreement the issues raised in this Petition. The first such meeting occurred over the telephone on October 2, 2015, beginning at 2:30 p.m. and concluding at approximately 3:15 p.m.

[redacted]

For Assurant, participants in the meeting included Frank Burt, Glenn Merten, Brian Perryman, and Charles Fash. For the Bureau, participants included Christian Woolley, John Marlow, Glenn Melcher, and Irfan Murtuza. Assurant memorialized these discussions in a letter dated October 5, 2015, attached hereto as Exhibit B.

On October 7, 2015, the parties met and conferred for a second time. This meeting also occurred over the telephone, beginning at 11:00 a.m. and concluding at approximately 11:30 a.m. For Assurant, participants in the meeting included Frank Burt, Glenn Merten, Brian Perryman, Kristin Shepard, Greg Tuttle, and Charles Fash. For the Bureau, participants included Christian Woolley, John Marlow, and Irfan Murtuza.

The parties were unable to resolve by agreement the issues raised by the Petition. The parties were, however, able to agree to an extension of time, to December 1, 2015, for Assurant to respond to Request for Written Report No. 2, and limit the scope of that Request's Exhibit A, including modifying or clarifying Element Nos. 2, 6, 21-23, 32, and 38-39, and acknowledging Assurant's representation that it cannot produce data for Nos. 3, 7-10, 33-34, 40, and 43.

III. OBJECTIONS TO THE BUREAU'S ENFORCEMENT AUTHORITY

Implicit in the CID is the suggestion that the Bureau is positioning itself to bring enforcement actions not only against unnamed "mortgage servicers" but also "other unnamed persons" that the Bureau believes has violated RESPA, the Dodd-Frank Act, or some other federal consumer financial law. Assurant understands that the Bureau may not yet have commenced such an enforcement action, may never do so, and may not even be suggesting that Assurant or the Underwriters can be subject to an enforcement action by the Bureau.

For the avoidance of doubt, however, Assurant's position is that the Bureau may not exercise enforcement authority over either Assurant or the Underwriters. In creating the Bureau,

Congress took special care to ensure that the Bureau had no enforcement authority over the business of insurance, including the writing, valuing, marketing, sale, and servicing of insurance or reinsurance. That authority has been traditionally reserved exclusively to the 50 states' insurance regulators, a reservation Congress reflected in the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, and preserved intact in both the Dodd-Frank Act and RESPA. Neither Dodd-Frank nor RESPA (nor any other law) confer on the Bureau enforcement jurisdiction over Assurant or the Underwriters.

A. The Dodd-Frank Act Does Not Confer On The Bureau Enforcement Authority Over Assurant Or The Underwriters.

1. The Dodd-Frank Act and the business of insurance.

The Dodd-Frank Act allows the Bureau to take enforcement actions against: (i) "covered persons," (ii) "service providers," and (iii) "any person to knowingly or recklessly provide substantial assistance to a covered person or service provider in violation of the provisions of section 5531 of this title, or any rule or order issued thereunder," 12 U.S.C. §§ 5531(a), 5536(a). A "covered person" is, in general, "any person that engages in offering or providing a consumer financial product or service" and any affiliate thereof "if such affiliate acts as a service provider to such person." *Id.* § 5481(6). A "service provider" is, in turn, "any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service," *id.* § 5481(26).

The Dodd-Frank Act's only mention of insurance with respect to the Bureau is to *limit* the Bureau's authority over that business and over persons regulated by a state insurance regulator. Specifically, the Act imposes two material limitations on the Bureau's authority:

First, the Act defines the term "financial product or service" to exclude "the business of insurance." *Id.* § 5481(15)(C). "The term 'business of insurance' means the writing of insurance

or the reinsuring of risks by an insurer, including all acts necessary to such writing or reinsuring and the activities relating to the writing of insurance or the reinsuring of risks conducted by persons who act as, or are, officers, directors, agents, or employees of insurers or who are other persons authorized to act on behalf of such persons." *Id.* § 5481(3). To prevent the Bureau from circumventing this broad exclusion, the Act specifically prohibits the Bureau from using its rulemaking authority to "define as a financial product or service, by regulation or otherwise, engaging in the business of insurance." *Id.* § 5517(m).

Second, the Dodd-Frank Act prohibits the Bureau from exercising enforcement authority over a "person regulated by a State insurance regulator." "The term 'person regulated by a State insurance regulator' means any person that is engaged in the business of insurance and subject to regulation by any State insurance regulator, but only to the extent that such person acts in such capacity." *Id.* § 5481(23). Except where "such person is engaged in the offering or provision of any consumer financial product or service or is otherwise subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H," *id.* § 5517(f)(2), "the Bureau shall have no authority to exercise any power to enforce [U.S.C. title 12, "Banks and Banking,"] with respect to a person regulated by a State insurance regulator." *Id.* § 5517(f)(1).

2. LPI and Outsourced Services are the business of insurance.

Against the backdrop of these two statutory limitations on the Bureau's jurisdiction, it is apparent that the Dodd-Frank Act was never meant to apply to companies like Assurant or the Underwriters. With respect to Assurant, that company is not:

- A "covered person," because it is not engaged in offering or providing a consumer financial product or service. In fact, as discussed more fully below in Section IV.B, *infra*, Assurant is a publicly traded holding company that neither offers nor provides financial products or services *of any kind*. Olich Decl. ¶¶ 4, 7.

- Either a "service provider" or a "person to knowingly or recklessly provide substantial assistance to a covered person or service provider," because Assurant does not contract with or assist mortgage lenders, servicers, or anybody else in the provision of LPI or Outsourced Services. *Id.* ¶ 8.

Several of Assurant's indirectly owned underwriting affiliates – the Underwriters – are engaged in the business of providing LPI and Outsourced Services. That fact cannot make a grandparent company like Assurant subject to a Bureau-initiated enforcement action. "It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (internal quotation marks omitted).

The Underwriters are not subject to the Bureau's enforcement authority anyway. Each of the Underwriters are insurance companies engaged in the business of insurance and subject to regulation by one or more state insurance regulators. For example, in New York, American Security's LPI and Outsourced Services activities are expressly regulated by the March 21, 2013 New York Consent Order. Similarly, in Florida, American Security's LPI and Outsourced Services activities are expressly regulated by the October 7, 2013 Florida Consent Order. The Underwriters also are regulated in a multitude of ways by a multitude of other state insurance regulators. The Bureau therefore has "no authority to exercise any power" to enforce the Dodd-Frank Act with respect to the Underwriters. *See* 12 U.S.C. § 5517(f)(1). Except where authorized by some other statute, that Act only allows the Bureau to examine or bring an enforcement action against an insurer providing a non-insurance service to a covered person in connection with the offering of a consumer financial product or service. *See id.* § 5517(f)(2).

LPI and Outsourced Services are part of the business of insurance. The Dodd-Frank Act's use of the term "business of insurance" echoes that term's use in other statutes, especially

the McCarran-Ferguson Act, which provides that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business," 15 U.S.C. § 1012(a), and, further, that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." *Id.* § 1012(b). The Act was designed to ensure "the supremacy of the States in the realm of insurance regulation," *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 500 (1993), and "to further Congress' primary objective of granting the States broad regulatory authority over the business of insurance." *Id.* at 505.

"Certainly," the Supreme Court has stated, "the fixing of rates is part of this business," as is the "selling and advertising of policies." *SEC v. Nat'l Secs., Inc.*, 393 U.S. 453, 460 (1969). In this context, courts have construed the term "business of insurance" broadly to further include the writing, marketing, entering into, trading, managing, valuation, servicing, administration, and performing of insurance. *See, e.g.*, *FTC v. Nat'l Cas. Co.*, 357 U.S. 560, 563-64 (1958); *Life Partners, Inc. v. Morrison*, 484 F.3d 284, 294, 297 (4th Cir. 2007); *Gilchrist v. State Farm Mut. Auto. Ins. Co.*, 390 F.3d 1327, 1333 n.7, 1334 (11th Cir. 2004); *Sabo v. Metro. Life Ins. Co.*, 137 F.3d 185, 191 (3d Cir. 1998); *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield*, 883 F.2d 1101, 1108 (1st Cir. 1989). Courts also have construed the term to include using a mortgage loan to require the purchase of an insurance policy. *See Dexter v. Equitable Life Assur. Soc'y of the U.S.*, 527 F.2d 233, 235 (2d Cir. 1975) ("Equitable used the mortgage loan to coerce the purchase of an insurance policy. Forcing people to buy insurance … is part of 'the business of insurance.'"). "An insurance company's methods of inducing people to become

policyholders pertain to the company-policyholder relationship, and thus constitute an integral part of 'the business of insurance.'" *Id.*; *see also Gilchrist*, 390 F.3d at 1333 n.7 (same quote).[12]

LPI and the Outsourcing Services attendant with LPI constitute not only the writing of insurance but also acts necessary to such writing. The nature of LPI is that coverage is extended automatically, even if there are exposures not known by or reported to the borrower, servicer, or insurance company. Maintaining continuous insurance coverage thus involves tracking loans for evidence of required insurance and placing insurance on properties for which the borrower has not maintained the required insurance.

Insurers must understand their exposure and price appropriately for the risks they take to remain solvent and be able to pay claims over time. For insurers like the Underwriters, exposure management of the entire LPI portfolio and determining which of the properties in the portfolio are inadequately insured – and therefore exposed to future losses – is the insurer's responsibility. The information required to recognize exposure in an LPI portfolio is obtained in the LPI insurers' tracking systems and through access as necessary to the servicers' loan servicing

[12] In another context, the Bureau has taken the position that if an insurance premium includes a component allegedly unlawful under the federal consumer financial laws (*e.g.*, a "kickback"), then the premium is not a part of the business of insurance and the Bureau may initiate an enforcement action. *See* Answering Brief for Enforcement Counsel at 29, *In the Matter of PHH Corp.*, No. 2014-CFPB-0002 (Feb. 9, 2014) ("The fact that PHH chose to mask the kickbacks as reinsurance premiums does not affect the result. By PHH's logic, any payment prohibited by federal law need only be labeled 'insurance premium' in order to escape liability."). Essentially, the Bureau has contended, it may assert its authority "whenever the insurer-defendant's conduct is alleged to be unlawful, because the 'business of insurance' cannot include violations of the law." *Pedraza v. United Guar. Corp.*, 2000 WL 36692425, at *5 (S.D. Ga. Aug. 14, 2000). "Merely to state [this] theory in this way is sufficient to demonstrate that it is erroneous." *Id.* (in a lawsuit alleging that private mortgage insurers entered into a scheme with lenders whereby, in exchange for the lenders referring mortgage insurance business, the insurers agreed to sell the lenders insurance products at below-market prices – which plaintiffs characterized as "kickbacks" – finding that RESPA claim was "reverse-preempted" by the McCarran-Ferguson Act); *see also Sabo*, 137 F.3d at 192 ("[I]f we were to construe the 'business of insurance' phrase by reference to federal legality, the [McCarran-Ferguson Act] would be read out of existence.").

systems. The service performed using these systems is a key risk management tool for the LPI insurer. Failure to use these tracking systems impedes an insurer's ability to understand its risk, rate the risk, place appropriate reinsurance, maintain adequate capital levels, and manage its profitability and solvency. Policy administration, insurance customer service, limited escrow administration, and loss draft administration are likewise part of the business of insurance.

Unsurprisingly, Outsourced Services like insurance tracking are regulated as the business of insurance by state insurance regulators. *See, e.g.*, N.M. Code R. § 13.18.3.13(E) (permitting the inclusion of "insurance tracking," "acquisition costs," "commissions," and "expense reimbursements to creditors" in filed premium rates, provided they do not exceed 30%). The New York and Florida Consent Orders, for example, recognize the reality that Outsourced Services are an insurer cost properly included in the filed premium rate. The Consent Orders do so by carving out all tracking costs incurred for exposure management from the prohibition on the signatory Underwriters providing mortgage servicers with free or below-cost services. Based on the Consent Orders, the Underwriters filed and received approval for new rates.

