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BUREAU OF CONSUMER FINANCIAL PROTECTION

In the matter of:

Synchrony Financial

COMBINED PETITION TO SET ASIDE AND PETITION TO MODIFY THE AUGUST 29, 2018 CIVIL INVESTIGATIVE DEMAND ISSUED TO SYNCHRONY FINANCIAL

On August 29, 2018, the Bureau of Consumer Financial Protection ("BCFP" or "Bureau") served a second Civil Investigative Demand (the "Second CID") on Synchrony Financial ("Synchrony") related to deferred interest promotions. It follows the first Civil Investigative Demand (the "First CID"), which was served on May 9, 2017. In a letter dated October 16, 2018, the BCFP modified certain terms for compliance with the Second CID (the "Modification Letter"). Pursuant to 12 U.S.C. § 5562(f)(1) and 12 C.F.R. § 1080.6(e), Synchrony files this Combined Petition to Set Aside and Petition to Modify the Second CID, as revised by the Modification Letter, because it does not provide an adequate Notification of Purpose, seeks documents and information not relevant to any apparent investigation, is unduly broad and burdensome, and is fundamentally at odds with the BCFP's mission.

INTRODUCTION

In evaluating this Petition, Synchrony respectfully asks the Bureau to consider the context in which the Second CID was issued:

1. Deferred interest promotions are legal. The BCFP's own Regulation Z proscribes how they should be disclosed and serviced.

2. Deferred interest promotions are popular, providing, in the BCFP's words, "obvious" benefits to consumers.[1]

3. The former Director unquestionably disliked deferred interest promotions.

4. Prior to issuing its First CID to Synchrony, the Bureau had examined Synchrony's compliance with the rules relating to deferred interest and identified no matters requiring attention.

5. Prior to the First CID, pursuant to a compulsory data request, the BCFP demanded massive amounts of data on deferred interest transactions from Synchrony (5+ terabytes) and other issuing banks. It took Synchrony 13 months to complete the work necessary to meet that demand. Following analysis of that data, the BCFP made no conclusions, produced no rulemaking or industry guidance, and changed nothing about how deferred interest products are to be offered.

6. In lieu of issuing clear rules or guidance, the former Director engaged in a public pressure campaign that culminated in letters to CEOs demanding that their companies stop offering deferred interest promotions, notwithstanding the express approval of such products in the Bureau's own regulations.

7. The former Director resorted to "regulation by enforcement," authorizing the issuance of the First CID to Synchrony.

8. In response to the First CID, Synchrony produced more than 13,000 documents and written reports that required the collection and analysis of over 3 terabytes of data.

[1] Consumer Fin. Prot. Bureau, *The Consumer Credit Card Market*, at 149 (Dec. 2015).

The production took approximately ten months to complete, involved over 200 Synchrony employees and outside professionals, and cost millions of dollars.

9. While the First CID was pending, Synchrony responded to another compulsory data request from the BCFP, producing an additional 2 terabytes of data, including data specific to deferred interest.

At this point, ***the BCFP knows perhaps more about deferred interest financing offered by Synchrony than any other product offered by any other institution***.

Notwithstanding the massive amount of data that the BCFP already has, however, the legal basis for the Enforcement Division's investigation of Synchrony remains a mystery. At no point did Enforcement Staff indicate the basis for the First CID, either at the time it was issued or in response to multiple inquiries from Synchrony. Even now—approximately eight months after Synchrony completed its First CID production—the BCFP still has not identified any specific suspected violations. Instead, with the Second CID, it launched yet another vast fishing expedition, as it did with the First CID and in so many other investigations under the prior administration, compelling businesses to undertake burdensome data exercises that show nothing about whether a UDAAP or other legal violation has occurred.

In response to repeated requests by Synchrony for Enforcement Staff to explain the grounds for continuing this investigation so that Synchrony could adjust its practices immediately if necessary, Enforcement Staff identified no action, policy, procedure, statement, or disclosure by Synchrony that is incorrect or a violation of law. Rather, they noted that some consumers have complained about oral misstatements made by employees of retail stores at the point of sale. But there are complaints about virtually any financial product or service. The Bureau need not look further than its own database to find them.

Had the BCFP checked that database or the data that Synchrony previously provided, the BCFP would have observed that complaints around deferred interest promotions are exceptionally infrequent. The Bureau's database of more than 1.1 million total complaints contains only a few hundred that even mention the phrase "deferred interest"—less than .0004% of the complaints in the database. And of those, many do not allege that consumers were misled about the promotion. Further, Synchrony's Written Report 3 from the First CID shows that, from 2013-2016, Synchrony financed over 75,000,000 purchases utilizing a deferred interest promotion. During that time, as shown on Written Report 4, Synchrony received approximately 44,000 expressions of dissatisfaction concerning accounts with a purchase financed with a deferred interest promotion that were coded with a reason that the BCFP selected.[2] In other

[2] Synchrony's complaint management systems contain reason codes that classify the general subject matter of each expression of dissatisfaction. The individuals responding to each consumer inquiry are responsible for selecting the appropriate reason code. Ex. B, Beaman Decl. ¶ 6. Many codes are general in nature and do not differentiate between deferred interest and other types of promotions. In connection with the First CID, Synchrony provided the BCFP with a list of all such reason codes, and the BCFP selected certain codes for analysis. Synchrony's Written Report 4 from the First CID identifies the number of expressions of dissatisfaction that were assigned the BCFP-selected codes that Synchrony received from 2013-2016 in connection with programs in its Retail Card and Payment Solutions platforms that offered deferred interest promotions, and where the expression of dissatisfaction was made within two years of a deferred interest transaction.

words, ***less than one tenth of one percent*** of purchases with a deferred interest promotion were the subject of expressions of dissatisfaction to Synchrony that could have related in some way to the promotion. From that data, there is no credible argument for BCFP to allege systemic unfair, deceptive, or abusive acts by Synchrony.

Nor does data about Synchrony's payoff rates and consumers' payment behavior suggest any wrongdoing by Synchrony. The data reported in the BCFP's own 2017 CARD Act Report show that the aggregate industry balance payoff rate on 2015 purchases made with deferred interest promotions was 74%.[3] If the BCFP were to pull the Synchrony-provided payoff data out of this analysis (which it could easily do), the BCFP would see that Synchrony's payoff rate was significantly higher than the rate for the rest of the industry. To the extent one can infer that payoff evidences consumer understanding of deferred interest promotions, the data in the 2017 CARD Act Report indicate that Synchrony consumers have a ***better*** understanding of those promotions than consumers who purchased using financing from Synchrony's competitors.

