UNITED STATES OF AMERICA
BEFORE THE CONSUMER FINANCIAL PROTECTION BUREAU

IN THE MATTER OF
Rent-A-Center, Inc.

**PETITION TO MODIFY OR SET ASIDE THE CIVIL INVESTIGATIVE DEMAND**

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## I. INTRODUCTION

Pursuant to 12 U.S.C. § 5562(f) and 12 C.F.R. § 1080.6(e), Rent-A-Center, Inc. ("RAC") respectfully petitions to modify or set aside the Civil Investigative Demand ("CID") issued on August 1, 2017 to RAC by the Consumer Financial Protection Bureau (the "Bureau").

## II. BACKGROUND

### A. The CID and this Petition.

It is important to clarify what this petition and investigation do and do not represent. In the words of the Bureau's regulation, the CID to RAC is not a determination of wrongdoing by RAC or any company. Rather, the CID conveys specific requests for information from RAC to aid the Bureau's investigation to determine whether there have been violations of consumer financial law by companies generally and, in particular, debt buyers. Importantly, the federal government's jurisdiction to oversee the rent-to-own industry does not lie with the Bureau. Instead, RAC is subject to the jurisdiction of the Federal Trade Commission ("FTC"). Unlike other areas of consumer financial protection laws, which give rise to concurrent Bureau-FTC jurisdiction, the Bureau is expressly barred from exerting legal authority to oversee RAC, under the terms of the Bureau's enabling statute.

By the same token, this petition is not necessarily indicative of RAC's refusal to produce the requested information. To the contrary, RAC would gladly be of assistance to the Bureau on consumer-protection matters and remains hopeful that further meet-and-confer discussions could result in a sensible revision of the CID's requests and impose an acceptable rolling production schedule. Moreover, the Bureau staff has expressed a willingness to modify the CID's requests given the broad wording of the CID. Why, then, is this petition needed?

The petition is necessitated by two factors. First, the current timeline created an unworkable predicament that forced the filing of this petition. The parties were engaged in

meaningful meet-and-confer discussions to identify, in good faith, ways to narrow the wording of the CID to address the lack of Bureau authority and overbroad and unduly burdensome requests, while also producing information and documents of interest to the Bureau. After the initial meeting, the Bureau's procedures afforded RAC six days to decide whether to file this petition—before the CID and the Bureau's position on the CID were even resolved. Given many areas in which the parties appeared to be in agreement, RAC asked the Bureau whether the parties could finalize negotiations of the CID modification before the petition deadline. The Bureau staff indicated that could not be done.

Although RAC would not have filed a petition if a resolution of the CID modification could be reached through negotiations, the Bureau's timeline left RAC with no good choices: either (1) file a petition that will possibly become moot if the CID modification process eventually produces an appropriate result, or (2) refrain from filing the petition while CID discussions are pending and miss the deadline, causing prejudice to RAC and waiver of its right to relief afforded to RAC under the Bureau's regulation. To resolve this predicament, RAC requested an extension of time while negotiations were pending. The Bureau denied this request.

Second, the Bureau provided a modification to the CID on the eve of the petition due date, but the modifications to which the Bureau could agree still failed to resolve the defects in the CID. After the request for the four-day extension was denied, RAC initiated a meet-and-confer, in an effort to resolve issues concerning the validity of the CID, without the need for a petition. During this discussion, which occurred on August 17, 2017, RAC offered to refrain from filing a petition and have further discussions regarding the overbroad and unduly burdensome requests after the filing deadline, if the Bureau would agree <u>at least</u> to modify the CID to be consistent with the Bureau's authority in the enabling statute, before the petition

deadline.

On August 18, 2017, the Bureau's Assistant Deputy Enforcement Director informed RAC during a teleconference that the Bureau had agreed to modify the CID and revise any requests seeking information about RAC's collection and account-maintenance activities to focus on "the Acceptance Now operating segment of Rent-A-Center." This proposal had not been raised before. RAC informed the Bureau that, for several reasons, the same exemptions that applied to RAC—and that evidently justified the modification decision to limit the CID to delete inquiries into certain collection activities—applied with equal force to Acceptance Now.[1] On this basis, RAC explained, the modifications do not address the legal defect of the CID.

The Assistant Deputy Enforcement Director disagreed, but confirmed that—if RAC elects to file a petition by the deadline of August 21, 2017—it should address the modified CID served on August 18, 2017 (and not the original CID served on August 1, 2017). As to whether the Bureau lacks authority over the operations of Acceptance Now and RAC's request that the CID be further modified to cure the defect in the CID, the parties appeared to be at an impasse. RAC asked the Bureau whether it would consider a counterproposal to address the invalidity of the CID, as modified, before the deadline for any petition. The Bureau confirmed it could not.

B. **RAC and Consumers.**

As the Bureau is aware, based on its in-house research, RAC focuses on improving the quality of life for customers by providing the opportunity to obtain ownership of high-quality, durable products under flexible, rental-purchase agreements with no long-term obligation.[2]

[1] The consumer-facing transactions at issue are governed by a rent-to-own lease agreement; for this and other reasons, the CID's requests reach into areas outside the Bureau's jurisdiction, regardless of whether the CID is narrowed to Acceptance Now. (*See* analyses in Sections II.B, III.A, and III.B.)

[2] During telephonic meet-and-confers between Bureau staff and RAC's counsel on August 11 and 15, 2017, Bureau Counsel indicated that the Bureau was familiar with the RAC's 10-k filings and had performed research on RAC's products and business.