That Outsourced Services are a necessary part of the business of insurance was further demonstrated by the California Insurance Commissioner's April 18, 2002 order denying a petition for a rate hearing on American Security's LPI rates, *In the Matter of the Rates, Rating Plans, or Rating Systems of American Security Insurance Co.*, No. OV-01-0108309, attached hereto as Exhibit C. The Commissioner's order answered in the affirmative the question "should an insurance rate include as part of the true costs of insurance certain charges which relate to general insurance services rendered by the insurer to a mortgage lender?" *Id.* at 5-6.

The petitioners argued that American Security's rates improperly included the costs of tracking services (and commissions) as part of the premium, thereby making the LPI rates

"excessive." *Id.* at 1. Denying the petition, the California Insurance Commissioner determined that expenses for the tracking services (and commissions) were appropriate components of the premium rates. *Id.* at 2. The "tracking services" American Security performed included receiving and reviewing insurance policies provided by borrowers, communicating with borrowers about their insurance obligations, sending warning letters when a borrower's policy was canceled or lapsed, and ordering LPI when borrowers did not respond to the letters. *Id.* at 2-3 ("These services are generally referred to as 'tracking services.'"). The Commissioner recounted how American Security's rate filing was based in part on expenses associated with "management of insurance tracking," which filing the Commissioner had previously approved. *Id.* at 7. It was therefore "clear" to the Commissioner that American Security's decision to include tracking services (and commissions) as components of the LPI rate did not make the rate "excessive" under California insurance law. *Id.* at 8.

In short, LPI and Outsourced Services are not consumer financial products or services; they instead involve the writing, marketing, advertising, entering into, selling, trading, managing, valuation, servicing, administration, and performing of insurance. These are core "business of insurance" activities constituting, or necessary to, the writing or reinsuring of risks.

B. RESPA Does Not Confer On The Bureau Enforcement Authority Over Assurant Or The Underwriters.

With respect to Assurant and the Underwriters, no other enumerated consumer law, including RESPA, confers enforcement authority on the Bureau. RESPA applies principally to the regulation of the "real estate settlement process," *see* 12 U.S.C. § 2601(a), and "settlement services" provided in connection therewith, *see id.* § 2602(3). "Settlement" means "the process of executing legally binding documents regarding a lien on property that is subject to a federally related mortgage loan. This process may also be called 'closing' or 'escrow' in different

jurisdictions." 12 C.F.R. § 1024.2. LPI is invariably a post-settlement event and is thus neither part of the settlement process nor a settlement service. Where charges are imposed *after* a real estate settlement, as they are with LPI, RESPA is inapplicable. *See Ali v. Wells Fargo Bank, N.A.*, 2014 WL 345243, at *3 (W.D. Okla. Jan. 24, 2014); *Rothstein v. GMAC Mortg., LLC*, 2013 WL 5437648, at *19 (S.D.N.Y. Sept. 30, 2013), *rev'd on other grounds sub nom. Rothstein v. Balboa Ins. Co.*, 794 F.3d 256 (2d Cir. 2015).

Although RESPA regulates some aspects of "force-placed insurance," *see* 12 U.S.C. § 2605(k)-(m), that Act regulates only "servicers." *See id.* § 2605(k) ("A servicer of a federally related mortgage shall not…"); § 2605(l)(1) ("A servicer may not…"); § 2605(l)(2) ("A servicer of a federally related mortgage shall…"); § 2605(l)(3) ("the servicer shall…"); *see also* 12 C.F.R. § 1024.37. Neither Assurant nor the Underwriters are servicers within the meaning of RESPA.[13] "The term 'servicer' means the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan)." 12 U.S.C. § 2605(i)(2). "Servicing" means "receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts …, and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan." *Id.* § 2605(i)(3).

Neither Assurant nor the Underwriters receive scheduled periodic payments from any borrower. They also do not make payments with respect to such amounts received from any borrower. They certainly do not do so "pursuant to the terms of any loan," which require that

[13] In addition, because "the Bureau shall have no authority to exercise any power to enforce" U.S.C. title 12, of which RESPA is a part, "with respect to a person regulated by a State insurance regulator," 12 U.S.C. § 5517(f)(1), for that independent reason the Bureau lacks authority over the Underwriters.

payments be made to the lender or its designated servicer. *See Jones v. ABN Amro Mortg. Grp., Inc.*, 606 F.3d 119, 125 (3d Cir. 2010) (although defendants received payments from borrowers and made payments to lenders, defendants were not RESPA "servicers" because the "actual loan documents" did not identify them as the persons to which such payments were to be made).

RESPA provides that all "charges, apart from charges subject to State regulation as the business of insurance, related to force-placed insurance imposed on the borrower by or through the servicer shall be bona fide and reasonable." 12 U.S.C. § 2605(m); *see also* 12 C.F.R. § 1024.37(h). This provision also does not reach Assurant or the Underwriters.[14] Again, as a mere holding company, Assurant itself does not charge *anything* for LPI – the Underwriters do. Olich Decl. ¶¶ 4, 10. And the Underwriters' LPI premium charges are "subject to State regulation as the business of insurance." The New York and Florida Consent Orders, and the California Insurance Commissioner's 2002 order, are clear evidence of that.

Indeed, with respect to American Security's LPI premiums, one court determined that:

> ASIC is an "admitted carrier" in 49 of the 50 states in the country (including in Florida), meaning that its rates and all expense components of those rates – including the business acquisition/broker commission component – are filed with and approved or authorized by the insurance regulation offices in each of those 49 states. Each office of insurance regulation has a different process for reviewing and approving rates, and each regulator engages in various levels of dialogue with ASIC about the information contained in its rate filings.

[14] In addition, if the Bureau is claiming that LPI premium charges are not reasonable or bona fide, the filed rate doctrine would bar that claim. *See, e.g.*, *Rothstein*, 794 F.3d at 262-66; *Miller v. Wells Fargo Bank, N.A.*, 994 F. Supp. 2d 542, 553-54 (S.D.N.Y. 2014); *Curtis v. Cenlar FSB*, 2013 WL 5995582, at *3-4 (S.D.N.Y. Nov. 12, 2013); *Johnson v. Green Tree Servicing, LLC*, 2015 WL 2452680, at *2 (N.D. Miss. May 22, 2015); *Singleton v. Wells Fargo Bank, N.A.*, 2013 WL 5423917, at *2 (N.D. Miss. Sept. 26, 2013); *Roberts v. Wells Fargo Bank, N.A.*, 2013 WL 1233268, at *13 (S.D. Ga. Mar. 27, 2013); *Decambaliza v. QBE Holdings, Inc.*, 2013 WL 5777294, at *6-7 (W.D. Wis. Oct. 25, 2013); *Kunzelmann v. Wells Fargo Bank, N.A.*, 2013 WL 139913, at *11-12 (S.D. Fla. Jan. 10, 2013); *Stevens v. Union Planters Corp.*, 2000 WL 33128256, at *3 (E.D. Pa. Aug. 22, 2000).

Kunzelmann, 2013 WL 139913, at *2. Moreover, the court continued, American Security's "commissions are included as a component of the insurance rates that are filed with state insurance regulators in each state." *Id.* Thus, as with the Dodd-Frank Act, nothing in RESPA regulates Assurant or the Underwriters.

IV. OBJECTIONS TO THE BUREAU'S INVESTIGATION

A. Applicable Legal Standards

Several universal principles govern civil investigative demands like the Bureau's. A company "may and should have protection from unlawful demands made in the name of public investigation," including "a governmental investigation in corporate matters" that is "of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power." *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). At a constitutional minimum, an agency's demand must be: (i) "within the authority of the agency," (ii) "not too indefinite," and (iii) "the information sought reasonably relevant." *Id.* "'The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.'" *Id.* at 652-53 (quoting *Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 208 (1946)). "An administrative subpoena thus may not be so broad so as to be in the nature of a "fishing expedition.'" *Peters v. United States*, 853 F.2d 692, 700 (9th Cir. 1988).

"It is now settled that, when an administrative agency subpoenas corporate books or records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. The agency has the right to conduct all reasonable inspections of such documents which are contemplated by statute, but it must delimit the confines of a search by designating the needed documents in a formal subpoena." *See v. City of Seattle*, 387 U.S. 541, 544 (1967).

Among other things, a company subject to a Bureau investigation is entitled to a description of "each class of documentary material to be produced under the demand with such definiteness and certainty as to permit such material to be fairly identified" and "a return date or dates which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction." 12 U.S.C. § 5562(c)(3)(A)-(B). "In addition, while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." *See*, 387 U.S. at 544-45; *see* 12 U.S.C. § 5562(h)(1).

In addition to these protections, the recipient of a civil investigative demand by the Bureau is entitled to know "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); *see also* 12 C.F.R. § 1080.5. "Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual." *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902).

B. The CID Should Be Set Aside And Redirected To The Underwriters.

As a threshold matter, the CID was improperly issued to the wrong company – Assurant. A proper Bureau investigation is an "inquiry conducted by a Bureau investigator for the purpose of ascertaining whether any person is or has been engaged in any conduct that is a violation," 12 U.S.C. § 5561(1). If the Bureau's investigation is being conducted to ascertain whether Assurant is or has been engaged in any conduct that is a violation, the Bureau is factually mistaken. Assurant does not participate in the matters under investigation.

If the Bureau's investigation is being conducted to ascertain whether unnamed "mortgage servicers" have been engaged in any conduct that is a violation, the CID's issuance is more properly directed to the companies which *do* participate in the investigated matters – the Underwriters, not Assurant. After all, "non-parties will generally be accorded more protection from sweeping administrative subpoenas under the rationale that individuals who do not participate in corporate matters that might reasonably become the subject of government inquiry have a greater reasonable expectation of privacy in their personal financial affairs than do those individuals who do participate in such matters." *In re Gimbel*, 77 F.3d 593, 599 (2d Cir. 1996) (internal quotation marks omitted).

Assurant is a publicly traded holding company and does not contract with or assist mortgage lenders, servicers, or anybody else to provide LPI or Outsourced Services. Olich Decl. ¶¶ 4, 8. Assurant does not: (i) transact the business of insurance, including the business of selling, underwriting, issuing, marketing, or administering insurance policies, collecting premiums paid for insurance policies, or providing Outsourced Services; (ii) sell, manufacture, supply, or offer for sale any product; or (iii) sell services to any person. *Id.* ¶¶ 7-11. Assurant does not pay, and has never paid, commissions to [redacted] or others in connection with LPI or Outsourced Services, nor has it been party to any reinsurance relationship with [redacted] or others. *Id.* ¶ 8. Assurant neither offers nor provides consumer financial products or services of any kind. *Id.* ¶ 7. Its assets consist primarily of the capital stock of its subsidiaries. *Id.* In short, contrary to the CID's "Notification of Purpose," Assurant is not engaged in "the procurement, offering, and use of lender-placed insurance involving residential mortgage loans."

The Underwriters are instead engaged in that business. *Id.* ¶ 5. Assurant is not, and has never been, involved in the Underwriters' daily decisionmaking or business operations. *Id.* ¶ 9.