The existence of some number of consumer complaints to Synchrony and some deferred interest promotions that do not payoff simply cannot justify or explain the massive First CID, much less the equally broad Second CID. Given the breadth of the First CID (and the other information Synchrony provided to the BCFP), one would expect that, to the extent a Second CID was necessary, it would focus on specific instances of suspected alleged misconduct derived from the data that the Bureau possesses. Instead, the BCFP served Synchrony with a CID that, on its face, was far from narrowly tailored to investigate potential oral misrepresentations concerning deferred interest promotions at the point of sale. Even if a small number of consumers were misinformed, the vast majority of the information sought in the Second CID has nothing to do with this theory.

For example, the Second CID, as originally served upon Synchrony, sought information regarding:

- programs that do not offer deferred interest promotions;
- a large sales platform that had excluded from the First CID; [4]
- expressions of dissatisfaction from consumers who never had a deferred interest promotion;
- deferred interest promotions offered exclusively on the internet so that no oral misrepresentations at point of sale could possibly have occurred; and

[3] *See* Consumer Fin. Prot. Bureau, *The Consumer Credit Card Market*, at 108 & Fig. 30 (Dec. 2017).

[4] The Second CID sought information regarding CareCredit, which is one of Synchrony's sales platforms and the market name of a Synchrony-branded credit card offered at health care providers and veterinarians. The CareCredit platform was the subject of an agreement with the BCFP regarding deferred interest promotions in December 2013 following a CID. The BCFP examined Synchrony's compliance with this agreement in 2014 and 2015, and there are no outstanding issues with respect to those examinations. CareCredit information was initially requested in the First CID, but information requests related to the platform were specifically removed pursuant to a modification. In other words, the BCFP recognized in modifying the First CID to exclude CareCredit that (1) the CareCredit platform is compliant with the requirements set out by the BCFP, and (2) CareCredit is not within the scope of this investigation.

- 5 years' worth of transactional histories for every consumer who had a deferred interest promotion, even if they paid off their promotions during the promotional period or never paid anything at all.

It is thus apparent that the Bureau made no genuine effort in the Second CID to limit its demands to solicit information needed for this investigation. Moreover, the Modification Letter makes clear that the gross overbreadth of the Second CID likely was the result of a strategic choice. Enforcement Staff realized that Synchrony would object to yet another burdensome deferred interest promotion-related CID in light of its multiple prior productions. So they issued the Second CID with requests so broad that they could later easily be "limited" to create the false appearance of a reasonable modification, without actually meaningfully reducing Synchrony's burden of compliance.

For example, the Modification Letter unremarkably agrees that the Second CID—a CID that purports to continue the First CID's investigation of deferred interest promotions—would exclude retailers that never offered deferred interest promotions and the sales platform that already had been excluded from the First CID. Modification Letter, at 1. In addition, with respect to many specific requests, the Modification Letter superficially reduces the overall volume of information requested, while wholly ignoring both (1) the technical issues which render the requests, even with modification, unreasonably onerous, and (2) the fact that information the requests seek has no reasonable relevance to an investigation of potential oral misrepresentations at the point of sale. Two examples illustrate that the Bureau's modifications—which it will likely misleadingly tout as significant—do not meaningfully reduce Synchrony's burden.

First, the Second CID's requests concerning "Complaints" (Document Requests 1 and 2) remain unprecedented in scope even after the Modification Letter. As noted above, the First CID identified only 44,000 responsive expressions of dissatisfaction from 2013-2016 from accounts with deferred interest promotions.[5] Apparently having discarded this information as not useful, BCFP demanded in the Second CID that Synchrony produce *all* consumer communications (including phone recordings, chat transcripts, and emails) and related contemporaneous internal notes coded with ten reason codes from *all* programs (many of which did not even offer deferred interest promotions) and platforms (including the sales platform excluded from the First CID) from January 1, 2015 to August 29, 2018—a population that Synchrony estimated exceeds 750,000 communications. In meet-and-confer discussions, including a lengthy teleconference with a Synchrony technical resource, Synchrony explained that the user interface through which it assigns reason codes does not connect with the three systems where consumer communications are stored, so they cannot be identified and retrieved in a systematic way. Currently, Synchrony uses a manual process to retrieve handfuls of communications at a time for litigation, investigation, and supervisory purposes—it has never attempted to retrieve thousands of consumer communications, much less tens or hundreds of thousands. To create an automated process to do so, Synchrony would have to write new software code and work with the system vendors, all while potentially compromising the performance of Synchrony's primary customer service user interface for a process that may not even work.

[5] *See* Synchrony's Written Report 4 in response to the First CID.

In response, Enforcement Staff modified these requests to exclude communications that did not occur within two years of a deferred interest promotion. Modification Letter, at 3. Synchrony estimates that the Second CID now requests documents concerning approximately 75,000 communications. While that number is certainly less than 750,000, the modification misses the primary point of Synchrony's modification request—underlying technical issues currently prohibit Synchrony from using an automated process to identify and collect responsive information. To collect and produce all consumer communications (phone recordings, chat transcripts, emails, etc.) and servicing notes related to 75,000 consumer inquiries, Synchrony would still need to create an entirely new automated process, or apply the current manual process over the course of more than 300 person-weeks. This places a massive burden on Synchrony, the extent of which simply is not mitigated by the fact that the Second CID's original requests were even more unreasonable.

Second, the modifications to the Second CID's requests for transaction-level data (Written Reports 1, 2, and 4) are even more illusory. Synchrony estimated that, to respond to the Second CID's original requests for five-years of transaction-level data on a monthly, account-by-account basis (with respect to the data fields that are obtainable), Synchrony would need to download and manipulate 6 to 8 terabytes of data over a total period of at least twelve months. In the Modification Letter, the BCFP stated that, "[t]o reduce Synchrony's burden," it would modify the report to require only a production of a sample which the BCFP contends "captures approximately 5% of the accounts originally implicated." Modification Letter, at 8. Again, however, this modification focuses myopically on the total number of accounts listed in the final report, while ignoring how Synchrony could identify those accounts in the first instance. To identify the "sample" accounts, Synchrony would need to undertake ***the very same process*** that would be needed to respond to the requests prior to modification—***plus more***. In other words, in practical effect, the "sampling" modification actually increases Synchrony's burden.