RAC's customers are "individuals," and therefore, also are "consumers" under the Bureau's enabling statute.[3] By shopping with RAC, consumers rent personal property, including, for example, consumer electronics, appliances, furniture, accessories, or smartphones, in exchange for lease payments on the chattel. The RAC rental-purchase lease agreement with consumers (a "Rental-Purchase Lease") provides consumers with the opportunity to gain immediate use and enjoyment of the products they desire without incurring any obligation to pay more than an initial rental payment yet still providing the option to obtain ownership at any time. These Rental-Purchase Leases empower consumers in a way no retail sale can.

Under a Rental-Purchase Lease, the consumer is only obligated to pay the rental payment for the initial period of possession and use. A consumer can return the merchandise at any time during the life of the agreement without penalty. Furthermore, the short term of the consumer's initial obligation and the structure of the Rental-Purchase Lease afford consumers with maximum flexibility as compared to any retail merchant sales or credit transactions, because the consumer controls whether the lease renews and continues or ends with the return of the merchandise. The agreement's initial term varies—from one week, two weeks, or one month. As to RAC's Core business, in most cases, the initial term of the Rental-Purchase Lease is one week. As to Acceptance Now, the initial term of the Rental-Purchase Lease is one month. In all cases, the initial lease term is less than 90 days, bringing all of RAC's rental purchase operations outside the authority of the Bureau.[4]

As a practical matter, the benefits from the Rental-Purchase Lease are evident from a

[3] *See* 12 U.S.C. § 5481(4) (defining "consumer" to mean "an individual or an agent, trustee, or representative acting on behalf of an individual.").

[4] *See* 12 U.S.C. §§ 5531(a) (restricting the Bureau's authority to take "any action" under subtitle E to a "covered person" or its service providers); 5481(15)(A)(ii) (together with § 5481(6), excluding from the definition of "financial product or service" and "covered person" any lease that has an initial term of less than 90 days).

consumer perspective. After the consumer takes possession, the consumer has the ultimate freedom to decide what happens next. From that point on, if a consumer is pleased with the merchandise and wants to keep doing business with RAC, the consumer can make the renewal payment on the Rental-Purchase Lease. If, however, for any reason the consumer is dissatisfied with the merchandise or the company, the lease can be terminated at the will of the consumer, without penalty.

The Bureau has modified certain CID requests to focus on the Acceptance Now segment of RAC's business. RAC's Core U.S. segment consists of company-owned, rent-to-own stores located throughout North America. RAC's Acceptance Now segment offers the rent-to-own transaction to consumers through kiosks located within other retailers' stores. The kiosks are staffed by either an Acceptance Now employee or employ a virtual solution where consumers can initiate the rent-to-own transaction onsite using a tablet computer.

Although the Bureau appears to believe that the Acceptance Now transaction is distinguished in some way to implicate the Bureau's authority, in actuality, it does not. The Acceptance Now segment involves the same features from a consumer perspective as the Rental-Purchase Lease transaction, save for differences in the initial term and renewal frequency (discussed above). The Acceptance Now business purchases the retail merchandise chosen by the consumer from the other retailer and leases the product to the consumer, thereby expanding the selection of goods from which consumers may choose. Once a Rental-Purchase Lease is executed between an Acceptance Now entity and the consumer, the same aspects of the RAC Core Rental-Purchase Lease (described above) are present in the Acceptance Now Rental-Purchase Lease. As the owners of the merchandise subject to the Rental-Purchase Lease, Acceptance Now also facilitates the return of product when the consumer elects not to renew and

must inventory and manage the previously leased product.

Therefore, to be successful at continuing to receive rent payments, the RAC business—whether Core or Acceptance Now—must win the trust of the consumer every week (or every month). Unlike other, traditional consumer agreements currently under review by the Bureau in other markets, the Rental-Purchase Lease ensures that consumers dictate how and when to continue doing business with the merchant and aligns positive customer relations with company revenue, tying economic incentives to responsible conduct towards consumers.

In sum, RAC's business is structured in a manner that affords a consumer with maximum control over her personal shopping and financial decisions. Consumers receive the benefit of their bargain under a Rental-Purchase Lease, and are empowered to control how and when to cease the relationship if they later change their mind about the merchandise—or the merchant. The Rental-Purchase Lease also informs the Bureau by showing RAC's well-established commitment (and ability) to win consumer trust. Because the Rental-Purchase Leases impose no obligation on the consumer to pay any substantial part of the value of the merchandise the consumer receives, the Rental-Purchase Leases do not constitute credit, loans, or financing to consumers.

C. **The Previous Meet-and-Confer Discussions.**

During prior meet-and-confer teleconferences with the Bureau, the parties discussed both the CID's individual requests and the parameters of the Bureau's authority. The precise discussions unfolded as follows:

On August 1, 2017, the Bureau served the CID to RAC. By August 2, 2017, RAC's registered agent for service in Delaware processed the CID and the appropriate department at RAC's headquarters in Texas was alerted to the CID. On August 2, 2017, a member of RAC's in-house legal department contacted the lead attorney at the Bureau assigned to this investigation

matter (the "Bureau Counsel") to confirm receipt of the CID and inform the Bureau of RAC's intentions regarding the CID. By August 9, 2017, outside counsel for RAC had been retained and contacted Bureau Counsel to schedule the meet-and-confer.

On August 11, 2017, the parties participated in a telephonic meet-and-confer. During this meet-and-confer, the parties discussed the enabling statute, which exempts RAC from the Bureau's authority, and ways in which the parties might agree to narrow the scope of specific requests set forth in the CID.[5] On August 15, 2017, RAC's counsel reached out to Bureau Counsel by e-mail to schedule a meeting to provide an update on the status of the proposal to modify the CID and seek an extension of the August 21, 2017 deadline to file a petition to modify or set aside the CID. On August 15, 2017, RAC's counsel and Bureau Counsel spoke by telephonic conference and discussed the document requests and the Bureau's enabling statute that restricts the Bureau's authority to investigate certain topics set forth in the CID.