It maintains separate corporate books and records from the Underwriters, which generate their own business. *Id.* Assurant does not participate in, direct, or control the placement, procurement, or binding of insurance policies that the Underwriters issue. *Id.* ¶ 11. It does not set or participate in setting the terms for policies issued by any Underwriter. *Id.*

The Underwriters sometimes operate under the registered trade name "Assurant Specialty Property." *Id.* ¶ 6. Assurant owns that trade name. *Id.* ¶ 5. Assurant itself, however, does not operate under the Assurant Specialty Property trade name, nor does it operate the companies that operate as Assurant Specialty Property. *Id.* As one court clarified, "Assurant is not Assurant Specialty Property, and Assurant Specialty Property is not a company at all." *Roberts*, 2013 WL 1233268, at *6. Indeed, numerous courts have recognized the clear distinction between Assurant, a mere holding company, and the Underwriters. *See, e.g.*, *Davis v. Wells Fargo Bank, N.A.*, 2015 WL 3555301, at *3-4 (E.D. Pa. June 8, 2015); *Montoya v. PNC Bank, N.A.*, 2014 WL 4248208, at *5 (S.D. Fla. Aug. 27, 2014); *Cochran-May v. Wells Fargo Bank, N.A.*, 2014 WL 361177, at *2-3 (S.D. Tex. Feb. 3, 2014); *Melinder v. Texas Farmers Ins. Co.*, 2014 WL 8298930, at *1 (S.D. Tex. Jan. 15, 2014); *Lauren v. PNC Bank, N.A.*, 2013 WL 5565511, at *4 (W.D. Pa. Oct. 8, 2013); *Roberts*, 2013 WL 1233268, at *6; *Cannon v. Wells Fargo Bank, N.A.*, 917 F. Supp. 2d 1025, 1032 (N.D. Cal. 2013); *Eaves-Leanos ex rel. Eaves v. Assurant, Inc.*, 2007 WL 2462632, at *3 (W.D. Ky. Aug. 28, 2007). Many of these courts have, for example, rejected the notion that vague references in Assurant's past Form 10-K reports (and other public filings) are to the contrary. *See, e.g.*, *Davis*, 2015 WL 3555301, at *4; *Cochran-May*, 2014 WL 361177, at *2-3; *Lauren*, 2013 WL 5565511, at *4; *Roberts*, 2013 WL 1233268, at *6-7.

Assurant was a party to the New York Consent Order, which concerns LPI and Outsourced Services, but was made a party "solely for the purpose of binding the New York FPI

Companies," *i.e.*, two of its indirectly owned underwriting subsidiaries. As one court held, the New York Consent Order was "entered without any admission of liability that would link Assurant to any conduct of the type made the basis of this action. In the New York Department of Financial Services Financial Fraud and Consumer Protection Division case, only the conduct of Assurant's subsidiaries was at issue and Assurant was expressly involved only to enforce the consent judgment against its subsidiaries." *Cochran-May*, 2014 WL 361177, at *3. Nothing about the New York Consent Order suggests that the CID is properly directed at Assurant. The CID should therefore be set aside and redirected to the Underwriters.

C. The CID Does Not Meaningfully Advise Assurant Of The Nature Of The Conduct Constituting The Alleged Violation Or Applicable Legal Provisions.

The CID offers only the most cryptic statement of its purpose in undertaking the investigation. In two sentences, its "Notification of Purpose" states:

> The purpose of this investigation is to determine whether mortgage servicers or other unnamed persons have engaged, or are engaging, in unlawful acts or practices in connection with the procurement, offering, and use of lender-placed insurance involving residential mortgage loans in violation of Sections 1031 and 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5531, 5536, the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.*, its implementing regulation, or any other Federal consumer financial law. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

The Bureau has declined to amplify this "Notification of Purpose." Such a vague statement, however, violates the Dodd-Frank Act's requirement that each "civil investigative demand shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." 12 U.S.C. § 5562(c)(2); *see also* 12 C.F.R. § 1080.5. ***First***, the CID states only the nature of the line of business under investigation ("the procurement, offering, and use of lender-placed insurance involving residential mortgage loans"), *not* "the conduct constituting the alleged violation." ***Second***, it

does not state "the provision of law applicable to such violation," citing only the far-reaching provisions of §§ 5531 and 5536, the *entirety* of RESPA and its implementing regulation, and every other law the Bureau enforces.

1. The CID specifies neither the nature of the investigated conduct, the persons engaged in the conduct, nor whether Assurant itself is under investigation.

The CID's "Notification of Purpose" is insufficient to advise Assurant of "the nature of the conduct constituting the alleged violation" under investigation, leaving Assurant with no basis on which to evaluate the relevance of anything that the Bureau requests.

There is no reason why the Bureau cannot know in advance of an investigation the nature of the conduct that it is concerned about and no reason why it cannot disclose that information at the beginning of an investigation. The Bureau must identify the alleged wrong, not merely the line of business in which the alleged wrong is occurring. The mere "procurement, offering, and use of lender-placed insurance involving residential mortgage loans" is not itself a violation of any law and is not otherwise wrongful. The CID offers no contextual clues as to what the wrongful conduct may be, citing only unspecified "unlawful acts or practices in connection with" LPI's provision. For example, the CID does not identify the persons committing those "acts or practices" or state whether Assurant itself is under investigation. It provides no guidance to Assurant or a reviewing court that would enable a real relevance determination.

The federal courts have shown lenience in accepting an administrative agency's explanation of its purpose in undertaking an investigation. But that lenience has its limits. Courts *have* refused to enforce an administrative subpoena when the agency failed to adequately

state the purpose for its investigation, thereby precluding a determination of relevancy.[15] While the nature of the investigated conduct need only be stated in general terms, the agency must nonetheless actually state the nature of the conduct.

The Bureau cannot cure this defect by asserting that the investigation can be made more specific through verbal communications to Assurant or through other post hoc rationalizations. Courts have rejected arguments that they should look beyond a civil investigative demand's text to cure the defect in an overly broad resolution, recognizing instead that "the validity of Commission subpoenas is to be measured against the purposes stated in the resolution, and not by reference to extraneous evidence." *FTC v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980); *see also FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1088 (D.C. Cir. 1992) (when a conflict exists in understanding investigatory purpose, "the language of the agency's resolution, rather than subsequent representations of Commission staff, controls"); *Montship Lines, Ltd. v. Fed. Maritime Bd.*, 295 F.2d 147, 155 (D.C. Cir. 1961) (investigatory purpose "must be apparent from the order itself and cannot be supplied by contentions in the briefs").

[15] *See, e.g.*, *Trailer Mar. Transport Corp. v. Fed. Maritime Comm'n*, 602 F.2d 379, 398-99 (D.C. Cir. 1979) (statement in administrative subpoena that requested information was necessary to enable the agency "to make initial determinations concerning the reasonableness" of a carrier's rates for water service to Puerto Rico did not adequately "state the reason and purpose for the information sought and thus establish a basis to determine the relevance of the information to agency action and the reasonableness of the agency request"); *United States v. Sec. State Bank & Trust*, 473 F.2d 638, 642-43 (5th Cir. 1973) (statement that production of records sought in an administrative subpoena was "essential to an investigation concerning trading in the September 1970 shell egg future on the Chicago Mercantile Exchange" was an inadequate basis for "enforcement of the subpoena in the face of the slender showing made by the government"); *Hellenic Lines Ltd. v. Fed. Maritime Bd.*, 295 F.2d 138, 140 (D.C. Cir. 1961) (statement in administrative subpoena that requested information was proper "pursuant to the responsibilities vested in the Board by the aforementioned Shipping Act, 1916, and in the effectuation in the public interest of the Board's regulatory duties under that Act" "clearly provides no standard for determining the relevancy of the information demanded").

2. The CID does not cite the specific legal provisions allegedly violated.

The CID's failure to identify the nature of the investigated conduct is exacerbated by the CID's additional failure to name "the provision of law applicable to such violation," as required by 12 U.S.C. § 5562(c)(2). The CID instead provides an extraordinarily broad, general description of the scope of the Bureau's omnibus investigation into "unfair" practices *or* RESPA violations, *or* something else entirely.

No notice at all would have been just as good as this notice. *The CID hypothesizes violations of literally every law that the Bureau administers.* Although the CID focuses on RESPA and on §§ 5531 and 5536, this clarifies little. RESPA occupies an entire chapter in the United States Code and features a host of potential legal violations. Reference to §§ 5531 and 5536 is even more ambiguous, as those provisions prohibit a covered person or service provider – or any person knowingly or recklessly providing substantial assistance to a covered person or service provider – "from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." *Id.* § 5531(a); *see also id.* § 5536(a). That covers not only the potential violation of not just 18 acts exclusive of Dodd-Frank itself, *id.* § 5481(12), (14) (defining "enumerated consumer laws" and "Federal consumer financial law"), but also any "unfair, deceptive, or abusive act or practice under Federal law" that can be plausibly conceived. Together, §§ 5531 and 5536 essentially comprise a new statute more sweeping than any prior consumer protection statute.

Such impenetrability exceeds the bounds of what courts will tolerate. For example, in *FTC v. Carter*, *supra*, the court addressed an administrative subpoena's notice of purpose that invoked § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, which, like §§ 5531 and

5536, broadly prohibits "unfair or deceptive acts or practices in or affecting commerce." 636 F.2d at 788. The *Carter* court found the agency's stated purpose to be sufficient based on three factors, none of which are present here. Those factors were that the agency: (i) "identif[ied] the specific conduct under investigation," namely, "cigarette advertising and promotion"; (ii) tied the § 5 violation to a predicate violation of a more specific statute, "section 8(b) of the Cigarette Labelling and Advertising Act"; and (iii) "additionally defined the application of section 5 in the Resolution by relating it to the subject matter of the investigation," *i.e.*, "the advertising, promotion, offering for sale, sale, or distribution of cigarettes." *Id.* At the same time, however, the *Carter* court ventured that a bare recitation of "Section 5's prohibition of unfair and deceptive practices ... standing broadly alone would not serve the very specific notice of purpose," and would be insufficient to evaluate the subpoena's relevance. *Id.*

That is precisely the CID's shortcoming – it identifies all conceivable legal violations that the Bureau may enforce and, on that basis, expects Assurant (and a reviewing court) to comprehend the nature of the conduct constituting the alleged violation *and* the provisions of law applicable to such violation. In that regard, the Bureau's CID is procedurally deficient.

D. The CID Should Categorically Exclude LPI Flood, Over Which The Bureau Lacks Investigative Or Enforcement Authority.

Assurant further objects to the CID's scope to the extent it encompasses LPI Flood. Under RESPA, the Bureau may have authority over mortgage servicers with respect to certain aspects of LPI Hazard and LPI Wind. The Bureau, however, lacks enforcement authority over *all* aspects of LPI Flood, rendering unjustified any investigation into supposedly unlawful "acts" or "practices" in connection with LPI Flood's procurement, offering, or use. RESPA specifically carves LPI Flood out of its reach while the Dodd-Frank Act more broadly carves the business of

insurance out of its reach. *See* Section III.A, *supra*. Resolution of this purely legal issue is simple – no discovery is necessary and no factual record need be constructed.

1. A court will not permit the Bureau to investigate matters outside the jurisdictional boundaries that Congress established.

The recipient of an administrative subpoena should not be burdened where, as here, the agency issuing it lacks jurisdiction to regulate the matters being investigated. "Compliance with a subpoena is a burden, and one that a person or institution that can show it is not subject to the regulatory regime in aid of which the subpoena was issued should not be required to bear." *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 492 (7th Cir. 1993); *see also United States v. Transocean Deepwater Drilling Inc.*, 936 F. Supp. 2d 818, 821 (S.D. Tex. 2013) ("Courts should not enforce administrative subpoenas issued in an investigation if the agency lacks jurisdiction to investigate."), *aff'd*, 767 F.3d 485 (5th Cir. 2014); *EEOC v. Grp. Health Plan*, 212 F. Supp. 2d 1094, 1096 (E.D. Mo. 2002) (quashing administrative subpoena because EEOC's charge did not involve practices covered by the Americans with Disabilities Act). After all, an agency's authority "is necessarily derived from the statute it administers and may not be exercised in a manner that is inconsistent with the administrative structure that Congress has enacted." *United States v. Transocean Deepwater Drilling, Inc.*, 767 F.3d 485, 489 (5th Cir. 2014). "An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant the agency power to override Congress." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374-75 (1986).

