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IN RE HARBOUR PORTFOLIO  
ADVISORS, LLC  
2016-MISC-Harbour Portfolio-0001

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**DECISION AND ORDER ON PETITION BY HARBOUR PORTFOLIO LLC  
TO SET ASIDE OR MODIFY CIVIL INVESTIGATIVE DEMAND**

Harbour Portfolio LLC (Harbour), the recipient of a civil investigative demand (CID) from the Consumer Financial Protection Bureau, has petitioned for an order to set aside or modify the CID. For the reasons set forth below, the petition is denied.

**FACTUAL BACKGROUND**

On September 8, 2016 the Bureau issued a CID to Harbour, which stated in its “Notification of Purpose” that it had been issued “to determine whether investment firms or other unnamed persons have been or are engaging in unlawful acts or practices relating to the marketing, offering, servicing, or collection of loans for the purchase of residential properties, or similar products or services, in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010 [CFPA], 12 U.S.C. §§ 5531, 5536, the Truth in Lending Act [TILA], 15 U.S.C. § 1601 et seq., the Equal Credit Opportunity Act, (ECOA), 15 U.S.C. §§ 1691-1691f, any of their implementing regulations, or any other Federal consumer financial law. The investigation also seeks to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.”<sup>1</sup> The CID posed twelve interrogatories, four requests for written reports, and sixteen document requests seeking information about the sale of residential properties by Harbour. The CID required the company to schedule a meeting (meet-and-confer) within ten days of receipt of the CID, and to produce responses to interrogatories, written reports, and requested documents by October 7, 2016.<sup>2</sup>

The Bureau’s enforcement counsel held a meet-and-confer conference call with Harbour on September 14, 2016, during which Harbour stated that the Bureau lacked authority to issue

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<sup>1</sup> On May 11, 2016, the Bureau issued a CID to Harbour seeking an investigational hearing. The company complied with the prior CID but has taken issue with the more recent CID at issue here.

<sup>2</sup> The CID was issued shortly before the Bureau issued CIDs to two entities that may be involved in the sale and servicing of Harbour’s residential properties, National Asset Advisors LLC (NAA) and National Asset Mortgage LLC (NAM). NAA and NAM filed a combined petition to set aside or modify the two CIDs on October 2, 2016. This decision and order regarding Harbour is issued contemporaneously with a decision and order regarding the combined petition of NAA and NAM.

the CID and that the scope and timeframe of the CID imposed an undue burden. Harbour filed its Petition to Set Aside or Modify the CID on September 28, 2016.

### LEGAL DETERMINATION

Harbour raises two general arguments in support of its Petition, as well as an argument regarding three individual requests. None of Harbour's arguments warrants setting aside or modifying the CID.

*First*, Harbour argues that the Bureau lacks statutory authority to issue the CID because the agreements for deed (AFDs) through which it sells residential properties "do not involve extending credit or servicing loans" and therefore do not constitute credit under the CFPA, TILA, or ECOA. Pet. at 11. An AFD, Harbour argues, "is not a credit transaction, but rather a contemporaneous exchange of payment at the beginning of each month in return for the consumer's ability to occupy the property for that period." *Id.* Harbour claims that AFDs instead "are akin to a residential lease or rent-to-own transaction, neither of which constitute 'credit.'" *Id.* at 14. In sum, because an AFD does not involve credit, Harbour argues, the Bureau cannot investigate the company pursuant to the CFPA, ECOA, or TILA. *See id.* at 19.