During that call, the parties also discussed scheduling. The Bureau Counsel indicated that he would be out of the office from August 16 to 18, 2017, and, in his absence, no other Enforcement Attorney in the Office of Enforcement could handle the CID matter. RAC requested an extension of time to file a petition and the parties discussed the length of time for any such extension. The Bureau Counsel asked that RAC submit this request in writing and said the request would be forwarded to the appropriate decision-makers at the Bureau. On August 15, 2017, RAC's counsel sought a four-day extension, consistent with the parties' discussions earlier that day. On August 16, 2017, the Bureau denied the requested extension. The Bureau and RAC engaged in a third meet-and-confer, through the Bureau's Assistant Litigation Deputy (in the Bureau Counsel's absence), on August 17, 2017. On August 18, 2017, the Bureau modified the CID, but the modifications to which the Bureau could agree failed to cure the CID's defect and

[5] *See* Statement of Counsel, attached as Exhibit A.

overreach. This petition followed.

## III. OBJECTIONS TO THE CIVIL INVESTIGATIVE DEMAND

The Bureau's enabling statute provides the Bureau with authority to issue a civil investigative demand ("CID") if the Bureau has reason to believe that the recipient of the demand is in possession, custody, or control of information that is "relevant to a violation."[6] The Bureau's jurisdiction to investigate, however, is not limitless. A CID is improper if the scope of the demand is jurisdictionally defective.[7] Moreover, the Bureau is required to state in the CID the "nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation" and to limit its investigation to alleged violations by a "covered person."[8]

Furthermore, the Bureau's enabling statute requires the Bureau to adhere to a commonsense level of specificity when making CID requests, prescribing standards that the CID must satisfy, depending on the type of information sought by the CID. For example, the statute provides that every CID issued to obtain documents must "describe each class of documentary material to be produced. . . . with such definiteness and certainty as to permit such material to be fairly identified" and "prescribe 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."[9] Similarly, for every request seeking written reports or

[6] 12 U.S.C. § 5562(c)(1).

[7] *See Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. and Schs.*, 854 F.3d 683, 689 (D.C. Cir. 2017); *EEOC v. A'Gaci, LLC*, 84 F. Supp. 3d 542 (W.D. Tex. 2015) (denying in part EEOC's Application to Enforce Administrative Subpoena where portions of the subpoena exceeded the EEOC's jurisdiction).

[8] *See, e.g.*, 12 U.S.C. § 5531(a) (permitting the Bureau to take any action authorized under subtitle E to prevent a "covered person or service provider" from certain categories of conduct) and 12 U.S.C. § 5562(c)(2) (requiring the Bureau to set forth the nature of the alleged conduct that is under investigation for alleged violations).

[9] 12 U.S.C. §§ 5562(c)(3)(A) and (B) (emphasis added).

interrogatory answers, the CID must "propound with definiteness and certainty the reports to be produced or the questions to be answered."[10]

Here, the Bureau's CID falls short of each of the statutory standards described above. The CID is invalid because: (A) the CID's requests go beyond the Bureau's authority to engage in investigative activities under its enabling statute; (B) the CID's requests exceed the Bureau's statutory authority to act generally, which exempts merchants and retailers such as RAC; (C) the purpose of the investigation—as revealed on the face of the original CID, during meet-and-confer discussions, and in the wording of the CID modification letter—exceeds the Bureau's jurisdiction; and (D) the requests contained in the CID are overbroad, indefinite and uncertain, and unduly burdensome.[11]

## A. The CID's Requests Exceed the Bureau's Legal Authority to Act Against Covered Persons.

Although RAC is amenable to producing information and materials to assist the Bureau in the Bureau's investigative work, the CID as presently drafted probes several topical areas that are plainly outside the scope of the authority delegated to the Bureau by Congress. For example, several of the CID's requests seek detailed, account-level "consumer data relating to Acceptance Now Debts,"[12] exemplars of contracts "forming the basis of a Debt,"[13] or policies and procedures, Board meeting minutes, audits, reports, and investigations relating to RAC's

[10] 12 U.S.C. § 5562(c)(5)(A) (emphasis added).

[11] RAC also notes that the U.S. Court of Appeals for the District of Columbia currently is considering a challenge to the constitutionality of the Bureau's structure. *See PHH Corp. v. Consumer Fin. Prot. Bureau*, No. 15-1177, 2017 U.S. App. LEXIS 2733 (D.C. Cir. Feb. 16, 2017). If the Court of Appeals finds that the Bureau's structure is unconstitutional, the CID at issue here, as a product of that unconstitutional structure, will be invalid.

[12] *See* Bureau's August 18, 2017 CID Modification Letter, Interrogatory 6(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k)(i), (k)(ii), (k)(iii), (k)(iv), (l), and (m) (emphasis added).

[13] *See* CID, Request for Document 7 (emphasis added).