Where factual matters cloud the issue, courts often defer to agency determinations of their own investigative authority. "Subpoena enforcement power is not limitless, however." *FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001). "Accordingly, 'there is no doubt that a court asked to enforce a subpoena will refuse to do so if the subpoena exceeds an express

statutory limitation on the agency's investigative powers.'" *Id.* (quoting *Gen. Fin. Corp. v. FTC*, 700 F.2d 366, 369 (7th Cir. 1983)). "Although a party may not avoid an administrative subpoena on the ground that it has a valid defense to a potential subsequent lawsuit, such a challenge may, in limited circumstances, be mounted when the defense raised is 'jurisdictional' in nature – *i.e.*, when the agency lacks jurisdiction over the subject of the investigation." *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1076-77 (9th Cir. 2001).

"Questions of regulatory jurisdiction are properly addressed at the subpoena-enforcement stage if, as here, they are ripe for determination at that stage," *Reich*, 4 F.3d at 492, because "a court must assure itself that the subject matter of the investigation is within the statutory jurisdiction of the subpoena-issuing agency." *Ken Roberts*, 276 F.3d at 586-87 (internal quotation marks omitted). "[W]hile the courts' role in subpoena enforcement may be a 'strictly limited' one, it is neither minor nor ministerial." *Id.* at 587. In *FTC v. Shaffner*, 626 F.2d 32 (7th Cir. 1980), for example, the FTC sought enforcement of an administrative subpoena to examine the records of an attorney thought to be engaged in illegal debt collection practices. The attorney defended enforcement on the ground that, as an attorney, the applicable statute exempted him from coverage. The *Shaffner* court held that "a party can challenge the authority of an agency to issue a particular subpoena where ... the issue involved is a strictly legal one not involving the agency's expertise or any factual determinations." *Id.* at 36 (emphasis omitted); *see also Grp. Health Plan*, 212 F. Supp. 2d at 1096.

Here, the Dodd-Frank Act tethers the Bureau's investigative power to "violations." Under that Act, only if the Bureau "has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to a violation," may the Bureau then issue a civil investigative demand. 12 U.S.C.

§ 5562(c)(1). "The term 'violation' means any act or omission that, if proved, would constitute a violation of any provision of Federal consumer financial law." *Id.* § 5561(5). Neither RESPA nor the Dodd-Frank Act regulate LPI Flood, however, so no person could violate those Acts in connection with the procurement, offering, or use of LPI Flood. Because the Bureau may only investigate "a violation" of a "Federal consumer financial law," the Bureau lacks regulatory jurisdiction to investigate legally (and logically) impossible "violations."

2. RESPA restricts the Bureau's enforcement authority to LPI Hazard, and specifically excludes LPI Flood.

RESPA governs servicers' obligations with respect to certain aspects of LPI Hazard, *see* 12 U.S.C. § 2605(k)-(m); 12 C.F.R. § 1024.37, pointedly defining "force-placed insurance" to mean "hazard insurance coverage obtained by a servicer of a federally related mortgage when the borrower has failed to maintain or renew hazard insurance on such property as required of the borrower under the terms of the mortgage." *See* 12 U.S.C. § 2605(k)(2); *see also* 12 C.F.R. § 1024.37(a)(1). The Bureau itself excluded LPI Flood from the term "force-placed insurance." *Id.* § 1024.37(a)(2)(i) ("The following insurance does not constitute 'force-placed insurance' under this section: (i) Hazard insurance required by the Flood Disaster Protection Act of 1973."); *see also id.* § 1024.37(h)(1) ("charges authorized by the Flood Disaster Protection Act of 1973" are not subject to the requirement that "charges related to force-placed insurance assessed to a borrower by or through the servicer must be bona fide and reasonable").[16]

Defining "hazard insurance" to exclude flood insurance is consistent with other sections in the same "Mortgage Servicing" subtitle of the pre-codified Dodd-Frank Act (Subtitle E of

[16] Flood insurance is required by the Flood Disaster Protection Act of 1973 when a mortgaged property is located in a "special flood hazard area," as designated by the Federal Emergency Management Agency. 42 U.S.C. § 4012a(b)(1)(A), (e); 12 C.F.R. §§ 22.2(e), (l), 22.3(a), 22.7.

Title XIV), which amended both RESPA and the Truth in Lending Act ("TILA"). Section 1461 of that subtitle distinguished between hazard and flood insurance:

> For purposes of this section, the following definitions shall apply:
> "(i) DEFINITIONS. – For purposes of this section, the following definitions shall apply:
> "(1) FLOOD INSURANCE. – The term 'flood insurance' means flood insurance coverage provided under the national flood insurance program pursuant to the National Flood Insurance Act of 1968.
> "(2) HAZARD INSURANCE. – The term 'hazard insurance' shall have the same meaning as provided for 'hazard insurance', 'casualty insurance', 'homeowner's insurance', or other similar term under the law of the State where the real property securing the consumer credit transaction is located.".

Pub. L. No. 111-203, § 1461(a), 124 Stat. 1376 (2010) (codified at 15 U.S.C. § 1639d(i)). That distinction is consistent with the comprehensive regulation of flood insurance through federal laws specifically addressing flood insurance, including the National Flood Insurance Act of 1968, Flood Disaster Protection Act of 1973, National Flood Insurance Reform Act of 1994, Flood Insurance Reform Act of 2004, and Biggert-Waters Flood Insurance Reform Act of 2012.

The "normal rule of statutory construction" assumes that identical words used in different parts of the same act, passed at the same time, are intended to have the same meaning. *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986). While the definition in Dodd-Frank § 1461 distinguishing between "flood insurance" and "hazard insurance" amends TILA and later § 1463 amends RESPA (12 U.S.C. § 2605(k)-(m)), both are located in the same "Mortgage Servicing" subsection of the Dodd-Frank Act and address insurance subject to premium payments through escrow accounts, *i.e.*, hazard insurance required to protect mortgaged property. That common locus within the Act and common subject matter are "especially damaging to any claim that 'the words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent.'" *Id.* (quoting *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934)).

Defining "hazard insurance" to exclude flood insurance is consistent with the Bureau's other regulatory actions. For example, in the Consent Judgment entered as part of the National Mortgage Settlement, the Bureau drew distinctions between LPI Hazard, Wind, and Flood. Section VII.A.1 of the "Servicing Standards" enumerated in Exhibit A of the Consent Judgment defines the term "force-placed insurance" to mean "hazard insurance coverage obtained by Servicer when the borrower has failed to maintain or renew hazard or wind insurance on such property as required of the borrower under the terms of the mortgage," while Section VII.A.9 clarifies that "[n]o provision of this section VII shall be construed as prohibiting Servicer from providing simultaneous or concurrent notice of a lack of flood insurance pursuant to section 102(e) of the Flood Disaster Protection Act of 1973." Other parts of the Consent Judgment likewise recognize the distinction between hazard, wind, and flood insurance.

In short, LPI Flood is not LPI Hazard and nothing in RESPA gives the Bureau authority to investigate or take enforcement action regarding LPI Flood.

3. LPI Flood is not offered or provided as a consumer financial product or service, but constitutes the business of insurance.

Likewise, nothing in the Dodd-Frank Act gives the Bureau authority to investigate or take enforcement action with respect to LPI Flood. The Bureau "shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws" – nothing more. 12 U.S.C. § 5491(a). As discussed more fully above, *see* Section III.A.2, *supra*, the term "financial product or service" does not include the business of insurance. *Id.* § 5481(15)(C)(i). Like all forms of LPI, LPI Flood is not a consumer financial product or service, but constitutes the writing of insurance and acts necessary to such writing.

E. The Applicable Time Period Should Be Modified To Commence On September 22, 2012, Not January 1, 2010.

The "Applicable Time Period for Responsive Materials" also is overbroad and exceeds the Bureau's authority. The CID seeks information and materials for the time period from January 1, 2010 until completion of the CID concerning alleged – but unspecified – violations of the Dodd-Frank Act and RESPA. The Applicable Time Period not only exceeds the limitations periods prescribed by Dodd-Frank and RESPA, but antedates the effective dates of the very provisions the Bureau purports to enforce.

1. The Bureau lacks authority to investigate or enforce alleged violations that exceed the three-year limitations periods applicable to RESPA and the Dodd-Frank Act.

As discussed in Section IV.A, *supra*, an agency's investigation must be within its legal authority. The CID reaches backwards nearly six years, far exceeding the limitations periods relevant to the CID and what is reasonably necessary for the Bureau to investigate any alleged legal violations. The CID should be modified to encompass a less-sweeping period. *See EEOC v. Ocean City Police Dep't*, 820 F.2d 1378, 1380 (4th Cir. 1987) (*en banc*) (refusing enforcement of an administrative subpoena based on a charge which could not be pursued for lack of timeliness, stating that "logic indicates that it is beyond the authority of EEOC to investigate charges which cannot be pursued"), *vacated on other grounds*, 486 U.S. 1019 (1988); *Gen. Ins. Co. of Am. v. EEOC*, 491 F.2d 133, 136 (9th Cir. 1974) (administrative subpoena was overbroad when it "reached back in time nearly eight years").

a. A three-year limitations period governs the RESPA amendments, which only became effective on January 10, 2014.

In 2010, the Dodd-Frank Act amended RESPA to add, *inter alia*, provisions governing servicer prohibitions and requirements for "force-placed insurance." *See* 12 U.S.C. § 2605(k)-

(m). Prior to these amendments, RESPA did not purport to regulate LPI. The amendments further granted the Bureau rulemaking authority and the authority to supervise and enforce compliance with RESPA. The amendments codified at § 2605(k)-(m) were to be effective on the date on which the final rule implementing those amendments took effect. Pub. L. No. 111-203, § 1400(c), 124 Stat. 1376 (2010). On February 14, 2013, pursuant to its rulemaking authority, the Bureau issued a final rule, Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696-01 (Feb. 14, 2013), which implemented the new RESPA provisions. The Bureau's final rule included new implementing regulations related to mortgage servicing, *see* 12 C.F.R. pt. 1024, subp. C, which by the Bureau's own terms became effective on January 10, 2014. *See* 78 Fed. Reg. 10,696-01 ("This final rule is effective on January 10, 2014."). These substantive provisions were given prospective effect only.

RESPA § 2614 provides that any action may be brought "within 3 years" in the case of a violation of § 2605. 12 U.S.C. § 2614.[17] Consequently, any conceivable RESPA violation concerning LPI Hazard could have only occurred *after* the effective date of the legislation and the Bureau's implementing regulations.[18] The Bureau lacks statutory authority to seek any information antedating § 2605(k)-(m)'s effective date, and certainly to seek information outside

[17] In § 2614, RESPA further provides that for a violation of 12 U.S.C. §§ 2607 or 2608, an action may be brought by the Bureau within three years from the date of the violation. Those sections, prohibiting "kickbacks and unearned fees" incident to settlement services, § 2607, and governing title insurance, § 2608, do not apply to Assurant or the Underwriters, which provide neither settlement services nor title insurance.

[18] *See, e.g.*, *Houston v. U.S. Bank Home Mortg. Wis. Servicing*, 505 F. App'x 543, 547 (6th Cir. 2012) (rejecting RESPA claim based on § 2605(k) that provision was not in effect in 2009, at the time of the conduct alleged); *Ali*, 2014 WL 345243, at *2 (dismissing RESPA claim because "Section 2605(m) took effect on January 10, 2014" and LPI was issued before that date); *Gomez v. Nationstar Mortg., LLC*, 2015 WL 966224, at *3 (E.D. Cal. Mar. 4, 2015) (dismissing RESPA claim because § 2605(k) is not applicable to LPI obtained prior to January 10, 2014); *Boardley v. Household Fin. Corp. III*, 39 F. Supp. 3d 689, 703 (D. Md. 2014) (alleged violations of § 2605(k) prior to January 10, 2014 are not actionable).

of the three-year limitation period from the CID's service. The Bureau's investigation should be governed by corresponding time limits.

b. A three-year limitations period governs both litigation and administrative actions to enforce the Dodd-Frank Act.