The Modification Letter also remains conspicuously silent with respect to any investigatory need for the requested information. The fact that the Modification Letter reduced the number of items demanded as compared to the original Second CID is no justification for the requests' themselves. When asked how years of transactional histories could be probative of whether a particular store associate made an oral misrepresentation to a particular consumer, Enforcement Staff told Synchrony that it should take as fact that consumers are being misled, and that the requested data could show which consumers were harmed by some alleged deception. The Staff then hypothesized that if the data showed consumers paid off their deferred interest promotional balance shortly after expiration, these consumers may have been harmed.

But that claim—which is the only theory that Enforcement Staff has ever offered to justify the massive data requests—defies reality and the BCFP's own prior concessions. In the 2015 Card Act Report, the BCFP stated that of the ~20% of promotions that expired without full payment, ~30% were paid in full within two months of the promotion's expiration, and noted that on these promotions (approximately 6% of the total promotions taken) consumers "appear to be acting" in a way that suggests they do not understand how the promotion works.[6] Even if this

[6] Consumer Fin. Prot. Bureau, *The Consumer Credit Card Market*, at 164-165, 198-200 (Dec. 2015).

data is correct (and based on Synchrony's analysis of its own data, it does not believe it to be[7]), the BCFP's hypothesis is pure conjecture. There are myriad reasons why a consumer may pay off a promotion within a few months of its expiration—most likely being that the consumer did not have the cash flow to pay the promotion prior to the expiration or the BCFP's payment allocation rules prioritized other balances over the promotional balance for the majority of the promotion's duration. Even the BCFP stated that "the data are not determinative on this point [of alleged misunderstanding]."[8] More importantly, the report did not allege that consumers were misled, nor could it have. Yet the Second CID is premised on just that assumption.

Moreover, as Synchrony has already advised the Enforcement Staff, Synchrony has a procedure to address any claims by consumers that they misunderstood the promotion at the point of sale (or for any reason): When consumers contact customer service about the application of deferred interest, Synchrony's representatives are required to waive the interest if the promotion is paid in full within 30 days of promotion expiration. As a customer service job aid Synchrony produced in response to the First CID instructs: "If a customer calls to complain about the interest on a deferred interest promo, as long as the cardholder pays their promotional balance within 30 calendar days of the promotion expiration date, Customer Service Representatives *must* waive the assessed interest charges on the expired promotion."[9]

The bottom line is that the Second CID is just a continuation of the failed strategy of the prior Director. It is no secret that former Director Cordray sought to end deferred interest financing. His position was based on his own dislike of the product, not on quantifiable harm to consumers, complaint data, or a measurement of costs and benefits. Even if that dislike was based on quantifiable evidence (and it was not), the proper action would have been to engage in industrywide discussion about possible enhancements to the product (something Synchrony repeatedly offered to do) or to engage in a transparent and fair rulemaking to develop changes to current regulations applicable to all parties (something the BCFP repeatedly refused to do). Instead, the BCFP utilized public statements, public meetings, letters to CEOs (including Synchrony's), and spurious CIDs—all weapons in the BCFP's well-worn arsenal to change public policy through enforcement.

Disappointingly, the Second CID and the Modification Letter continue that strategy even though Acting Director Mulvaney has disavowed it. He recently stated that "the people we regulate should have the right to know what the rules are before being charged with breaking them. This means more formal rule making and less regulation by enforcement."[10] The Second CID adopts the opposite approach. In this matter, the BCFP could right the misguided approach of the prior administration, and act to minimize regulatory burden and prioritize its enforcement resources based on costs and benefits. If the BCFP analyzes the data it already has, it will

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[7] It appears that the BCFP's analysis included accounts with multiple balances. However, to isolate payoff behavior on deferred interest promotions, the analysis should have considered accounts with a single purchase using a deferred interest promotion and no other balances (promotional or non-promotional). For such accounts, Synchrony's statistics concerning payoffs within two months of promotion expiration—data which the BCFP has in its possession—is far different from those reported in the 2015 Card Act Report.

[8] *Id.* at 200.

[9] SYF_DICID_00070296 at SYF_DICID_00070299 (emphasis added); *see also* Synchrony's Nov. 22, 2017 Response to Interrogatory No. 5.

[10] Mick Mulvaney, *The CFPB Has Pushed Its Last Envelope*, Wall St. J. (Jan. 23, 2018), https://www.wsj.com/articles/the-cfpb-has-pushed-its-last-envelope 1516743561?mod=searchresults&page=1&pos=2.

confirm that deferred interest promotions are well-liked and there are no reasonable indications of any systemic issues concerning potential oral misrepresentations at the point of sale—Synchrony's deferred interest programs have few complaints and Synchrony's payoff rates are far above the industry average. The continued badgering of Synchrony in the apparent hope that it will be the next terabyte of data that points Enforcement Staff towards a potential violation of law is excessive, wrongheaded, and an abuse of the BCFP's authority.

Enough is enough. The BCFP's behavior with respect to Synchrony and deferred interest promotions is fundamentally wrong. It should stop.

Synchrony requests that the Second CID be set aside. If the facts discussed above are not sufficient, the CID should be set aside, as discussed below, because (1) the BCFP has failed to satisfy the statutory requirement for the Notification of Purpose, a basis on which multiple courts of appeals have set aside similar BCFP CIDs; (2) the information sought in the CID is not reasonably related to any actionable violation of law; and (3) the CID is unreasonable and unduly burdensome, especially coming on top of the prior CID that consumed enormous amounts of Synchrony resources. If the BCFP does not set aside the Second CID in full, the CID should be modified as set forth below and explained in more detail in the modification letter submitted by Synchrony to the BCFP on September 28, 2018 and the summary chart attached hereto as Exhibit A.

BACKGROUND

Deferred Interest Promotions

Synchrony is a financial services company that, among other things, partners with a variety of retailers to issue private label and/or co-branded credit cards for those retailers. Some of those retail partners choose to provide deferred interest financing to their customers as part of their private label/co-brand credit program. A deferred interest promotion allows consumers to avoid paying interest on charged purchases for a certain number of months so long as they pay off charges before the end of the promotional period. Deferred interest promotions have been offered to consumers for decades. They are popular with both consumers (who save money) and retailers, especially small-to-mid-sized merchants (who use them to compete against big box chains). And deferred interest promotions undoubtedly are lawful.