"collection activities with respect to Acceptance Now Debt."[14]

RAC invites further discussions with the Bureau to clarify the meaning of "RAC's collection activities with respect to Acceptance Now Debt" as these terms are awkward and contrived, and may be inapplicable given the nature of RAC's business. To date, however, the Bureau has orally clarified that these requests should be construed to mean that the Bureau has enforcement authority over the entire spectrum of conduct pertaining to payments made under rent-to-own agreements, which is an assertion that is at odds with the Bureau's enabling statute. Nonetheless, in the Bureau's August 18 CID modification letter, the requests were revised to more conclusively probe "Debt arising out of a transaction between a consumer and Acceptance Now."[15] To be within the Office of Enforcement's ("Enforcement") "covered person" authority, the RAC business must first meet the definition of a "consumer financial product or service."[16] To do so, businesses involving consumers must fall within a "financial product or service," such as providing a covered "lease" or "collecting debt related to any consumer financial product or service" under the Bureau's enabling statute.[17] RAC—whether in the Core or Acceptance Now segments—engages in neither of such activities, as explained below.

### 1. The Consumer Financial Protection Act expressly exempts RAC's business from the statutory definition of "financial product or service."

The Bureau's enabling statute provides that a lease falls within the Bureau's authority if the lease is:

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[14] *See* Bureau's August 18, 2017 CID Modification Letter, Requests for Documents 5, 8, and 9 (emphasis added).

[15] *See id.* at 1.

[16] 12 U.S.C. §§ 5531(a) (defining authority to act against covered persons); 5561(1) (defining "Bureau investigation"); 5562(b)(1) and (c) (authority to issue subpoenas and demands); 5481(6) (defining covered person to mean one who provides a consumer financial product or service); 5481(5) (defining "consumer financial product or service"); 5481(15)(A) (defining "financial product or service").

[17] 12 U.S.C. §§ 5481(15)(A)(i) (extending credit) and (x) (collecting debt related to any consumer financial product or service).

> of personal or real property that [is] the functional equivalent of purchase finance arrangements, if— (I) the lease is on a non-operating basis; (II) the initial term of the lease is at least 90 days; and (III) in the case of a lease involving real property, at the inception of the initial lease, the transaction is intended to result in ownership of the lease property to be transferred to the lessee, subject to standards prescribed by the Bureau.[18]

Here, the initial term of each Rental-Purchase Lease is less than 90 days. On August 15, 2017, Bureau Counsel asserted that RAC's Rental-Purchase Leases extend for a total term of greater than 90 days and that, therefore, the provision is satisfied. The Bureau must not, however, erase the words "initial term of the lease" from the statute. No matter if the consumer possesses the goods for more than 90 days, Congress made clear that the authority of the Bureau depends upon the initial term of the lease. The sole obligation of a consumer under the Rental-Purchase Leases offered by RAC (whether through the Core or Acceptance Now segments) is an initial period ranging from one week to one month—none require an initial term equal to or greater than 90 days. Therefore, the Rental-Purchase Lease transactions are among the type that the Congress has explicitly exempted from the Bureau's covered person authority. The CID requests probing the nature of Rental-Purchase Leases are invalid, because the enabling statute instructs they are not within the scope of authority Congress granted to the Bureau.

### 2. RAC is not engaged in "collecting debt related to a consumer financial product or service" under the Bureau's statute.

As discussed during meet-and-confers with Bureau Counsel, RAC understands that one focus of the CID is on debt-buying as such debt sales relate to the rent-to-own industry, whether directly or indirectly. While the Bureau's focus on debt sales does not come at a surprise, the enabling statute actually restricts the types of collections activities that the Bureau may explore.

Specifically, the statute provides that debt collection is within the Bureau's authority so

[18] 12 U.S.C. § 5481(15)(A)(ii) (emphasis added).

long as the activity constitutes "collecting debt relating to any consumer financial product or service."[19] It does not say "collecting consumer debt of any kind." Instead, the words "relating to" make clear that the collections the Bureau may investigate must be linked to a "consumer financial product or service"—which is itself a defined term, as discussed above. To eliminate any uncertainty, when RAC asked the Bureau what types of "debts" and collection activities are being sought in the CID's Interrogatories and Document Requests, the Bureau Counsel responded by explaining that such requests seek answers or documentary materials relating to collecting on any obligations arising under rent-to-own agreements—even if those agreements were never involved in any debt sale.

Assuming the Bureau's intent is—as Bureau Counsel said and as the August 18, 2017 modification letter confirmed—to explore collections and account-management related to the Rental-Purchase Leases, this scope is wholly improper. To be proper, the collections under scrutiny must be related to at least one "financial product or service," and here, the collections targeted by the Bureau are for collections on the Rental-Purchase Leases. For reasons stated in Section III.A, the Lease is not a "financial product or service." Therefore, the collections-related topics explored by the CID requests are beyond the scope of Enforcement's authority. Moreover, in addition to the lack of "covered person" authority, the CID is also defective given the restrictions on the Bureau's jurisdiction under the merchant exclusion, as discussed below.

## B. **The Merchant Exclusion in the Bureau's Enabling Statute Places RAC Squarely Outside of the Bureau's Jurisdiction.**

In defining the authority granted to the Bureau by the Dodd-Frank Act—as the Bureau is aware—Congress expressly stated in Sections 1027 and 1029 of the enabling statute that certain industries are outside the authority of the Bureau, including the Bureau's authority to write

[19] 12 U.S.C. § 5481(15)(A)(x) (emphasis added).

regulations, conduct supervision audits, initiate enforcement activities, or exercise "any other authority" of the Bureau arising out of Title X of the Dodd-Frank Act.[20] Among these exemptions is the merchant exclusion, which provides both a general exclusion for merchants or retailers, and a specific exclusion even for merchants or retailers that offer some forms of consumer financial products. The merchant exclusion provides:

> (a) EXCLUSION FOR MERCHANTS, RETAILERS, AND OTHER SELLERS OF NONFINANCIAL GOODS OR SERVICES.—
>
> (1) SALE OR BROKERAGE OF NONFINANCIAL GOOD OR SERVICE.— The Bureau may not exercise any rulemaking, supervisory, enforcement or other authority under this title with respect to a person who is a merchant, retailer, or seller of any nonfinancial good or service and is engaged in the sale or brokerage of such nonfinancial good or service, except to the extent that such person is engaged in offering or providing 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.[21]

If a merchant or retailer is within the Bureau authority because of an enumerated consumer law, the Bureau is permitted to exercise authority over such a person or company, but only to the extent of regulating for compliance with that enumerated consumer law.[22]

Here, the merchant exclusion applies to RAC. RAC is a merchant, retailer, or seller of a nonfinancial good. RAC also is engaged in the sale of nonfinancial goods. Moreover, RAC's Rental-Purchase Lease transactions and in-house collections on the Rental-Purchase Lease are not equivalent to a "consumer financial product or service." RAC is also not a third-party debt collector, such that the Fair Debt Collection Practices Act, an enumerated consumer law, does not apply to RAC. Although the Fair Credit Reporting Act ("FCRA") is an enumerated consumer law and RAC is subject to the FCRA, only three of the twenty-nine requests in the modified CID

[20] 12 U.S.C. §§ 5517, 5519.

[21] 12 U.S.C. § 5517(a)(1) (emphasis added).

[22] *See* 12 U.S.C. §§ 5517(a)(2)(C)(ii)(II) (discussed further below), 5517(a)(1).

relate solely to the FCRA.[23] The CID therefore reaches outside the scope of the authority that Congress delegated to the Bureau to compel RAC to produce answers.

Apart from the general exclusion, another section in the merchant exclusion applies independently to exempt RAC from the CID. The merchant exclusion further provides:

> (2) OFFERING OR PROVISION OF CERTAIN CONSUMER FINANCIAL PRODUCTS OR SERVICES IN CONNECTION WITH THE SALE OR BROKERAGE OF NONFINANCIAL GOOD OR SERVICE.—
>
> (A) IN GENERAL.—Except as provided in subparagraph (B), and subject to subparagraph (C), the Bureau may not exercise any rulemaking, supervisory, enforcement, or other authority under this title with respect to a merchant, retailer, or seller of nonfinancial goods or services, but only to the extent that such person—(i) extends credit directly to a consumer, in a case in which the good or service being provided is not itself a consumer financial product or service (other than credit described in this subparagraph), exclusively for the purpose of enabling that consumer to purchase such nonfinancial good or service directly from the merchant, retailer, or seller; (ii) directly, or through an agreement with another person, collects debts arising from credit extended as described in clause (i); or (iii) sells or conveys debts described in clause (i) that is delinquent or otherwise in default.[24]

Here, the RAC Rental-Purchase Lease does not constitute credit. Assuming for argument's sake, however, that the Bureau believes that a Rental-Purchase Lease constitutes credit, the specific exclusion would apply in any event to RAC. Under subsection (i) set forth above, RAC provides Rental-Purchase Leases to consumers for the purpose of enabling such consumers to use the nonfinancial good while preserving a right to purchase it from RAC directly. Under subsection (iii), RAC's Acceptance Now segment has sold debt described in clause (i) that is delinquent or in default. Accordingly, the RAC transaction, even if it were hypothetically credit (and it is not), clearly triggers the specific exclusion of the merchant exclusion under at least two subsections (i and iii) above.

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[23] *See* CID, Interrogatory 5, Written Report 1 ((y) to (aa)), and Request for Document 4. Requests for Documents 8 and 9 also relate to the FCRA, but must be revised to eliminate extraneous topics beyond the Bureau's authority.

[24] 12 U.S.C. § 5517(a)(2) (emphasis added).

Furthermore, the exclusion contains an exception for enumerated consumer laws, but this exception further reveals the overreach of the CID. The exclusion states:

> (C) LIMITATIONS.—
>
> (ii) EXCEPTION.— Subparagraph (A) and clause (i) of this subparagraph do not apply to any merchant, retailer, or seller of nonfinancial goods or services— . . . . (II) to the extent that such merchant, retailer, or seller is subject to any enumerated consumer law or any law for which authorities are transferred under subtitle F or H, but the Bureau may exercise such authority only with respect to that law.[25]

A merchant, retailer, or seller of nonfinancial goods that falls within Section 1027(a)(2) might be within the authority of the Bureau due to the application of an enumerated law, but the Bureau's authority exists only with respect to that enumerated law.

Here, as explained above, a select segment of RAC's business is subject to the FCRA. The language of the exception instructs the Bureau that even if it had authority to investigate RAC by virtue of an enumerated consumer law, the authority clearly is limited to inquiries concerning the FCRA. Therefore, the CID's twenty-six requests having nothing to do with the FCRA are invalid because they demonstrate an effort by the Bureau to delve into areas that are expressly exempted from the Bureau's jurisdiction.[26]

In sum, under the provisions of the merchant exclusion, the CID's requests amount to an improper extension of Enforcement authority against an exempted entity. Unless the CID is narrowed to propound only the requests related to the FCRA (*see* footnote 23), the CID reaches

[25] 12 U.S.C. § 5517(a)(2)(C)(ii) (emphasis added).