Harbour's argument is misplaced, as it does not relate to the scope of the Bureau's authority to issue the CID. Under the CFPA, the Bureau's investigative authority to issue CIDs extends to "any person" who may have information "relevant to a violation" of federal consumer financial law, including violations of the CFPA, ECOA, or TILA. 12 U.S.C. §§ 5562(c)(1); 5481(12)(D), 12(O), (14). Harbour's argument does not address the scope of this investigative authority. Rather, Harbour prematurely asserts substantive defenses to claims the Bureau has not asserted. As the Bureau has previously explained, an entity's fact-based arguments about whether it is subject to or has complied with substantive provisions of the CFPA, or any other enumerated consumer law, are not valid defenses to the enforcement of a CID. *See In re Next Generation Debt Settlement, Inc.*, 2012-MISC-Next Generation Debt Settlement-0001 (Oct. 5, 2012), at 2.<sup>3</sup> Indeed, the Supreme Court has "consistently reaffirmed" the principle that "courts should not refuse to enforce an administrative subpoena when confronted by a fact-based claim regarding coverage or compliance with the law." *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1076 (9th Cir. 2001) (citing, *inter alia*, *United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950)). And courts have agreed with federal agencies that have reached the same conclusion in similar circumstances. *See FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001) ("[C]ourts of appeals have consistently deferred to agency determinations of their own investigative authority, and have generally refused to entertain challenges to agency authority in proceedings to enforce compulsory process."); *SEC v. Savage*, 513 F.2d 188, 189 (7th Cir. 1975) (SEC not required to establish that company's commodities future contracts were "securities" within the meaning of the Securities Act before subpoena would be enforced).

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<sup>3</sup> Available at [http://www.consumerfinance.gov/f/201210\\_cfpb\\_2012-MISC-Next-Generation-Debt-Settlement-0001-Order.pdf](http://www.consumerfinance.gov/f/201210_cfpb_2012-MISC-Next-Generation-Debt-Settlement-0001-Order.pdf).



In the rare cases in which courts have evaluated an agency's investigative authority, they generally have enforced the CID so long as there was "some plausible ground for jurisdiction, or to phrase it another way, unless jurisdiction [was] plainly lacking." *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1077 (9th Cir. 2001) (quotations and citations omitted); accord *EEOC v. Randstad*, 685 F.3d 433, 442 (4th Cir. 2012); see also *Gov't of Territory of Guam v. Sea-Land Serv., Inc.*, 958 F.2d 1150, 1155 (D.C. Cir. 1992) (explaining that an agency can determine the scope of its authority unless there is a "patent lack of jurisdiction"). Here, the Bureau has plausible grounds to believe that Harbour may be offering or providing credit as defined under the CFPA, ECOA, and TILA. Each of these statutes includes in its definition of credit the right to defer payment of a debt. See 12 U.S.C. § 5481(7), 15 U.S.C. §§ 1691a(d), 1602(f). Harbour's AFD transactions appear to include a promissory note that defers payment of a debt. Specifically, under the AFD transactions, it appears that the consumer promises and is obligated to pay a principal sum (the purchase price) plus interest through deferred monthly payments. The transactions therefore may involve the right to defer the payment of debt and thus may constitute credit under the CFPA, ECOA, or TILA. Harbour's argument as to whether the Bureau should ultimately reach that conclusion is premature, where, as here, the Bureau's authority is not plainly lacking.

*Second*, Harbour argues that the CID is overbroad and unduly burdensome. The Bureau has repeatedly stated that in making such claims a petitioner must "prove[] the inquiry is unreasonable because it is overbroad or unduly burdensome." *In re Great Plains Lending, LLC*, 2013-MISC-Great Plains Lending-0001 (Sept. 26, 2013), at 8 (citing *FDIC v. Garner*, 126 F.3d 1138, 1143 (9th Cir. 1997) (emphasis added)); *In re Assurant, Inc.*, 2015-MISC-Assurant-0001 (Apr. 25, 2016), at 5.<sup>4</sup> Accordingly, a petitioner "must undertake a good-faith effort to show 'the exact nature and extent of the hardship' imposed, and state specifically how compliance will harm its business." *In re Great Plains Lending, LLC*, at 8 (quoting *In re PHH Corp.*, 2012-MISC-PHH Corp-0001 (Sept. 20, 2012), at 6).<sup>5</sup>

None of Harbour's arguments demonstrates that the CID is overbroad or unduly burdensome. Harbour claims that the seven-year timeframe of the CID "far exceeds the applicable period for which the Bureau could hold Harbour liable." Pet. at 19. The Bureau has repeatedly rejected similar objections of overbreadth regarding the applicable time periods of CIDs. The issue regarding information requested during such periods "is not whether all such information is itself actionable; rather, the issue is whether such information is relevant to

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<sup>4</sup> Available at [http://files.consumerfinance.gov/f/201309\\_cfpb\\_decision-on-petition\\_great-plains-lending-to-set-aside-civil-investigative-demands.pdf](http://files.consumerfinance.gov/f/201309_cfpb_decision-on-petition_great-plains-lending-to-set-aside-civil-investigative-demands.pdf); [http://files.consumerfinance.gov/f/documents/201604\\_cfpb\\_decision-and-order-on-petition-by-assurant-inc-to-modify-or-set-aside.pdf](http://files.consumerfinance.gov/f/documents/201604_cfpb_decision-and-order-on-petition-by-assurant-inc-to-modify-or-set-aside.pdf).