The Dodd-Frank Act created a new right of action prohibiting covered persons and service providers from "committing or engaging in an unfair, deceptive, or abusive acts or practice" in connection with consumer financial products or services. 12 U.S.C. §§ 5531(a), 5536(a). Congress granted the Bureau authority to enforce this prohibition and to establish governing rules and guidance. These provisions only became effective on July 21, 2011, the designated date authority was transferred to the Bureau. *See id.* § 5582; Designated Transfer Date, 75 Fed. Reg. 57,252-02 (Sept. 20, 2010). The CID's Applicable Time Period nonetheless extends all the way back to January 1, 2010, a 19-month gap.

The CID's Applicable Time Period also runs afoul of the Dodd-Frank Act because 12 U.S.C. § 5564, which grants litigation authority with respect to the new right of action, provides that "no action may be brought under this title more than 3 years after the date of discovery of the violation to which an action relates." *Id.* § 5564(g)(1). This limitations period applies not only civil actions brought in federal court, but also administrative enforcement proceedings.

The Bureau has taken the opposite position. *See In the Matter of PHH Corp.*, No. 2014-CFPB-0002, slip op. at 10-12 (June 4, 2015).[19] And the Bureau has taken the position that, accordingly, *no* limitations period applies to administrative enforcement proceedings undertaken by the Bureau. *See id.* at 11 (because the Dodd-Frank Act "provides no statute of limitations for administrative proceedings" brought by the Bureau, "no statute of limitations applies here").

[19] http://tinyurl.com/qzqutnh

That view is irreconcilable with the Supreme Court's recent decision in *Gabelli v. SEC*, which ruled in the context of a Securities and Exchange Commission administrative enforcement action that targeted persons should not be subject to potential liability "brought at any distance of time." 133 S. Ct. 1216, 1223 (2013) (internal quotation marks omitted). The Court explained:

> Statutes of limitations are intended to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. They provide security and stability to human affairs. We have deemed them vital to the welfare of society and concluded that even wrongdoers are entitled to assume that their sins may be forgotten.

133 S. Ct. at 1221 (internal quotation marks and citations omitted). Accordingly, potential defendants should not be left "exposed to Government enforcement action" for "an additional uncertain period into the future." *Id.*

Where no limitations period has been specifically provided, "we do not ordinarily assume that Congress intended that there be no time limit on actions at all; rather, our task is to 'borrow' the most suitable statute or other rule of timeliness from some other source." *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 158 (1983); *see also Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 146 (1987) (statute of limitations applicable to Clayton Act civil actions borrowed for application to RICO civil actions). "We therefore assume, as we have before, that Congress intended to impose an appropriate period borrowed either from a state statute or from an analogous federal one." *Stevens v. Dep't of Treasury*, 500 U.S. 1, 7 (1991). In borrowing a time limit, a reasonable source is a "statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here – a statute that is, in fact, an analogy to the present lawsuit." *DelCostello*, 462 U.S. at 169.

Here, to adopt varying *state* rules would burden the Bureau's administrative efforts and prove an "unsatisfactory vehicle" for the enforcement of federal consumer financial laws. *See id.*

at 161. But there is a *federal* statute of limitations that would aptly apply to the Bureau's administrative enforcement proceedings (if, indeed, it does not apply already) – 12 U.S.C. § 5564(g)(1). That limitations period should apply to protect targeted persons whether the Bureau commences an administrative enforcement proceeding or a civil action in federal court. The goals of either procedural vehicle are identical – to enforce the federal consumer financial laws that the Bureau administers. The important policy of repose that Congress established in § 5564(g)(1) should not be avoided via the simple expedient of the Bureau selecting an alternative adjudicative forum. Such a bypass would effectively negate § 5564(g)(1).

Section 5564(g)(1)'s three-year period runs from the date of the violation's discovery. The Bureau has, or should have been, aware of alleged LPI violations for more than three years prior to the CID. Indeed, for many years LPI has been subject to intense regulatory scrutiny and class action litigation. Consider:

- During March 6, 2012 prepared remarks before the National Association of Attorneys General, the Director announced that the Bureau would issue rules on "force-placed insurance" to prevent servicers from charging for this product unless there is a reasonable basis to believe that borrowers have failed to maintain their own insurance.[20]
- [redacted]

[20] http://tinyurl.com/nemp56a

[21] [redacted]

- On September 17, 2012, the Bureau issued proposed rules to regulate LPI, including a rule that charges for LPI "would have to bear a reasonable relationship to the servicer's cost of providing the service." 2012 Real Estate Settlement Procedures Act (Regulation X) Mortgage Servicing Proposal, 77 Fed. Reg. 57,200-01, 57,201 (Sept. 17, 2012). In connection with the proposed rules, the Bureau received comments from consumer advocates raising a variety of alleged legal violations or abuses.

- A public hearing on LPI was held on May 17, 2012, at the NYDFS.[22] After the hearing, New York State's Governor Andrew Cuomo and Superintendent of Financial Services Benjamin Lawsky announced that LPI carriers operating in New York must lower the premiums they charge. "Our hearings suggest a lack of competition, high prices and low loss ratios, all of which hurt homeowners," Superintendent Lawsky said in a contemporaneous press release.[23]

- August 9, 2012 hearings before the NAIC focused on the use of LPI, how consumers are affected by the practice, and probed the process for LPI and its impact on homeowners, including reviewing the relationships between mortgage servicers and insurers; whether coverage was being imposed retroactively; disclosures used to inform consumers about LPI; coverages provided by LPI; and premiums charged, loss ratios, and rating and pricing information.[24]

- [redacted]

There can thus be no argument that the "discovery" aspect of § 5564(g)(1) tolls or extends the applicable three-year limitations period.

2. Fundamental principles of fairness and due process dictate against retroactive application of the Dodd-Frank Act's provisions.

The CID also is overbroad because it seeks the production of documents and information antedating the effective date of 12 U.S.C. §§ 5531 and 5536 and the RESPA amendments. When legislation is enacted it carries a presumption that it can only be enforced prospectively.

[22] http://tinyurl.com/q9a52xl

[23] http://tinyurl.com/pon8xyo

[24] http://tinyurl.com/q9a52xl

[25] [redacted]

"[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994) (internal quotation marks omitted). Courts consider "fair notice, reasonable reliance, and settled expectations" when determining if a statute is retroactive. *Id.* at 270. New legislation is thus prospective and will not have a retroactive effect unless Congress expressly requires a contrary result. *Id.* at 264.

The Dodd-Frank Act, including its RESPA amendments, created new, substantive enforcement authority in the Bureau that can only be applied prospectively. The Dodd-Frank Act itself declares that its contents should *not* be construed as retroactive. *See* 12 U.S.C. § 5553. There is neither express statutory language nor any other indication that Congress intended these provisions to be applied retroactively. Courts interpreting the provisions have so held. *See, e.g.*, *Campbell v. Nationstar Mortg.*, 611 F. App'x 288, 297-98 (6th Cir. 2015) (nothing in congressional intent or the Bureau's intent in issuing mortgage servicing rules suggests that the RESPA amendments should be applied retroactively); *Gomez*, 2015 WL 966224, at *3 (Dodd-Frank not retroactively applicable). The Bureau's attempt to investigate conduct antedating the applicable provisions of the Dodd-Frank Act, including the RESPA amendments, is unwarranted.

3. Documents and information antedating 2013 are irrelevant because LPI and Outsourced Services business practices have been modified since that time.

In other contexts, the Bureau has expressed the view that information about the original decisionmaking, planning, and execution of what it believes to be a "continuing course of conduct" extending over many years may be relevant to its investigations. That view does not apply here. Starting in 2012, the Underwriters and [redacted] were legally required by multiple

sources to modify their business practices (and have complied with those legal requirements) with respect to LPI and Outsourced Services. Those sources include:

- [redacted]
- The March 21, 2013 New York Consent Order.
- The October 7, 2013 Florida Consent Order.
- The January 1, 2013 California LPI rate reduction.
- The 49-state roll-out of the MIP LPI product begun in 2012.
- [redacted]

[redacted] Accordingly, even if it is not constrained by the applicable three-year limitations periods, the Bureau should account for the modifications to the business practices at issue in assessing whether the Applicable Time Period should extend back to January 1, 2010.

F. Interrogatory No. 1 Seeks Protected Attorney Work-Product.

Assurant also objects to specific Requests in the CID, including Interrogatory No. 1, which seeks information subject to the work-product doctrine. That Interrogatory states: "Identify all Persons who participated in responding to this CID, and describe the specific tasks

[26] [redacted]

[27] [redacted]

performed by each Person, including the responses for which the tasks were performed." Without agreeing to withdraw or modify Interrogatory No. 1, the Bureau has informally clarified that the Interrogatory should be construed to require identification of only the persons who participated in responding to the CID. Not only does this clarification fail to alter the Interrogatory's plain language or demands, the identification of persons who participated in responding to the CID is precisely the sort of attorney work-product protected from disclosure.

"Although the work product doctrine is most commonly applied to documents and things, unjustified disclosure of the opinions or mental processes of counsel may occur when questions are posed which seek information at depositions or in interrogatories." *Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 230 (E.D.N.Y. 2007) (internal quotation marks omitted). "[I]nterrogatories which seek to discover facts regarding an attorney's mental thought process seek improper work product information." *Id.* at 231. Here, requiring Assurant to name the persons who participated in preparing its Interrogatory responses would necessarily reveal the persons who Assurant's attorneys believe to have the most relevant information. *See id.* at 231-32 (denying motion to compel answer to interrogatory demanding that plaintiff "identify all persons who assisted in preparing responses to these Interrogatories" because "it seeks information regarding individuals who assisted plaintiffs' counsel with the preparation of their interrogatory responses, which is protected work product").[28]

[28] *See also Yerger v. Liberty Mut. Grp., Inc.*, 2012 WL 4424017, at *4 (E.D.N.C. Sept. 24, 2012) (interrogatory seeking the "identity of each person(s) who prepared or assisted in the preparation of any part of defendant's response(s) to these interrogatories" improperly sought "the identity of each individual the attorney spoke to before drafting a response"); *Weiss v. Nat'l Westminster Bank, PLC*, 242 F.R.D. 33, 61 (E.D.N.Y. 2007); *Robinson v. Penner*, 2007 WL 2902967, at *4 (E.D. Cal. Oct. 2, 2007) (party properly asserted the work-product privilege in response to an interrogatory seeking identification of "each known person to you and not otherwise identified in your answers to these interrogatories who has provided any information, or assistance of

(footnote continues on next page)

The Bureau may not seek information subject to the work-product doctrine. *See* 12 U.S.C. § 5562(f)(3). Moreover, that doctrine applies to judicial subpoena-enforcement proceedings. *See* Fed. R. Civ. P. 26(b)(3); Fed. R. Civ. P. 81(a)(5) ("These rules apply to proceedings to compel testimony or the production of documents through a subpoena issued by a United States officer or agency under a federal statute, except as otherwise provided by statute, by local rule, or by court order in the proceedings."). Assurant objects, and should not be required to respond, to Interrogatory No. 1, whether as worded or as informally clarified.

G. Interrogatory No. 2(c) And (g) Seek Irrelevant And Overbroad Information Relating To Thousands Of Discrete Data Fields.

Assurant also objects to aspects of Interrogatory No. 2. Interrogatory No. 2(c) seeks "the names and descriptions of the data fields" in each Database used by Assurant related to LPI or Outsourced Services. Similarly, subpart (g) seeks "the timeframe for which information in each data field is stored or maintained." The relevant Databases, however, collectively contain *thousands* of discrete data fields – some Databases contain hundreds of data fields of their own. Many fields have changed over the course of the Applicable Time Period. Assurant should not be put to the Herculean (and needless) task of naming and explaining each individual data field.