[26] During meet-and-confer discussions, RAC was informed of the Bureau's understanding that while subsection (i) of Section 1027(a)(2)(A) might apply to exempt RAC's Core segment from Bureau authority, it does not exempt the Acceptance Now segment because the latter operates kiosks in stores owned by other retailers and consumers buy the product directly from other retailers. This assertion is factually and legally incorrect. Rental-Purchase Leases are executed between Acceptance Now and the consumer, after Acceptance Now has purchased product from the other retailer. The product is leased by the consumer from Acceptance Now until the customer elects to obtain ownership from Acceptance Now. Therefore, RAC's operations, whether Core or Acceptance Now, fall squarely in subsection (i) of Section 1027(a)(2)(A). Moreover, even if the Bureau's assertion were factually correct (and it is not), the assertion is inapposite because RAC's operations are exempted in any event under Section 1027(a)(1) and, separately, subsection (iii) of Section 1027(a)(2)(A) of the merchant exclusion.

beyond the boundaries of the Bureau's jurisdiction. The CID should be set aside or, alternatively, modified to conform to the authority that the Congress delegated to the Bureau.

## C. **The CID is Facially Defective and its Notification of Purpose Exceeds the Boundaries of Bureau Authority.**

On April 21, 2017, the D.C. Circuit affirmed Judge Richard J. Leon's order ruling that the Bureau's CID in the *Accrediting Council* matter should be set aside because the CID had an improper purpose beyond the Bureau's jurisdiction. Many cases before or after *Accrediting Council* have made similar challenges to Bureau CIDs. What truly distinguishes, however, the *Accrediting Council* CID from other CIDs is the fact that the Bureau made clear in the Notification of Purpose section that its intent was to investigate a specific industry, which the court described as "fields not clearly ceded to the Bureau by Congress."[27] In that case, the Bureau's CID was explicit in the intent to investigate the process for accrediting for-profit schools, as opposed to a "consumer financial product or service" or the financing of higher education.[28] Judge Leon held that the CID was invalid because the accreditation process was not within the Bureau's jurisdiction. The court further held that the fact that the Bureau was also investigating for-profit schools for their financial-advisory services or lending activities "does nothing to change this."[29] The D.C. Circuit affirmed Judge Leon's order on the grounds that the CID did not comply with the Bureau's enabling statute.

Here, the CID issued to RAC expresses the following purpose:

> The purpose of this investigation is to determine whether rent-to-own agreement companies, debt buyers, debt collectors, or other persons in connection with engaging in sales, collections or furnishing information to consumer reporting

[27] *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. and Schs.*, 183 F. Supp. 3d 79, 84 (D.D.C. 2016), *aff'd*, 854 F.3d 683 (D.C. Circ. 2017) (dismissing action brought by Bureau to enforce Civil Investigative Demand).

[28] *Id.*

[29] *Id.*

> agencies relating to debts arising from rent-to-own agreements, have engaged or are engaging in unfair, deceptive or abusive acts or practices in violation of §§ 1031 and 1036 of the Consumer Financial Protection Act of 2010; 12 U.S.C. §§ 5531, 5536; or have violated the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et seq.; or the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 et seq., or its implementing regulations. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.[30]

As in *Accrediting Council*, the Bureau's CID has made clear the Bureau's intent: to probe the depths of RAC's rent-to-own operations. For reasons stated in Sections III.A and III.B of this petition, the Bureau's investigation of RAC's Rental-Purchase Leases and account management related to them is improper as exceeding the Bureau's authority. In reviewing the Notification of Purpose, the underlined language (above) on the CID's face signals that the Bureau may be seeking to investigate areas not ceded to it by Congress. Arguably, the remaining, non-underlined language (above) initially would support the possibility that the Bureau's intent is to only investigate debt buyers or debt collectors, not rent-to-own businesses. Therefore, RAC was open-minded, based on the good-faith reading of the CID, to the possibility that Bureau may not be attempting to investigate topics beyond the Bureau's authority.

On August 11, 15, and 18, however, the Bureau removed all doubt. During the parties' meet-and-confers, the Bureau Counsel and Assistant Deputy Enforcement Director unequivocally confirmed that (i) the Bureau disagrees with RAC's position that the Rental-Purchase Leases are outside of the Bureau's enforcement authority; (ii) the Bureau "is investigating sales from rent-to-own agreements;" and (iii) the requests in the CID are crafted to gather information about rights and obligations under the Rental-Purchase Leases in RAC's Acceptance Now business. Given these affirmations, the CID's requests cannot be reconciled with the Bureau's investigative authority, which is "limited to inquiries to determine whether

[30] *See* CID, Notification of Purpose (emphasis added).

there has been a violation of any consumer financial laws."[31]

Moreover, although the Bureau is entitled to investigate debt buyers or debt collectors who collect debts relating to credit or retail-installment loan products, the Notification of Purpose, the CID's requests, the CID modification letter, and the Bureau's oral affirmations truly "belie any notion that its inquiry is limited in this way."[32] In fact, the CID's wording and the Bureau's representations during meet-and-confers "clearly reveal its investigation targets the [rent-to-own industry] generally," which the Bureau was "never empowered to do."[33] Indeed, the CID is invalid for its reach into the rent-to-own industry, and the fact that the CID may elsewhere indicate that the Bureau is also investigating consumer reporting or debt collection "does nothing to change this."[34] The Bureau is "not afforded 'unfettered authority to cast about for potential wrongdoing. . . .' Accordingly, courts will not enforce a CID when the investigation's subject matter is outside the agency's jurisdiction."[35] The D.C. Circuit and the Bureau's statute require the Bureau to inform a CID recipient of "the link between the relevant conduct and the alleged violation."[36] Here, in light of numerous statutory exclusions, any such relevant link does not even exist between RAC's rent-to-own business and the laws that the Bureau is permitted to enforce.