Pursuant to the Credit Card Accountability Responsibility and Disclosure Act of 2009 ("the CARD Act"), the Federal Reserve engaged in an extensive rule-making process in which it considered the concerns of consumer advocacy groups regarding the marketing, disclosure, and servicing of deferred interest promotions in the context of the Truth in Lending Act and its implementing regulations—*i.e.*, Regulation Z, 12 C.F.R. pt. 1026, and the general prohibitions on unfair, deceptive, and abusive acts or practices (now a part of Dodd-Frank). 12 U.S.C. §§ 5531, 5536. The Federal Reserve finalized its amendments to Regulation Z on January 12, 2010.

Authority to implement the CARD Act was transitioned to the BCFP by the Dodd-Frank Act on July 21, 2011, and the relevant regulations became BCFP regulations. Those regulations speak specifically to deferred interest promotions. First and foremost, they make clear that deferred interest promotions are lawful. In addition, they prescribe how such promotions should

be described at origination so that the product is understood[11] and what must appear on billing statements to ensure the consumer receives a contemporaneous warning of promotion expiration.[12] Regulation Z also sets forth the default payment allocation methodology that card issuers must use to allocate payments above the minimum payment amount on accounts with multiple balances (*e.g.*, a deferred interest balance and a non-promotional purchase balance).[13] The BCFP has stated that the BCFP's "expectations" are that lenders "comply with the requirements in Regulation Z" and accurately describe the promotions in their marketing materials.[14]

Synchrony describes its deferred interest promotions consistently with the requirements in Regulation Z. The billing statements prepared by Synchrony provide the requisite contemporaneous warning of promotion expiration and other required information. And Synchrony allocates payments consistent with the terms and conditions disclosed to consumers and with Regulation Z. Synchrony has been examined by the BCFP on its compliance with these rules and is unaware of any unresolved issues. Indeed, the BCFP's 2015-2016 credit card account management examination of Synchrony addressed, among other things, advertising and marketing, periodic statements, training, complaints, disclosures, payment allocation, and deferred interest promotions generally.

The BCFP's Focus on Deferred Interest Promotions

Over the last few years, the former Director of the BCFP focused the Bureau's resources on deferred interest promotions, including a significant campaign asking the financial services industry to consider changes to the requirements for such products. Synchrony affirmatively sought to work with the BCFP on changes that could be applied to all consumers. In 2014, the BCFP demanded a massive amount of material from Synchrony as part of its research effort. Among other things, BCFP requested 6 years' worth of data about individual consumer transactions—more than 5 terabytes of information—which took Synchrony 13 months to gather and provide, at significant cost and burden to Synchrony.[15]

Ultimately, the BCFP took no action on its industrywide effort, declining to initiate an industrywide discussion about the product much less to initiate rulemaking. Instead, the BCFP's former Director deployed public criticism of deferred interest promotions in multiple forums,[16]

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[11] For example, Regulation Z requires clear statements to consumers that "interest will be charged to your account from the purchase date … if the balance is not paid in full within the deferred interest period or you make a late payment." 12 C.F.R. pt. 1026, Appendix G, Sample G-24; *see* 12 C.F.R. § 1026.16(h) (advertising).

[12] For example, the billing statement must contain, on the "front" "page," "the date by which that outstanding balance must be paid in full in order to avoid the obligation to pay finance charges." 12 C.F.R. § 1026.7(b)(14) (periodic statements). *See also* 12 C.F.R. § 1026.53(b)(1) (payment allocation).

[13] *See* 12 C.F.R. § 1026.53(b)(1)(ii); *see also* 12 C.F.R. pt. 1026, Supp. I, pt. 4.

[14] Consumer Fin. Prot. Bureau, CFPB Bull. No. 2014-02, Marketing of Credit Card Promotional APR Offers (2014), https://files.consumerfinance.gov/f/201409_cfpb_bulletin_marketing-credit-card-promotional-aproffers.pdf.

[15] *See* Ex. F, Lyons Decl. ¶¶ 14, 29; *see also* Lyons Decl. ¶¶ 3-4 (June 6, 2017), *available at* https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201709_cfpb_synchrony-financial_combined-petition.pdf.

[16] *See The Semi-Annual Report of the Bureau of Consumer Financial Protection: Hearing Before the H. Comm. on Fin. Servs.*, 114th Cong. (2016) (statement of Richard Condray, Director, CFPB), https://financialservices.house.gov/uploadedfiles/114-78.pdf; *see also* Richard Cordray, Director, CFPB, Prepared

culminating in a May 2017 press statement urging retailers and banks to "reconsider their reliance on deferred-interest products."[17] Within days of that statement, on May 9, 2017, the BCFP served the First CID. Three weeks after the issuance of the CID and before Synchrony was scheduled to respond, the former Director took the extraordinary step of sending a letter to Synchrony and to other credit companies and retailers, asking that they consider discontinuing deferred interest promotions notwithstanding their legality and benefits to consumers and retailers.[18]

The First CID

The Treasury Department has criticized the Bureau's CID process. In a recent report to President Trump, the Treasury Department concluded that the Bureau's current CID process is "lacking in appropriate safeguards" and is "fraught with risks for abuse."[19] The Treasury Department expressed particular concern that "the CID process provides little protection for parties seeking to modify or set aside a CID," which it views as particularly problematic given that regulated parties have "consistently raised" meritorious objections to CIDs on the ground that they do not comply with the relevant statutory requirements. *Id.* The Treasury Department recommended that the BCFP reform its CID process by adopting guidance designed to "ensure that subjects being investigated for a potential violation of federal consumer financial laws receive clear notice of the conduct at issue, along with a description of the specific laws the BCFP believes may have been violated." *Id.* at 91. The Treasury Department, much like Acting Director Mulvaney, has also recommended that the BCFP end its troubling campaign of regulation by enforcement and instead engage in more formal rulemakings. *Id.* at 82-83, 89-90.

The First CID is a textbook example of the abuse of the CID process under the BCFP's prior leadership that the Treasury Department concluded needs to change. The First CID contained sweeping requests that spanned Synchrony's entire deferred interest offerings. When Synchrony received it, Synchrony questioned whether, in preparing the First CID, the Enforcement Division had analyzed the wealth of information concerning deferred interest promotions that Synchrony had provided to the BCFP Research and Markets and Supervisory Divisions over the preceding year. Seeking an efficient process recognizing the significant resources Synchrony had already expended to compile that information, Synchrony requested

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Remarks of CFPB Director Richard Cordray at the Consumer Bankers Association (Mar. 9, 2016) (also explicitly defending regulation by enforcement).