Assurant appreciates the Bureau's agreement to informally set aside, at least for now, Interrogatory No. 2(c) and (g), but respectfully requests that these subparts be *formally* withdrawn or materially modified. As an alternative, Assurant proposes producing the file

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whatever nature or description, relating to any of your answers to these interrogatories"); *Bd. of Educ. of Evanston Twp. High Sch. Dist. No. 202 v. Admiral Heating & Ventilating, Inc.*, 104 F.R.D. 23, 32 (N.D. Ill. 1984) (interrogatory asking "defendants to identify the persons who 'furnished information utilized in or participated in the preparation of the answer' to each of the Second Set interrogatories" would afford plaintiffs "the potential for significant insights into the defense lawyers' preparation of their case (and thus their mental processes)").

layout for the most relevant Databases and allowing the Bureau the opportunity to specify the particular data fields for which the Bureau requires further information.

H. Request For Documents No. 2 Is Overbroad And Imposes A Burden Assurant Should Not Have To Bear.

Request for Documents No. 2 is inconsistent with the rest of the CID. While the bulk of the CID seeks information regarding the Underwriters' LPI relationship with [redacted] or background information regarding the Underwriters' LPI operations, Request No. 2 seeks contracts and agreements governing *all* of the Underwriters' LPI relationships. Untethered from the [redacted] LPI program, the Request is overly intrusive.

1. The Request is overbroad.

As discussed in Section IV.A, *supra*, "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." *Morton Salt*, 338 U.S. at 652. An inquiry is permissible only if it is "within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *Id.* In other words, the CID "may not be so broad so as to be in the nature of a 'fishing expedition.'" *Peters*, 853 F.2d at 700. An agency cannot "rely on its broad investigatory powers to pursue 'other wrongdoing, as yet unknown.'" *In re Sealed Case*, 42 F.3d 1412, 1418 (D.C. Cir. 1994).

Request for Documents No. 2 is in scope far beyond any reasonable request made in the course of a properly focused inquiry. The Request seeks copies of agreements with more than 80 mortgage servicers that have nothing to do with the [redacted] LPI program. In fact, the Bureau specifically *excluded* [redacted] LPI program agreements from the Request's scope. In *Long Island Precast, Inc. v. Dep't of Labor*, the court quashed, in part, an administrative subpoena that sought information regarding non-employees "who performed services of any kind" for the

employer as overbroad and not within the scope of the investigation into purported on-site hazards. 2014 WL 3735943, at *5 (E.D.N.Y July 14, 2014). That is the situation here – a broad-based inquiry regarding unidentified persons who are, by definition, not relevant to the focus of the inquiry and for who the Bureau has no articulable suspicion of wrongdoing. *See also Peters*, 853 F.2d at 700 (quashing administrative subpoena regarding seeking information about unnamed third parties; "we can find no reported decision in which the INS has attempted to issue a third-party group subpoena in connection with a general investigation of unnamed individuals on the suspicion that some of them may be undocumented aliens").

While an agency's investigative authority is broad, it is not unfettered. In addition, many of the program agreements pertain in part to LPI Flood which, as discussed, is outside of the Bureau's investigative or enforcement authority. *See* Section IV.D, *supra*.

2. The Request is unduly burdensome.

Request for Documents No. 2 also imposes an undue burden on Assurant and the Underwriters. During the Applicable Time Period, the Underwriters were engaged in more than 80 distinct LPI relationships. Each of those relationships is governed by a series of program agreements covering all aspects of the LPI relationship, many of which have been modified, amended, restated, or revised multiple times. Compiling, reviewing, and producing the various iterations of these program agreements, which are in no way relevant to the apparent focus of the inquiry – the [redacted] LPI program – imposes an undue burden on the Underwriters.

In addition, the program agreements sought by this Request are highly confidential. They detail the Underwriters' individually negotiated relationships with loan servicers, including the distinct scope, cost, fees, and expenses associated with each program. Public disclosure of these trade secrets would harm both to the Underwriters and their mortgage servicer clients. For this

reason, each set of program agreements contain individually negotiated confidentiality provisions, imposing varying obligations on the Underwriters. Complying with those obligations – which often include providing notice of an administrative subpoena coupled with an opportunity to intervene to prevent disclosure – would impose an additional significant burden on the Underwriters, and may be impossible within the timeframe identified in the CID. When balanced against the limited relevance of the requested documents to the [redacted] LPI program, the Bureau cannot justify imposing this burden on Assurant or the Underwriters.

Notwithstanding its objection that none of the program agreements other than the [redacted] agreements are relevant to the focus of the inquiry, Assurant suggested that the Bureau narrow Request for Documents No. 2 in one of two ways that have been accepted by other regulators. Specifically, Assurant suggested production of either: (i) the program agreements of the top three LPI programs (by volume), or (ii) a sampling of six sets of program agreements (two large servicers, two medium servicers, and two small servicers). Both proposals take into account Assurant's objections to the relevance of and burden imposed by the Request as drafted, while recognizing the Bureau's investigatory authority. The Bureau declined both the proposed compromises without explanation, insisting that Assurant produce complete sets of all program agreements for all LPI relationships during the Applicable Time Period.

I. The CID Should Be Modified To Amend The Production Deadline.

Assurant appreciates that the Bureau granted it an extension of time (to December 1, 2015) in which to respond to Request for Written Report No. 2. The CID nonetheless includes multiple Interrogatories with multiple subparts, as well as Requests for Documents and two other Requests for Written Reports requiring compilation of information over a multi-year period, to be produced by October 22, 2015 in compliance with exacting Document Submission Standards.

Assurant requests modification of the CID so that responses and productions can be produced on a rolling basis and within a reasonable period to be agreed upon by the parties. *See* 12 U.S.C. § 5562(c)(3)-(5); 12 C.F.R. § 1080.6(a)(1)-(3) (compliance date must provide "a reasonable period of time" for assembly and production of requested material).

V. CONCLUSION

For the foregoing reasons, Assurant respectfully requests that the Director enter an order modifying or setting aside the CID consistent with the factual and legal objections raised herein.

Dated: October 12, 2015

Respectfully submitted,

CARLTON FIELDS JORDEN BURT, P.A.

By:_____

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CERTIFICATE OF MEET-AND-CONFER

I, Frank G. Burt, counsel for petitioner Assurant, Inc., certify that I met and conferred with Christian Woolley, counsel for the Consumer Financial Protection 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. The meeting occurred over the telephone on October 2, 2015, beginning at 2:30 p.m. and concluding at approximately 3:15 p.m. For Assurant, participants in the meeting included myself, Glenn Merten, Brian Perryman, and Charles Fash. For the Bureau, participants included Christian Woolley, John Marlow, Glenn Melcher, and Irfan Murtuza.

On October 7, 2015, I met and conferred with Mr. Woolley for a second time in a good-faith effort to resolve by agreement the issues raised by the Petition. The meeting occurred over the telephone, beginning at 11:00 a.m. and concluding at approximately 11:30 a.m. For Assurant, participants in the meeting included myself, Glenn Merten, Brian Perryman, Kristin Shepard, Greg Tuttle, and Charles Fash. For the Bureau, participants included Christian Woolley, John Marlow, and Irfan Murtuza.

The parties were unable to resolve by agreement the issues raised by the Petition. The parties were able to agree to an extension of time, to December 1, 2015, in which to respond to Request for Written Report No. 2, and to limit the scope of that Request's Exhibit A, including modifying or clarifying Element Nos. 2, 6, 21-23, 32, and 38-39 and acknowledging Assurant's representation that it cannot produce data for Element Nos. 3, 7-10, 33-34, 40, and 43.

Dated: October 12, 2015

Frank G. Burt

CERTIFICATE OF SERVICE

I, Frank G. Burt, hereby certify that on this 12th day of October, 2015, I caused the foregoing Petition to Modify or Set Aside September 22, 2015 Civil Investigative Demand to be served by electronic mail and first-class mail, postage prepaid, to:

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Frank G. Burt

EXHIBIT A

UNITED STATES OF AMERICA
CONSUMER FINANCIAL PROTECTION BUREAU

IN THE MATTER OF CIVIL
INVESTIGATIVE DEMAND
ISSUED TO ASSURANT, INC.

DECLARATION OF JESSICA M. OLICH IN SUPPORT OF ASSURANT, INC.'S PETITION TO MODIFY OR SET ASIDE SEPTEMBER 22, 2015 CIVIL INVESTIGATIVE DEMAND

I, Jessica M. Olich, declare as follows:

1. I am a Vice President and Assistant Secretary of Assurant, Inc. The statements set forth in this declaration are based upon my personal knowledge, or are based upon a personal review of the corporate records and/or publicly available information regarding Assurant, Inc., and information and/or records regarding American Security Insurance Company ("ASIC"), Standard Guaranty Insurance Company ("SGIC"), and Voyager Indemnity Insurance Company ("VIIC") (collectively, the "Underwriters"), some of which was provided to me by other officers of Assurant, Inc., employees of the Underwriters, or affiliates thereof.

2. I am over 21 years of age and competent to testify to the statements set forth in this declaration.

3. I make this declaration in support of Assurant, Inc.'s Petition to Modify or Set Aside the September 22, 2015 Civil Investigative Demand. Terms used in this declaration having the same meaning ascribed to them in the Civil Investigative Demand include '[redacted] and "Outsourced Services."

4. I am familiar with the public company known as Assurant, Inc. Assurant, Inc. is a holding company. Assurant, Inc. is a Delaware corporation the shares of which are traded on the

New York Stock Exchange under the symbol AIZ, and whose principal place of business is New York, New York.

5. I am familiar with the organization of a group of companies that sometimes conduct business utilizing the federally registered trade name "Assurant Specialty Property." Assurant, Inc. merely owns this federally registered trade name (United States Patent and Trademark Office Registration No. 3224152). Assurant, Inc. does not operate, and has never operated, the businesses that sometimes use the trade name "Assurant Specialty Property." "Assurant Specialty Property" is a financial reporting segment. The businesses in the reporting segment that sometimes use the "Assurant Specialty Property" trade name include entities providing administration services and lender-placed insurance to the residential mortgage industry.

6. The Underwriters are businesses that sometimes use the "Assurant Specialty Property" trade name. Assurant, Inc. is the indirect parent of the Underwriters. SGIC and ASIC are both Delaware corporations with their principal place of business in Atlanta, Georgia. SGIC is a wholly-owned subsidiary of ASIC, which is a wholly owned subsidiary of Interfinancial Inc., which in turn is a wholly owned subsidiary of Assurant, Inc. VIIC is a Georgia corporation with its principal place of business in Atlanta, Georgia. VIIC is a wholly-owned subsidiary of Voyager Group, Inc., which is a wholly-owned subsidiary of American Bankers Insurance Group, Inc., which is a wholly owned subsidiary of Interfinancial Inc., which in turn is a wholly owned subsidiary of Assurant, Inc. ASIC, SGIC, and VIIC are insurance companies.

7. Assurant, Inc. does not sell, manufacture, supply, or offer for sale any product, or sell services to any person. Assurant, Inc. does not offer or provide consumer financial products or services of any kind. The assets of Assurant, Inc. consist primarily of the capital stock of its subsidiaries.

8. Assurant, Inc. does not contract, and has never contracted, with any affiliate or subsidiary of [redacted] or any other mortgage lender or servicer to provide lender-placed insurance or to provide any services relating to lender-placed insurance, including Outsourced Services. It is the Underwriters, rather than Assurant, Inc., which enter into such contracts and perform such services. Assurant, Inc. does not pay, and has never paid, commissions or other compensation to [redacted] or to any other mortgage lender or servicer in connection with lender-placed insurance or Outsourced Services. Assurant, Inc. is not a party to reinsurance contracts or reinsurance agreements with [redacted] or any other mortgage lender or servicer.

9. Assurant, Inc. is not, and has never been, involved in the daily decision-making or business operations of the Underwriters. Assurant, Inc. maintains separate books and corporate records from the Underwriters, and the Underwriters generate their own business.

10. Assurant, Inc. is not, and has never been, an insurance company. It has never sold, underwritten, issued, marketed, or administered insurance policies. Assurant, Inc. does not collect, and has never collected, premiums paid for insurance policies. Assurant, Inc. does not provide Outsourced Services.