What's more, the CID issued to RAC is arguably more problematic than the one issued to the recipient in *Accrediting Council*. The D.C. Circuit ruled that the CID violated the statute, as the Notification of Purpose did not provide its recipient with the ability to "accurately determine

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[31] *Accrediting Council for Indep. Colls. and Schs.*, 183 F. Supp. 3d at 83.

[32] *Id.*

[33] *Id.* at 84.

[34] *Id.*

[35] *Accrediting Council for Indep. Colls. and Schs.*, 854 F.3d 683, 589 (D.C. Cir. 2017) (affirming Judge Leon's order regarding Bureau CID) (quotations omitted).

[36] *Id.* at 691.

whether the inquiry is within the authority of the agency and whether the information sought is reasonably relevant."[37] Here, the Bureau's CID definitively thrusts the probe into an investigation of the rent-to-own business practices—practices that the Congress specifically excluded from the Bureau's jurisdiction (described in Sections III.A and III.B). Unlike in the case of *Accrediting Council*, where the CID was invalid because the financial laws were silent on for-profit schools and the Notification of Purpose did not sufficiently inform the recipient, here, the CID and staff pronouncements clearly express the purpose of the investigation, which is directly at odds with the statute's explicit bar precluding the Bureau's effort to investigate RAC's Rental-Purchase Leases. Accordingly, the CID as presently drafted is invalid and should be set aside.

## D. **The CID's Requests are Overbroad, Indefinite and Uncertain, and Unduly Burdensome.**

If the CID is not set aside by the Bureau in its entirety, RAC would propose that the CID be narrowed to focus on the topics related to the FCRA (*see* footnote 23). (As the Bureau refused to agree to RAC's previously submitted, reasonable requests,[38] RAC was required to file this petition, which seeks relief that is consistent with the merchant exclusion and the Bureau's covered person authority, pursuant to which the Bureau lacks authority over RAC's debt sales. *See* Section III.B.)

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[37] *Id.*

[38] During the meet-and-confer process, RAC had offered a proposal to modify the CID to strike Request for Document 5, strike the reference to Document Request 5 in Request for Document 6, strike any reference to RAC's collection activities with regard to its rent-to-own operations in Request for Documents 8 and 9, and insert in Request for Document 13, "With respect to Debts listed in your response to Request for Written Report 1" before "All documents." This proposal would have allowed the Bureau to receive a significant proportion of the overall documents sought by the CID, including documents related to debt buyers. In doing so, RAC did not concede that the Bureau has any authority over debt sales that do not involve consumer financial products or services, (*see* 12 U.S.C. § 5481(15)(x)), but RAC was willing—in an effort to avoid this petition—to provide the information to assist the Bureau in its review of debt buyers, so long as the Bureau would agree to bring the scope of the CID in line with the enabling statute. The Bureau refused to do so and declined the proposal.

In the alternative of setting aside the CID, the CID should be modified to address the overbreadth, indefiniteness, and uncertainty in the wording of the Interrogatories, Request for Documents, and Request for Written Report.

1. **The Document Requests.**

For example, Request for Document 12 seeks, "All documents reflecting concerns expressed by any Person about any aspect of any Sale of Debt Portfolios by Rent-A-Center." As discussed during the meet-and-confer, this request is not definite and certain enough to permit RAC or any person to ascertain what material is being identified by the request. The words, "concerns" and "any Person" and "any aspect" and "All documents" are impenetrably vague, broad, and unduly burdensome. Modifications should be made to the CID's Requests for Documents, as discussed in the parties' meet-and-confers. RAC communicated during the meet-and-confers the examples of changes that might make the wording more decipherable, depending on the intent of the Bureau in propounding the requests. Rather than offering a response to RAC's questions raising indefiniteness, the Bureau suggested that RAC submit to the Bureau in writing a proposal that explains how the vague requests should be revised—an explanation that RAC is unable to provide absent further clarification from the Bureau regarding what these requests seek to obtain.

As presently drafted, the requests are overbroad or indecipherably vague and—as the Bureau has yet to clarify in a CID modification what these requests truly seek—the August 28, 2017 return date is not a "reasonable period of time" within the documents may be assembled and produced.[39] For these reasons, the CID falls short of the Bureau's enabling statute and the standards that it establishes for sufficiency of CIDs.

[39] 12 U.S.C. § 5562(c)(3)(A) and (B).

2. **The Interrogatories and the Request for Written Report.**

Interrogatories 6 and 7 each contain seventeen and eighteen, respectively, separately embedded subpart questions—several of which in turn contain indefinite, uncertain, and ambiguous questions. For example, subpart (l) of Interrogatory 6 asks RAC to explain "how the database interacts with other systems" and subpart (j) asks for "any weaknesses noted by the persons conducting these procedures." At least the preamble portion of the request tries to be specific, in asking RAC for "all databases or other systems used to store account-level consumer data relating to Acceptance Now Debt or Debt in Debt Portfolios."[40] During meet-and-confer discussions, however, the Bureau explained that this language, too, is intended to mean consumer obligations on all RAC rent-to-own agreements in the Acceptance Now business, without any limitation to any consumer financial products that were, for instance, sold to debt buyers. Certainly, none of it is tailored to the permissible scope of FCRA.