[17] Paul Ausick, *Wal-Mart's No-Interest Financing Plan Is a Good Deal for Consumers*, Yahoo Finance (May 5, 2017), now available at https://247wallst.com/retail/2017/05/05/wal-marts-no-interest-financing-plan-is-a-good-deal-for-consumers.

[18] Consumer Fin. Prot. Bureau, Press Release, Consumer Financial Protection Bureau Encourages Retail Credit Card Companies to Consider More Transparent Promotions (June 8, 2017), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-encourages-retail-credit-card-companies-consider-more-transparent-promotions/.

[19] U.S. Dep't of Treasury, *A Financial System That Creates Economic Opportunities—Banks and Credit Unions: A Report to President Donald J. Trump*, at 86 (June 2017), https://www.treasury.gov/press-center/press-releases/Documents/A%20Financial%20System.pdf.

that the Enforcement Staff defer the First CID's requests until after it had reviewed that data, and Synchrony affirmatively consented to such a review.[20] The Staff refused Synchrony's request.

Synchrony then brought a Petition to Set Aside or Modify the First CID on burden and other grounds, but its request was denied by former Director Cordray. *See* Decision & Order on Petition by Synchrony Financial to Modify or Set Aside Civil Investigative Demand, *In re Synchrony Financial*, 2017-MISC-Synchrony Financial-0001 (C.F.P.B. Sept. 7, 2017) ("2017 Decision & Order"). Director Cordray did not analyze whether the First CID met the legal requirement that it be "narrowly tailored to solicit the information necessary for the investigation."[21] Instead, the 2017 Decision & Order defends the First CID with a series of non-responsive and conclusory statements that laid bare the reality that the First CID was part of the former Director's campaign to use the weight of his office to pressure Synchrony to eliminate legal and fully-regulated deferred interest promotions through means other than rulemaking.

The 2017 Decision & Order begins by placing former Director Cordray's antipathy towards large banks and deferred interest in full view. He emphasized his opinion that, based on Synchrony's SEC filings, Synchrony was a big bank, and essentially stated that no requests could be unduly burdensome for a large financial institution. As to the argument that Enforcement Staff should first review the information Synchrony had already produced to the BFCP, he stated that "even if Synchrony has produced data to the Bureau in other contexts, that fact would not render the CID unduly burdensome in the context of this investigation." 2017 Decision & Order at 6. Yet neither the First CID nor the 2017 Decision & Order identified any specific activity or alleged violation as "the context of this investigation," nor did they explain how a broad investigation of deferred interest promotions could be justified given that, within the prior year, Synchrony's Regulation Z compliance had been confirmed in a thorough BCFP examination. Instead, the former Director attempted to establish a precedent that the burden associated with Enforcement Division CIDs must be considered in a silo, without recognizing the activities of the Bureau as a whole. This is a nonsensical and dangerous principle the BCFP should affirmatively disclaim.

The Former Director also simply disregarded the detailed and unrebutted declarations Synchrony provided estimating the time and cost it would take for Synchrony to comply with the First CID. For example, without any analytical support, he baldly concluded that "the actual amount of time required to comply with these [marketing document production] requests should be significantly less than the 'thousands' of hours predicted by Synchrony prior to the Enforcement team's modifications." 2017 Decision & Order at 7. And his discussion of the burden put to Synchrony by the First CID's Written Reports did not contain any analysis at all. Instead, he stated only that "Synchrony's objection [to] some of the requested data . . . is now

[20] In its letter seeking to modify the First CID, Synchrony wrote: "Any inquiry on deferred interest promotions should start with: (i) the already completed deferred interest study, and the enormous data review pursuant to which Synchrony provided five terabytes of account level data, . . . and (iii) the other exams conducted by the CFPB that address deferred interest promotions, including the credit card account management exam in 2015-2016 . . . . The CFPB should hold the CID in abeyance until the Enforcement attorneys have been able to digest the voluminous materials already produced by Synchrony. To the extent Synchrony needs to consent to such a review, it does." Modification Letter from J. Noga to CFPB (June 7, 2017) at 3.

[21] CFPB Office of Enforcement, Policies and Procedures Manual, May 2017, at 58, https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201710_cfpb_enforcement-policies-and-procedures-memo_version-3.0.pdf.

moot" because of modifications, without considering whether the still-massive post-modification data requests were necessary or appropriately tailored. *Id.*

In reality, the First CID was exceptionally onerous even after it was modified following a lengthy meet-and-confer process. The former Director's unsupported statements attempting to minimize the burden associated with Synchrony's response to the First CID turned out to be completely wrong, while Synchrony's measured and reasoned attempts to estimate that burden turned out to be understated.

In response to the first CID, Synchrony searched for and produced over 13,000 documents. Ex. G, Martini Decl. ¶ 4. The documents produced included advertisements and consumer-facing materials, policies and procedures, and training materials. *Id.* The search for marketing-related documents that former Director Cordray hypothesized would require "significantly less" time than Synchrony had forecasted actually involved a team of 70 Synchrony employees who reviewed, sorted, and categorized over 26,000 unique items. *Id.* ¶ 3. Moreover, outside counsel had to engage in a pointless exercise of preparing indexes to all of the electronically-produced documents that met the BCFP's demanded format, including identifying metadata to each document.

The most significant burden imposed on Synchrony by the First CID derived from its written reports. Even with the modifications that former Director Cordray used to justify the denial of Synchrony's Petition, the modified written reports required Synchrony to create multiple data sets that included information on every deferred interest promotion for hundreds of retailers over a 4-year period, regardless of whether there was reason to believe that somehow there may be an identifiable violation of law buried in the mountain of data. This included information on *all transactions* involving deferred-interest promotions for those retailers—a dataset of approximately 79 million transactions. Ex. F, Lyons Decl. ¶ 6.

The written reports required new software code to be written from scratch, which took months of work. *Id.* ¶ 10. While Synchrony's Senior Vice President in charge of the project predicted that his share of the project would require 400-650 hours, in fact he and his team spent approximately 1,800 hours on the project. *Id.* ¶¶ 4, 10. The Vice President on his team spent 40-50% of his time for four months working on the written reports, and his most senior analyst spent nearly 100% of her time on the project for seven months, delaying projects for Synchrony's business. *Id.* ¶ 10. The data requests were so large that they had to be conducted with great care so as to avoid overloading business critical systems. *Id.* ¶ 6.