<sup>5</sup> Available at [http://www.consumerfinance.gov/f/201209\\_cfpb\\_setaside\\_phhcorp\\_0001.pdf](http://www.consumerfinance.gov/f/201209_cfpb_setaside_phhcorp_0001.pdf).

conduct for which liability can be lawfully imposed.” *In re PHH Corp.*, at 7.<sup>6</sup> Here, such information is essential to the Bureau’s ability to develop a complete understanding of Harbour’s practices and operations, which may date back as far back as 2010.

Harbour’s claims of undue burden are similarly unavailing. Harbour makes only generalized assertions about the burden of the CIDs, stating that “every document produced must be reviewed for responsiveness and privilege” and that it lacks sufficient staff to comply with the timeframe of the CID. Pet. at 20-21. Harbour offers no specific information about the volume of data, the cost of production, or any possible technical limitations that may impair its ability to comply with the CID. Harbour’s generalized assertions fail to show the “exact nature and extent of the hardship” on Harbour and cannot establish that the CID is unduly burdensome. See *In re Great Plains Lending, LLC*, at 8.

Third, Harbour objects to requests for information regarding Harbour’s purchase or ownership of residential properties as requested under Written Report #4, Request for Document/Data Request # 1, and Document Request #16. Pet. at 20. Harbour claims that “the purchase of property in bulk sale clearly does not involve credit, a loan, or any other type of consumer financial product or service,” and that the fact that these properties may later have been “available for purchase through an AFD does not mean that every purchase or bid, whether successful or not, qualifies for investigation by the Bureau.” *Id.* at 20-21. Harbour’s argument misses the point. Whether Harbour believes that any given property was offered as part of a consumer financial product or service is not the test for determining whether the Bureau has authority to request the information. Rather, the issue is whether such material is reasonably relevant to the purpose of the Bureau’s investigation. See *In the Matter of Westgate Resorts, Ltd.*, 2015-MISC-Westgate Resorts, Ltd.-0001 (Mar. 11, 2016), at 3 (citing *Morton Salt Co.*, 338 U.S. at 652-53).<sup>7</sup> The subject challenging the CID “bear[s] the ‘burden to show that the information [sought] is irrelevant.’” *In re Great Plains Lending, LLC*, at 9 (quoting *F.T.C. v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992)). Here, information regarding Harbour’s inventory of residential properties may be relevant to the Bureau’s investigation into how Harbour marketed and selected certain properties for sale through its AFD transactions. Harbour’s objection cannot meet its burden of demonstrating how such information is irrelevant to the Bureau’s investigation.

## CONCLUSION

For the foregoing reasons, Harbour’s petition to set aside or modify the CID is denied. Within 10 calendar days of this Decision and Order, Harbour is directed to produce all responsive documents, items, and information within its possession, custody, or control that are

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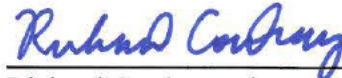
<sup>6</sup> Harbour does not argue that the Bureau’s investigative authority is limited because of the timeframe of any possible violation, acknowledging that “the Bureau may not be constrained by statutes of limitation or retroactivity concerns in conducting an investigation.” Pet. at 19.

<sup>7</sup> Available at [http://files.consumerfinance.gov/f/201603\\_cfpb\\_decision-and-order-on-petition-by-westgate-resorts-ltd-to-modify-or-set-aside-civil-investigative-demand.pdf](http://files.consumerfinance.gov/f/201603_cfpb_decision-and-order-on-petition-by-westgate-resorts-ltd-to-modify-or-set-aside-civil-investigative-demand.pdf).



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covered by the CID. The company is welcome to engage in further discussions with the Bureau's enforcement team about any further suggestions for modifying the CID, which may be adopted by the Assistant Director for Enforcement or his Deputy as appropriate.



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Richard Cordray, Director

November 1, 2016