Not only are these requests impermissibly beyond the boundary of the Bureau's jurisdiction, their wording is also impenetrable and mysterious. There is no wording that tells RAC which databases, interactions, strengths/weaknesses, or "other systems" that the Bureau had in mind, or even the type of business transactions among all transactions that the Bureau is focused on. Furthermore, the request in Interrogatories 7 and 8 for "all databases or other systems" and "any weaknesses" or "any changes" is also unduly burdensome. As discussed during the meet-and-confers, RAC has similar requests for clarifications relating to many of the remaining Interrogatories. Instead of providing a response to RAC's requests for clarifications, the Bureau asked RAC to draft a proposal for how the CID should be revised—a proposal that RAC was unable to make absent additional information from the Bureau regarding the goal of these requests and an extension for the due date of the petition (both of which the Bureau

[40] *See* August 18, 2017 CID Modification Letter, Interrogatory 6.

declined to provide).

Finally, Request for Written Report 1 asks thirty-three different questions for each account responsive to Written Report 1, and is unduly burdensome. While many of the questions in the earlier subparts can be gathered and produced as soon as possible, some of the subparts would require significant and extensive manual review and data entry to create—from scratch—new data reports that do not exist in the form requested by the Bureau. As discussed with Bureau Counsel, RAC understands that the intent of the Bureau was not to require manual file review. At the very least, the wording of the thirty-three questions in Written Report 1 should be amended to reflect this accommodation, the subparts should be revised to focus on the FCRA, and the deadline should be extended to a feasible time in which the data can be gathered and produced.

In sum, RAC requests that the CID, as drafted, be set aside as exceeding the Bureau's authority and jurisdiction. In the alternative of setting aside the CID, RAC requests that the Interrogatories, Requests for Documents, and Request for Written Report be modified to conform to the boundaries of the merchant exclusion and the Bureau's "covered person" authority, propounded with "definiteness and certainty" as to the questions to be answered, and revised to eliminate burdensome manual file review which the Bureau finds undesirable. Absent such a modification, the CID is unduly burdensome and inconsistent with the requirements of specificity and the authority set forth in the Bureau's enabling statute.

## IV. CONCLUSION

For the foregoing reasons, RAC respectfully requests that the CID be set aside in its entirety, or in the alternative, modified to bring the CID within the boundaries of the Bureau's enabling statute.

Dated: August 21, 2017

Respectfully submitted,

By: _____

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# EXHIBIT A

**Statement of Counsel Pursuant to 12 C.F.R. § 1080.6(e)(1).**

Before filing this petition, counsel for the petitioner, Rent-A-Center, Inc. ("RAC"), has conferred with counsel for the Consumer Financial Protection Bureau ("Bureau") pursuant to 12 C.F.R. § 1080.6(c) in a good-faith effort to resolve by agreement the issues raised by the petition and has been unable to reach such an agreement. The specific details pertaining to the meet-and-confer meetings are described below.

On August 11, 2017, between 3:00 pm and 4:05 pm Eastern Standard Time, J.H. Jennifer Lee and Kathryn Johnson, outside counsel for RAC, conferred by telephone with David Dudley, counsel for the Bureau, and Elizabeth Rosario and Michael Lloyd, Bureau staff, to discuss the Civil Investigative Demand ("CID"). During this teleconference, the parties meaningfully discussed the issues relating to the CID, including: the individual Document Requests, Interrogatories, and the Request for Written Report; clarifications of indefinite or uncertain terms; the burdensome nature of the requests; a potential rolling production schedule; and the Bureau's authority to investigate or enforce the law as to RAC.

On August 15, 2017, between 5:51 and 6:21 pm Eastern Standard Time, Ms. Lee and Mr. Dudley engaged in a second meet-and-confer discussion, during which the parties further discussed the CID and the authority of the Bureau. That day, RAC requested from the Bureau a four-day extension in which to file any petition to modify or set aside the CID, in an effort to allow additional time for the parties to finalize negotiations and avoid the need for the petition. The Bureau denied that request on August 16, 2017.

On August 17, 2017, between 3:30 pm and 4:25 pm Eastern Standard Time, Ms. Lee, Ms. Johnson, and Eric Epstein (also counsel for RAC) engaged in a third meet-and-confer discussion with Cynthia Lesser, the Bureau's Assistant Deputy Enforcement Director, and Ms. Rosario.

During this teleconference, the parties meaningfully discussed the CID's requests—as already had been discussed on August 11 and 15—and negotiated proposed modifications in a final, good-faith effort to avoid the need to file a petition by the August 21 due date. The Bureau indicated that RAC's requests would be reviewed and a response would be forthcoming.

On August 18, 2017, between 11:37 am and 12:16 pm Eastern Standard Time, Ms. Lee and Ms. Lesser engaged in a fourth meet-and-confer discussion, during which Ms. Lesser explained the Bureau's upcoming CID modification. The Bureau had agreed to remove requests seeking information regarding RAC's collections and account-management activities on the rent-to-own transactions in the Core business, but not in the Acceptance Now business. RAC explained that, given the nature of the Acceptance Now business and the Bureau's statute, the modification did not revise the requests to be consistent with the Bureau's authority, as RAC had requested. The Bureau confirmed it understood the facts pertaining to the transactions at issue, but no further negotiations could be had regarding the Bureau's authority to investigate the rent-to-own business. On August 18, the CID Modification Letter was issued to RAC, consistent with Ms. Lesser's description of the extent to which the Bureau could agree to modify the CID.

In sum, notwithstanding the good-faith efforts of the parties to meet and confer, the parties were unable to reach a resolution and this petition followed.

Date: August 21, 2017

## CERTIFICATE OF SERVICE

I hereby certify that on the 21st of August, 2017, pursuant to 12 C.F.R. § 1080.6(e), I caused the foregoing Petition to Modify or Set Aside the Civil Investigative Demand to be served via email upon the Executive Secretary of the Consumer Financial Protection Bureau and the Assistant Director for the Bureau's Office of Enforcement.

Date: August 21, 2017