More than 2,500 hours were spent by more than 200 Synchrony employees in connection with the First CID's document requests, interrogatories, and written reports, and for the entire response to the First CID, more than 3,000 outside counsel hours were expended. Ex. G, Martini Decl. ¶¶ 2, 3, 5.

The Second CID and the Modification Letter

At no time during Synchrony's massive effort to respond to the First CID did the Enforcement Staff provide any information about what Synchrony was alleged to have done wrong or explain why such heavy burdens were required for the as-yet unexplained investigation. Instead, on August 29, 2018, they issued the Second CID.

Nothing in the Second CID's statutorily-required Notification of Purpose explains or justifies its requests. As explained to Synchrony by the Enforcement Staff, the investigation appears to be premised on the following flawed premise:

- Some consumers complain about deferred interest promotions (this is actually an exceptionally small number, as the BCFP is aware from data it has already collected, *supra* at 2-3). Some of those complaints may be about alleged oral statements at point of sale. Such alleged oral statements would have been made by parties other than Synchrony and, if they did incorrectly describe the product, would have been contradicted by clear written terms and conditions and the requisite clear disclosures on every billing statement.

- But because some such complaints exist, the BCFP can compel Synchrony to expend enormous resources to collect *all* expressions of dissatisfaction possibly relating to deferred interest promotions, and to create a database of *all* deferred interest purchases for *all* customers, even if the consumer paid off the promotion without any interest, never complained about oral statements at the point of sale, or even if the consumer bought the product online (with no human interaction) and was provided disclosures about deferred interest that the BCFP concedes were sufficient.

- Somehow, from this mass of data, and without any specific allegations of oral statements made with respect to any transaction, the BCFP appears to be attempting to reverse engineer a set of consumers whom it will claim were misled and harmed.

The Enforcement Staff has identified nothing in the policies, procedures, disclosures, training, or anything else created by Synchrony that might have contributed to any alleged oral misstatement by a retail employee. Nevertheless, if they believe there is a material issue with oral misstatements at the point of sale—a belief that also is not supported by the BCFP's or Synchrony's complaint data—the scope of the Second CID is bizarre. The information the Second CID seeks—even after the Modification Letter—will impose enormous burdens on Synchrony, but will do nothing to identify whether a misstatement occurred or its impact.

For example, the Second CID originally demanded production of documents relating to expressions of dissatisfaction assigned ten specific reason codes (Document Requests 1 and 2), including for programs that never offered deferred interest promotions, consumers who never utilized deferred interest promotions, and a sales platform which had been excluded from the First CID. Synchrony's response would have required the collection of documents concerning approximately 750,000 consumer communications, which could only be retrieved through a painstaking manual process or through attempting to create new software functionality across multiple unrelated systems—a time-consuming and expensive process that has uncertain prospects of success. Ex. B, Beaman Decl. ¶ 9; Ex. C, Castle Decl. ¶¶ 5, 8, 9.

In the Modification Letter, the BCFP limited its requests to expressions of dissatisfaction made concerning accounts in the Retail Card and Payment Solutions platforms by consumers who had utilized a deferred interest promotion within two years of the communication. Modification Letter, at 3. Synchrony estimates the requests now seek documents concerning 75,000 consumer communications—a collection which remains greater than any collection Synchrony has ever had to complete for litigation, investigation, or supervisory purposes. Ex. B,

Beaman Decl. ¶¶ 9, 10; Ex. E, Koehler Decl. ¶ 2. Even as modified, though, the requests are just an unsupported fishing expedition, in which the BCFP casts a wide net for some evidence of the alleged oral misrepresentations that the Enforcement Staff has assumed exist in numbers to justify this investigation. The modifications do nothing to narrowly tailor these requests to accounts with even suspected oral misrepresentations.

The Second CID also demands the creation of four additional written reports. Three of the reports concern transaction-level data. In particular, the Second CID originally demanded that Synchrony create databases that include *every* billing statement for a five-year period of every consumer that had a deferred interest promotion at any point during that period, whether or not the consumer complained, the consumer paid off the promotion, or the consumer paid anything at all (*see* Second CID, Written Reports 1(e) and 2(e)); and *every* consumer who sought a waiver of deferred interest at two of the largest retailers in the world, regardless of reason and whether or not the consumer received the waiver and never paid any interest (*see id.*, Written Report 4(e)). These reports would have imposed an enormous burden on Synchrony. Creating the reports likely would have entailed the collection and manipulation of 6-8 terabytes of data over a period of approximately twelve months. Ex. F, Lyons Decl. ¶¶ 15, 29.

In the Modification Letter, the BCFP stated that it would reduce Synchrony's burden of compliance by limiting these written reports to a sample of approximately 5% of the accounts original requested. Modification Letter, at 8. But, just as in the case of the complaints-related requests, the BCFP's modifications do nothing to actually target the requests towards accounts the Enforcement Staff reasonably suspects could have had oral misrepresentations at the point of sale. Instead, the BCFP's modifications simply reduce the overall number of accounts for which it seeks 5-years' worth of billing statement data. Moreover, in practical effect, BCFP's modifications are illusory. The Modification Letter's "sampling" methodology requires that Synchrony first determine the full universe of accounts that were responsive to the original requests, then apply a process to select only certain accounts. Ex. F, Lyons Decl. ¶¶ 16-19. Therefore, the "sampling" modification actually increases the burden the requests impose on Synchrony. *Id.* ¶ 16. Responding to these requests will require months of computer programming and effort by Synchrony.

The Bureau's demand for Written Report 3 about deferred interest waivers for one online retailer and one large brick-and-mortar retailer is even more of a stretch. At the meet-and-confer, Enforcement Staff explained that they seek this information to compare waivers from a brick-and-mortar retailer with waivers from an online retailer, presumably in order to make the leap that somehow misinformation was provided in the first retailer's stores if online consumers requested fewer waivers.[22] Synchrony, in turn, explained to the Enforcement Staff that its Workstation customer service interface system does not record requested waivers that were not granted, and did not maintain notes of granted waivers in an easily-searchable format. In the Modification Letter, the BCFP demanded that Synchrony nonetheless identify accounts based on notes from Workstation that exist only when waivers have been granted. Putting Synchrony to the substantial burden of creating this modified report is pointless. Every account identified on

[22] It is not clear how the BCFP intends to normalize the behavior of cardholders within different portfolios. Of the material reasons for differentiation between cardholder behavior across portfolios (e.g., why cardholders for Retailer A behave different from those for Retailer B), none would involve hypothetical store clerk discussions about deferred interest financing.

the report will be one for which the consumer paid no deferred interest, and thus could not have been harmed from any alleged oral misrepresentation at the point of sale.