11. Assurant, Inc. does not participate in, direct, or control the placement, procurement, or binding of insurance policies that the Underwriters issue. Assurant, Inc. did not and does not set or participate in setting the policy terms for insurance policies issued by the Underwriters.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 6, 2015.

Jessica M. Olich

EXHIBIT B

CARLTON FIELDS
JORDEN BURT

ATTORNEYS AT LAW

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October 5, 2015

Via USPS & Email

Mr. Christian Woolley
Enforcement Attorney
CFPB
1700 G Street NW
Washington DC 20552

Dear Christian:

Thank you for taking the time on Friday afternoon to meet and confer with us by teleconference regarding the Bureau's CID to Assurant, Inc. We appreciate the Bureau's willingness to discuss the scope of the CID and the requested production. During our call, we discussed the following points:

- The CID should be set aside and redirected to the Underwriters. Assurant, Inc. is not an insurance company, does not engage in the business of insurance, is not engaged in "the procurement, offering and use of lender-placed insurance involving residential mortgage loans," and does not have an LPI relationship with [redacted] or any other loan servicer. Assurant is a mere holding company, with no LPI or Outsourced Service operations of its own. Accordingly, Assurant is not the correct subject of the CID, which is properly directed at American Security Insurance Company, Standard Guaranty Insurance Company and Voyager Indemnity Insurance Company (the "Underwriters"), Assurant's indirect insurance subsidiaries that underwrite the coverage issued in

conjunction with the [redacted] LPI program. You indicated that you would consider Assurant's request to set aside the CID and redirect it to the Underwriters.

In the interests of brevity, I will continue to refer to "Assurant" when recounting our discussion. This is not a waiver of our position that the CID should be set aside and redirected to the Underwriters. Moreover, the points below apply equally to Assurant and the Underwriters.

- Lender-Placed Flood Insurance. The Bureau's enforcement and investigatory authority does not extend to LPI flood. RESPA defines force-placed insurance as hazard insurance, 12 U.S.C. § 2605(k)(2); 12 C.F.R. § 1024.37(a)(1), and specifically excludes LPI Flood from that definition. *Id.* § 1024.37(a)(2)(i). Similarly, the Bureau regulates only "consumer financial products or services," 12 U.S.C. § 5491(a), and specifically excludes the "business of insurance" from that definition. *Id.* § 5481(15)(C)(i). Moreover, the Bureau lacks enforcement authority over persons regulated by a State insurance regulator, *i.e.*, the Underwriters, 12 U.S.C. § 5517(f), or whose LPI premiums are regulated by a State insurance regulator, 12 U.S.C. § 2605(m). Accordingly, Assurant requested that the CID be modified to exclude information and materials related to LPI Flood. You indicated that you disagreed with this position.

- Applicable Time Period. Assurant requested that Applicable Time Period be modified to commence as of September 22, 2012, the beginning of the applicable limitations periods of the Dodd-Frank Act and RESPA which govern the Bureau's enforcement activities. You indicated your disagreement with this request because (i) pre-September 2012 information would aid your investigation, and (ii) section 5564(g)(1)'s limitations period runs from the date of discovery of an alleged violation. Assurant respectfully requests

that the Bureau reconsider its position. The framework under which the [redacted] LPI program operates has changed since 2012, rendering any information regarding the pre-September 2012 program irrelevant to an assessment of the program since then. Moreover, the Bureau cannot credibly assert that it was unaware of (or could not reasonably have been aware of) potential alleged violations regarding LPI coverage prior to September 22, 2012. For example, the New York Department of Financial Services CIDs to servicers and underwriters regarding LPI commenced in October 2011, and DFS and the NAIC conducted public hearings on LPI in May and August 2012, respectively.

- Interrogatory No. 1. Assurant requested that Interrogatory No. 1 be withdrawn, as it requires the disclosure of the mental impressions of counsel in formulating responses to queries posed by the CID. This information constitutes attorney work product, and is protected from disclosure. 12 U.S.C. § 5562(f)(3); *see also Strauss v. Credit Lyonnais, S.A.*, 242 F.R.D. 199, 231-32 (E.D.N.Y. 2007).

- Interrogatory No. 2, subparts (c) and (g). The databases at issue in Interrogatory No. 2 contain thousands of different data fields. Requiring a description of those fields, many of which have no bearing on the purpose of the CID and/or are self-explanatory, would serve no purpose and impose a significant burden. After the Bureau has had the opportunity to review the responses to the other subparts of Interrogatory No. 2, if the Bureau needs further information on these specific fields, Assurant proposed to provide the Bureau with a file layout for those databases most relevant to the [redacted] LPI program. Subject to confirmation, you agreed with this approach.

- Written Report No. 2, Exhibit A. As we discussed, Assurant does not collect and does not have in its possession, custody, or control

the data requested in fields 3, 7-10, 33-34, 36-37, 40 and 43 of Exhibit A, as well as subsets of other fields discussed below. In addition, we requested modification or clarification regarding certain of the other fields based on data accessibility and the burden of providing the data:

- Element 2. Assurant's response will reflect either the current date (if the loan is active) or the paid off/transferred date (if the loan is no longer active). Subject to confirmation, you agreed with this approach.

- Element 6. Assurant's response will identify whether the loan is a first or second trust, but cannot identify whether the loan was a HELOC.

- Elements 21-23. Responses to these elements require a cumbersome matching process of various system elements, rely on incomplete information, and will not be 100% accurate. For these reasons, Assurant requested an additional 60 days in which to complete its response for these elements. In addition, Assurant will provide data for these elements only to the extent it is available. You stated that you would take under advisement Assurant's proposed modification and requested extension of time.

- Element 32. Assurant does not have information regarding the date a borrower was charged by [redacted] for LPI. As an alternative, we suggested that Assurant provide the date the Underwriters charged [redacted] for LPI. Subject to confirmation, you agreed with this approach.

- Element 38. Assurant can provide the coverage amount for LPI, but is unable to identify whether that coverage amount

was based on replacement value, last known coverage amount, or outstanding principal balance.

- Element 39. Assurant cannot provide the date voluntary coverage was obtained. As a proxy, we suggested that Assurant provide the cancellation date of the LPI coverage. Subject to confirmation, you agreed with this approach.

- Document Request No. 2. This request is untethered to the [redacted] LPI program, the apparent focus of the inquiry. Moreover, during the Applicable Time Period, the Underwriters have had LPI relationships with more than 80 different loan servicers. (Again, Assurant, Inc., a holding company, has not had an LPI relationship with any loan servicer.) Each of those relationships is governed by a series of program agreements that we believe have been amended, superseded, revised and replaced multiple times during the Applicable Time Period. In addition, each set of agreements contains its own individually negotiated confidentiality provision which typically requires providing notice to the counterparty of any intent to disclose the agreements pursuant to an administrative inquiry. Accordingly, Assurant requested that the Bureau withdraw this request, or limit it to a subset of LPI relationships. For example, as we discussed, in another regulatory inquiry the Underwriters produced program agreements for the top three LPI programs (by volume). For another, the Underwriters produced a sampling of program agreements for six servicers (two large, two medium, and two small). You indicated you were amenable to reasonable limitations in scope, but would need to get back to us regarding specifics.

- Elaboration of the Purpose of the CID. The Notification of Purpose is insufficiently detailed. Generalized references to "unlawful acts or practices" and citation to literally every "Federal

consumer financial law" – including broad sections of the Dodd-Frank Act and the entirety of RESPA – do not adequately describe the nature of the conduct constituting the alleged violation, or the provisions of law applicable to such violation. Assurant requested that the Bureau confirm that neither Assurant nor the Underwriters are targets of the CID, and that the Bureau does not have enforcement authority regarding the "business of insurance." You indicated that the Bureau was unwilling to discuss the investigated conduct, alleged legal violations, or targets at this time, beyond what is already included in the CID, other than to say that the investigation involves practices in the mortgage servicing industry and could thus encompass servicers in addition to [redacted]

- Extension of Return Date and Petition Date. The CID requests an extraordinary amount of information – interrogatories with multiple subparts, reports containing numerous data elements (many of which are not easily accessible through computer searches), and thousands of thousands of pages of documents. Notwithstanding the scope of the CID, Assurant intends to provide information and documents responsive to Interrogatories 3, 4 and 5, Requests for Written Reports 1 and 3, and Requests for Documents 1, 3, 4 and 5 by the October 22, 2015 return date identified in the CID (subject to the objections and limitation raised herein). Assurant requested that the Bureau extend the deadline for providing responses to Interrogatory No. 2 and Request for Written Report No. 2 by one month, until November 24, 2015.

We are hopeful that Assurant and the Bureau will be able to agree on the proper scope of the CID to ensure that the Bureau has access to the information it needs for its inquiry while protecting Assurant and the Underwriters from undue burden and unnecessary costs. To that end, we requested and now re-request an extension of two

weeks, until October 26, 2015, for Assurant to file a petition pursuant to 12 C.F.R. ¶ 1080.6(e). Many (if not all) of the issues raised on our call and recounted herein can be resolved through further discussion, potentially obviating the need for a petition altogether. While we recognize such extensions are disfavored, we believe that Assurant's commitment to substantially respond to the majority of the CID's requests by the requested return date and limited number of areas of disagreement warrant such consideration.

Thank you, and please do not hesitate to contact me if you have any questions.

Sincerely,

FGB/pjc
cc: Richard J. Fortwengler, Esq.
Charles H. Fash, III, Esq.

EXHIBIT C

BEFORE THE INSURANCE COMMISSIONER

OF THE STATE OF CALIFORNIA

In the Matter of the Rates, Rating Plans, or Rating Systems of American Security Insurance Company, Respondent.	Case No. OV-01-01-8309 Filing Nos. 96-6783; 95-4150; 95-1591; 94-6977; 93-7271, 7126 ORDER DENYING PETITIONERS' REQUEST FOR A RATE HEARING PURSUANT TO CALIF. CODE OF REGS. TITLE 10, SUBCHAPTER 4.9, § 2649.1 et seq.

I. Introduction

This case involves a petition for a rate hearing, filed by counsel for Bruce H. Conley, Kathleen D. Conley, Kenneth R. Younger, Sandra Jean Elliott, and John Michael Elliott, on behalf of themselves, all others similarly situated and the general public (hereafter "Petitioners"). Petitioners' request for a rate hearing was prompted, in part, by a Superior Court Order dated December 10, 1999 and issued by the Honorable Judge David Moon. Petitioners have argued that American Security Insurance Company (hereafter "Respondent") improperly includes the costs of tracking services as part of the premium, thereby making Respondent's rates excessive. Because

the Department of Insurance (hereafter "Department") has concluded Respondent's commissions and tracking expenses are appropriate components of an insurance rate, Petitioners' request for a rate hearing is denied.

II. Factual History

Norwest Mortgage, Incorporated (hereafter, "Norwest[1]") is a mortgage company that makes and services loans, which are secured by mortgages. Respondent provides force placed insurance coverage for Norwest and Norwest's borrowers. Petitioners are residents of California who obtained loans from Norwest and subsequently failed to maintain hazard insurance on the subject real property.

Petitioners, in seeking to obtain real estate loans, have signed security instruments with Norwest. The security instruments contain a clause that obligates Petitioners to insure their homes against various physical hazards, such as fire damage. The security instruments provide that Norwest must be named as an additional insured under the policy. If Petitioners do not maintain their insurance, the security instruments provide that Norwest may purchase hazard insurance to protect Norwest's interests in the real estate. The security instruments also allow Norwest to charge the Petitioners for the force placed insurance premiums by adding those premiums to the total outstanding debt owed to Norwest. This type of insurance is generally referred to as "force placed insurance." Norwest obtains its force placed insurance under an agreement with Respondent.

Respondent performs certain functions and services for the benefit of Norwest, which relate to the force placed insurance. The functions performed by Respondent include receiving and reviewing insurance policies provided by borrowers, communicating with borrowers about their insurance obligations, sending warning letters when a borrower's policy is canceled or lapses, and ordering force placed insurance when borrowers do not respond to the warning letters.

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[1] Petitioners have referred to this company as Norwest Mortgage, Inc. in previous correspondence to the Department. Counsel for Respondent advises the Department that Norwest Mortgage, Inc. is presently known as "Wells Fargo Home Mortgage." (See Respondent's letter to the Department of March 1, 2002 at 3.) Nevertheless, for purposes of uniformity, this entity will be referred to as "Norwest" hereafter.

These services are generally referred to as "tracking services." Petitioners filed suit against Norwest in San Diego Superior Court, alleging, inter alia, that Norwest was improperly passing on the cost of the tracking services to the Petitioners on Norwest's accounts.

Judge David Moon of the San Diego Superior Court stayed the Superior Court case in a judicial order filed on January 10, 2000. Judge Moon concluded that the plaintiffs' allegations concerned questions of insurance rate making. Because the "Department of Insurance is best suited initially to determine whether the rates approved by it include charges which are improperly passed on by lenders to [force placed insurance] purchasing borrowers," Judge Moon stayed the case under the Primary Jurisdiction Doctrine. (*See Conley, et al. v. Norwest*, Judge Moon's Order, filed Jan. 10, 2000 at 2, lines 25-27 (San Diego Superior Court Case No. N73741).)

On April 24, 2000, counsel representing the Petitioners wrote a letter of complaint to the Department, alleging that Norwest had "improperly charged its borrowers for the value of cash and in-kind kickbacks that Norwest received from its insurance carrier, American Security Insurance Company." Borrowers chose not to raise claims against Respondent. (See Mark Chavez' letter to Robert Hagedorn of the Department, dated Apr. 24, 2000.)

Through Deputy Attorney General Gregory S. Price, the Department appeared before San Diego Superior Court Judge Dana Sabraw on February 1, 2002. At the court appearance, the parties agreed that the petition should have been filed against Respondent, as the insurer. Therefore, on February 19 of 2002, Petitioners filed a new petition against Respondent. Petitioners state that this petition is "based on California Code of Regulations, Title 10, Subchapter 4.9, sections 2649.1 et seq. and Insurance Code section 1861.05. The petition is also based on those other sections of the Insurance Code and Regulations that allow the Commissioner to investigate the practices of those individuals and businesses, licensed and unlicensed, conducting the business of insurance in the State of California." (*See* Petitioner's Petition for a Rate Hearing, dated Feb. 12, 2002, at 2, lines 21-25.)

Respondent has answered the petition for a rate hearing. As a preliminary matter, Respondent states that, contrary to Petitioner's Request for a Rate Hearing pursuant to Article 10, the correct procedural vehicle for existing approved rates falls within Article 7 of Chapter 9, Division 1, Part 2 of the Insurance Code. (*See* Respondent's letter to David Marham and Mark Chavez, dated March 1, 2002.) Respondent assumed further that, because the proceedings fell within Article 7, Respondent's answer to the Department, and any materials provided to the Department should remain confidential. (*Ibid.*)

Respondent interprets Petitioners' request for a rate hearing as containing two components: 1) an allegation that Respondent's rate is excessive because it includes tracking expenses, and 2) Respondent's rates are excessive because they include a component "for a commission paid to a licensed insurance agent which is affiliated with [Norwest]." (Respondent's letter to the Department, dated March 1, 2002 at 3-4.) Respondent argues that its rates are not excessive, noting that in 1993, Respondent provided the Department with data on its tracking expenses, which were listed as one of Respondent's risk characteristics in its schedule rating plan. (Respondent's letter to the Department, dated March 1, 2002 at 4.) As part of the rate filing, Respondent described that characteristic in detail and the application which included Respondent's schedule rating plan was subsequently approved. (*See* Cal. Dept. Ins. Rate Filing No. 93-7271.) Respondent also argued that the commissions it charges were filed with, and approved by the Department. (Respondent's letter to the Department, dated March 1, 2002 at 4.)

Petitioners wrote a brief letter to the Department on March 4, 2002, acknowledging receipt of Respondent's answer of March 1, 2002, and requesting information regarding when a hearing would be held. (*See* Petitioner's letter to the Department, dated March 4, 2002.)

III. Determinations

A. Article 7 Versus Article 10 Proceedings

Respondents, in their letter to the Department of March 1, 2002, indicate that they have responded to the petition "pursuant to Article 7 of Chapter 9, Div. 1, Part 2 of the California Insurance Code." Respondents argue that California Code of Regulations, title 10, section 2649.1 *et seq*, described by Respondents as "the RH-339 Regulations," were not designed to apply to rates already in effect. The Commissioner is not persuaded by Respondent's argument[2].

While Petitioners would have been within their right to file a complaint pursuant to Insurance Code section 1858 *et seq.*, they have chosen to file their allegations in accordance with title 10, California Code of Regulations, section 2649.1 *et seq.* The fact that the rates being challenged are existing approved rates does not affect Petitioners' options. Petitioners may challenge existing rates, if the rates have been in effect for more than 12 months, by filing a petition pursuant to California Code of Regulations, title 10, section 2649.1 *et seq.* (Cal. Code Regs, tit. 10, § 2653.2.) Petitioners filed their request for a rate hearing pursuant to title 10, California Code of Regulations section 2649.1 *et seq.* This proceeding is, therefore, an Article 10 proceeding.

B. Tracking Expenses and Commissions as Part of Respondent's Rates

At the core of this petition for a rate hearing, Petitioners and Judge Moon ask the Department two questions. The first question is: "should an insurance rate include as part of the

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[2] The regulatory intent behind any regulation can be found in an agency's response to the comments received during the Rulemaking proceedings. (See *Friends of Sierra Madre et al. v. City of Sierra Madre* (2001) 25 Cal.4th 165, 186, fn. 15 [105 Cal.Rptr.2d 214].) RH-339 resulted in the promulgation of California Code of Regulations, title 10, section 2649.1 *et seq.* The purpose of RH-339, therefore, is instructive. The rulemaking file for RH-339 reveals the following response to a submitted comment, arguing California Code of Regulations, title 10, section 2653.2 is inconsistent with Insurance Code section 1858: "Insurance Code section 1858 allows any person to request the Commissioner to review the manner in which a rate has been applied to that person. Insurance Code Section 1861.10 authorizes any person to initiate proceedings. Insurance Code Section 1861.05 provides that no rate shall remain in effect which is contrary to law. Consequently, intervenors can request initiation of a proceeding to determine whether an existing rate is contrary to law, and need not do so in accordance with Section 1858." (See CDI rulemaking file RH-339 "Summaries and Responses to Comments" p.25. (OAL Z-File No. Z95-0911-01.).)

true costs of insurance certain charges which relate to general insurance services rendered by the insurer to a mortgage lender?" (See *Conley, et al. v. Norwest*, Judge Moon's Order of December 10, 1999 at 2, lines 17-19 (San Diego Superior Court Case No. N73741); *see also* Petitioner's Petition for a Rate Hearing, dated Feb. 12, 2002, at 2, lines 15-17.) Next, the Petitioners and Judge Moon have asked whether the rates approved by the Department of Insurance "include charges which are improperly passed on by lenders to FPI purchasing borrowers." (*See* Judge Moon's Order of Dec. 10, 1999 at 2, lines 25-27 (San Diego Superior Court Case No. N73741); *see also* Petitioner's Petition for a Rate Hearing, dated Feb. 12, 2002, at 2, lines 18-19.) This order will address the first of these two questions, but cannot address the second.[3]

The Insurance Code broadly defines the group of people who may request a rate hearing. Any person may initiate a rate hearing under Insurance Code section 1861.05. (Ins. Code, § 1861.10, subd. (a).) No rate shall remain in effect which is excessive, inadequate, unfairly discriminatory or otherwise in violation of Chapter 9, Division 1, of Part 2 of the Insurance Code. (Ins. Code, § 1861.05, subd. (a).) Generally, any insurer that desires to change its insurance rates must file a complete rate application with the Commissioner. (Ins. Code, § 1861.05, subd. (b).) The rate application must include, inter alia, information regarding the insurer's expenses incurred, including loss adjustment expense, commission and brokerage expense, other acquisition expense and general expense, as well as such other information as the Commissioner may require. (Ins. Code, § 1861.05, subd. (b); Ins. Code, § 1857.7, subd. (11).) All information provided to the Commissioner as part of a rate application must be made available to the public for inspection. (Ins. Code, § 1861.07.) A hearing on a rate application, when based on the

[3] Insofar as Petitioners ask the Department to decide whether premium charges "are improperly passed on" to Petitioners, the Commissioner cannot and does not express an opinion. The jurisdiction of the Commissioner extends to issues concerning the reasonableness of insurance rates vis-à-vis Respondent as the insurer and Norwest as the insured. The Department has no jurisdiction to decide the scope of charges which would be reasonable as between a lender and its borrower.

allegation that the rate in effect is excessive, shall be for the purpose of determining whether the insurer has properly applied the statute, the regulations, and the generic determinations made pursuant to the regulations in calculating the maximum or minimum permitted earned premium. (Cal. Code Regs., tit. 10, § 2646.4, subd. (b)(1).)

Respondent, in 1993, submitted a rate change application to the Department. (See Cal. Dept. of Ins. Rate Filing No. 93-7271.) As part of the rate change application, Respondent submitted its scheduled rating plan. This component of the rate application reflected that, "in recognition of the unique risk characteristics of each mortgagee," a lender's base rate would be modified under the plan by no more or less than 25 percent of the base rate. (See Rate Filing No. 93-7271, MSP-CA, at 3.) According to Respondent's rate application, the extent of the proposed modification of its base rate would depend upon a number of characteristics. One characteristic was designated "Management of Insurance Tracking." Respondents indicated that this characteristic could alter the base rate for a lender's premium by no more or less than 10 percent of the base rate. (See Rate Filing No. 93-7271, MSP-CA, at 3.) The Department subsequently asked for Respondent to "objectify, define, and/or explain the risk characteristic [for 'Management of Insurance Tracking']... under the proposed Scheduled Rating Plan MSP-CA (11/93)." (See Cal. Dept. Ins. Letter to Janice Stuart of ASIC, dated Dec. 30, 1993.) Respondent submitted a letter in reply, which stated, in part: ""Management of insurance tracking – This rate characteristic concerns how the account tracks the insurance on each loan to provide the information to the company. If the tracking system is well run, the account would receive a credit." (See Respondent's letter to Richard Patterson of the Department of Insurance, dated January 18, 1994.) Ultimately, the Department approved the application. The Department concluded "the rates at this time are in conformance with Section 1861.05(a) of the California Insurance Code." (See Cal. Dept. Ins. "Approval of Application" letter for File No. 93-7271.)

Similarly, Commissions have traditionally been recognized as an appropriate component of insurance rate making, so long as the overall rate does not exceed the maximum or minimum permitted earned premium under the regulations. (See Cal. Code Regs., tit. 10, §§ 2644.2 & 2644.14.) Respondent has submitted data concerning its commissions, as they relate to Respondent's rates. (Cal. Dept. Ins. Form CA-RA5, at 2, File No. 93-7271) Indeed, when applying for a rate change, Respondent is required to submit data concerning "commission and brokerage expense." (Ins. Code, § 1857.7, subd. (11).) Respondent's commissions were considered as part of the overall rate application, and the rates were approved by the Department. (See Cal. Dept. Ins. "Approval of Application" letter for File No. 93-7271.)

Therefore, it is clear that Respondent's decisions to include tracking services and commissions as components of Respondent's insurance rate structure do not make the rates "excessive" as that term is understood in Insurance Code section 1861.05.

IV. Order

Based on the foregoing,

IT IS ORDERED that Petitioners' request for a hearing regarding the rates of Respondent is DENIED, in light of the findings and determinations set forth above.

Dated: April 18, 2002

HARRY W. LOW
Insurance Commissioner

By _____
STEVEN J. GREEN
Chief Counsel