In sum, the Second CID's original requests were grossly overbroad and not tethered to the investigation of alleged oral misrepresentations at the point of sale the BCFP claims it is investigating. The BCFP's Modification Letter does not change that situation. For the reasons described in more detail below and in the attached Declarations, the Second CID should be set aside in its entirety.

ARGUMENT

The CID must be set aside for numerous reasons. *First*, the CID's Notification of Purpose violates the Consumer Financial Protection Act ("CFPA"). The CID's vague suggestion that the BCFP is investigating "the marketing and servicing of deferred-interest credit cards" under one or more of the consumer protection laws of the United States is plainly insufficient to apprise Synchrony of the specific "nature of the conduct constituting the alleged violation" or of "the provision of law applicable to such violation." 12 U.S.C. § 5562(c)(2). Though the Bureau denied Synchrony's petition to set aside the First CID on similar grounds, the Fifth Circuit has since rejected the Bureau's position and made clear that a Notification like that issued here is unlawful. Moreover, as the Second CID is a follow-up to the First CID, the Second CID's purpose should be stated with greater specificity and explain the issues that necessitate further requests.

Second, the vast majority of the CID appears unconnected to any possible violation of law that the BCFP could be investigating. This CID, like the first one, is little more than an effort to "cast about for potential wrongdoing." *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Schs.* ("*ACICS*"), 854 F.3d 683, 689 (D.C. Cir. 2017) (quotation marks omitted). To the extent the BCFP was even properly established in compliance with the U.S. Constitution (which it was not),[23] that type of regulatory overreach is both unlawful and at odds with the BCFP's purpose and role. Indeed, this is precisely the sort of regulatory overreach that Acting Director Mulvaney has criticized. As he has explained, the BCFP's mission is decidedly not to search for *legal* products to regulate by enforcement. In his words, the BCFP has "committed to fulfill the Bureau's statutory responsibilities, but go no further."[24] The Second CID violates that "ironclad promise."[25] It concerns (1) deferred interest promotions that are legal and (2) payment allocations that are specifically covered by the BCFP's own Regulation Z. It seeks data and information pertaining to transactions that predate the relevant statute of limitations and therefore could not possibly be reasonably relevant to a legitimate

[23] As Judge Preska ruled a few months ago, the CFPB itself is unconstitutional, which renders the CID invalid. *See Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, No. 17-CV-890 (LAP), 2018 WL 3094916, at *36 (S.D.N.Y. June 21, 2018) (holding that the "CFPB lacks authority to bring this enforcement action because its composition violates the Constitution's separation of powers" (internal quotation marks omitted)); *see also PHH Corp. v. CFPB*, 881 F.3d 75, 164-202 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). For this additional reason, the CID should be set aside.

[24] *Bureau of Consumer Financial Protection Strategic Plan FY2018-FY2022*, Mick Mulvaney, Message from the Acting Director, at 2 (2018), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_strategic-plan_fy2018-fy2022.pdf.

[25] *Id.*

enforcement purpose. For all of these reasons, the Second CID appears to be the exact type of dubious regulation by enforcement that Acting Director Mulvaney has warned against.

Third, the enormous burden of complying with the Second CID is excessive and an independent basis for setting it aside. The Second CID is particularly unnecessary given (1) the vast amounts of information already provided to the BCFP (see above) and (2) Synchrony's demonstrated record of compliance with the law as evidenced by the BCFP's examinations concerning deferred interest promotions. Despite Synchrony's compliance with deferred interest requirements and the massive amounts of information Synchrony has already produced in response to the First CID, the BCFP continues to push Synchrony for still more documents, information, and reports. This serves only to increase the costs of offering customer-friendly initiatives to consumers.

The BCFP should close its investigation of Synchrony; address any remaining policy concerns through revisions to the existing regulations; and address any potential concerns about Synchrony's operations through ordinary, supervisory channels. Synchrony remains willing to engage in discussions about potential changes to the rules surrounding deferred interest promotions, applicable to all providers of such products.

I. The Second CID should be set aside because it fails to comply with the notification requirements contained in 12 U.S.C. § 5562(c)(2).

The Consumer Financial Protection Act requires that a CID "shall state [1] the nature of the conduct constituting the alleged violation which is under investigation and [2] the provision of law applicable to such violation." 12 U.S.C. § 5562(c)(2). The CID's Notification of Purpose does not comply with these two statutory requirements, and thus it must be set aside.

Synchrony's prior Petition to Set Aside or Modify the 2017 CID extensively discussed the D.C. Circuit's 2017 opinion in *ACICS*. In that case, the court found that a CID issued by the BCFP was invalid because it failed to "ensure[] that the recipient of a CID [was] provided with fair notice as to the nature of the Bureau's investigation." 854 F.3d at 690. The court held that the CID's description of the conduct being investigated by BCFP—"unlawful acts and practices in connection with accrediting for-profit colleges"—was insufficiently specific because it used "broad and non-specific term[s]" and essentially gave "no description whatsoever of the conduct the CFPB is interested in investigating." *Id.* at 690-91. The D.C. Circuit also found that the CID at issue in *ACICS* failed to comply with the statutory requirement to describe "the provision of law applicable to such violation" because it referenced only the general consumer protection statutes at 12 U.S.C. §§ 5531 and 5536 and "any other Federal consumer financial protection law." *Id.* at 691 (quotation marks omitted).

In denying Synchrony's prior Petition to Set Aside, the former Director asserted that the Notification of Purpose was sufficient because it specified that the "unlawful acts and practices" related to "the marketing and servicing of deferred-interest credit cards." 2017 Decision & Order at 2 (quotation marks omitted). But even if *ACICS* permitted that level of generality (and it did not), the Bureau cannot defend it any longer. Last month, the Fifth Circuit held yet again that the Notification of Purpose in one of the BCFP's CIDs failed to comply with the statutory requirements at 12 U.S.C. § 5562(c)(2). *See Consumer Fin. Prot. Bureau v. Source for Pub.*

Data, L.P., No. 17-10732, __ F.3d __, 2018 WL 4258966, at *2 (5th Cir. Sept. 6, 2018) ("*Public Data*"). The Notification of Purpose in that case stated that the purpose of the BCFP's investigation

> is to determine whether consumer reporting agencies, persons using consumer reports, or other persons have engaged or are engaging in unlawful acts and practices in connection with the provision or use of public records information in violation of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681, *et. seq.*, Regulation V, 12 C.F.R. Part 1022, 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.

Id. at *1. In finding this Notification deficient, the Fifth Circuit noted that the phrase "unlawful acts and practices in connection with the provision or use of public records information" did not adequately identify what conduct constituted the alleged violation because "[p]roviding and using public records are not violations of federal law." *Id*. at *2 (internal quotation marks omitted). The court also held that the Notification's references to broad provisions of law failed to comply with the CFPA's requirement that the CID specifically state the law applicable to the violation. *Id*. Although the Notification referred to the Fair Credit Reporting Act, the Court characterized that statute as "an expansive law" and faulted the agency for its lack of specificity.[26] *Id.*

As in *Public Data* and *ACICS*, the Notification in the Second CID fails to give Synchrony the notice required by law. As to the requirement that the BCFP "state the nature of the conduct constituting the alleged violation," 12 U.S.C. § 5562(c)(2), the CID's suggestion that the agency is investigating "unlawful acts and practices in connection with the marketing and servicing of deferred-interest credit cards" is plainly insufficient. *Public Data*, 2018 WL 4258966, at *2 (quotation marks omitted). Like "[p]roviding and using public records," *id.*, the "marketing and servicing of deferred-interest credit cards" are not violations of federal law. A Notification that references only lawful activity is insufficient to apprise Synchrony of the nature of the BCFP's investigation. Moreover, the Second CID's suggestion that the BCFP is investigating "the marketing and servicing of deferred-interest credit cards" (Second CID, at 1) uses same type of "broad and non-specific" language that was found insufficient in *ACICS*. *See* 854 F.3d at 690. (Synchrony would also note that it is unaware of a "deferred-interest credit card"—deferred interest is offered as a promotion on certain credit cards.)

As to the requirement that the agency specify the "provision of law applicable to such violation," 12 U.S.C. § 5562(c)(2), the Notification in the Second CID is again deficient. It references Sections 5531 and 5536, plus unspecified portions of TILA and Regulation Z, plus unidentified agency directives that may be contained in "*any* prior orders issued" by the BCFP

[26] By contrast, earlier this year the Third Circuit affirmed the sufficiency of a Notification of Purpose that offered greater specifics. *See Consumer Fin. Prot. Bureau v. Heartland Campus Solutions, ECSI*, No. 18-1516, __ F. App'x __, 2018 WL 3831444, at *1 (3d Cir. Aug. 13, 2018). There, the Notification provided greater detail, both about the relevant actors and activities under investigation. *Id.* at *4. But that Notification may not have survived under the standards applied by the D.C. and Fifth Circuits.

(emphasis added). This invocation of numerous sources of law without any further detail is closely analogous to problematic "catch-all" that the D.C. Circuit found improper in *ACICS*. Although the Second CID does reference TILA and Regulation Z, those are both relatively "expansive" sources of law. *Public Data*, 2018 WL 4258966, at *2. Thus, the Notification also suffers from the same problem that led to the invalidation of the Notification at issue in *Public Data*, which merely gestured at various statutes without providing further detail about the purported violation.

The deficiencies in the Notification are not simply a technicality that can be overlooked or dismissed. "There are consequences to the absurdity of giving a notification that notifies of no purpose whatsoever." *Public Data*, 2018 WL 4258966, at *3 (internal quotation marks omitted). Such a Notification prevents a court from exercising meaningful judicial review and prevents regulated parties from challenging the scope and propriety of the agency's investigation. Such notifications also place unwarranted burdens on companies such as Synchrony, who are forced to spend huge amounts of time and money sifting through information without having any understanding of what the agency is concerned about or what specifically the agency is looking for. Ultimately, the effects of vague Notifications like the one at issue here are to delay the resolution of investigations, waste time and resources, and impede meaningful cooperation between regulators and industry. The failure to provide adequate notice in this case is particularly egregious because the BCFP has already sought and received vast amounts of information under the First CID. Moreover, Synchrony raised this issue with Enforcement Staff during the meet and confer process and in Synchrony's September 28, 2018 modification request letter. But the Modification Letter failed to revise the Notification of Purpose or provide any additional information concerning the purpose of the investigation. The Enforcement Staff's continuing inability to point to a specific violation underscores the fact that the agency is merely engaged in a fishing expedition at a huge expense to Synchrony.

It is no answer to suggest that the Enforcement Staff has orally relayed vague information about what the agency is interested in investigating. First, the relevant statutes and regulations require the agency to specifically apprise regulated parties of the conduct and laws at issue in investigations *in the Notification itself*. *See* 12 U.S.C. § 5562(c)(2) (requiring the nature of the conduct and relevant law to be stated in the civil investigative demand itself); *see also* 12 C.F.R. § 1080.5. Second, the Staff's oral representations have provided little more detail than is available from the face of the Notification. According to statements made by Enforcement Staff, the BCFP is concerned about statements made at the point of sale by parties other than Synchrony. What those statements are and by whom they may have been made remain unexplained. Enforcement Staff have pointed generally to complaints made to Synchrony, but that tells Synchrony nothing other than, like any company, it receives complaints and takes action to respond them. It says nothing about what alleged misrepresentations have been made—even in general terms. Thus, even if such oral statements could cure that inadequate Notification of Purpose, they do not.

For these reasons, the CID is invalid under 12 U.S.C. § 5562(c)(2) and must be set aside.

II. The Second CID should be set aside in its entirety because it seeks irrelevant information.

The Second CID exceeds the scope of the BCFP's powers unless the agency can show that the information sought in the CID is "reasonably relevant" to an investigation that has some chance of withstanding judicial scrutiny. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). Although agencies often have significant latitude in seeking information from regulated parties, that authority is not limitless. *ACICS*, 854 F.3d at 689.

The Bureau cited *ACICS* in its order denying Synchrony's Petition regarding the First CID, *see* 2017 Decision & Order at 3, but it ignored the D.C. Circuit's command that "there are real limits on any agency's subpoena power." *ACICS*, 854 F.3d at 689. Specifically, agencies are "not afforded 'unfettered authority to cast about for potential wrongdoing.'" *Id.* (citing *In re Sealed Case (Admin. Subpoena)*, 42 F.3d 1412, 1418 (D.C. Cir. 1994)). And "courts will not enforce a CID when the investigation's subject matter is outside the agency's jurisdiction. Nor will they enforce a demand "where there is 'too much indefiniteness or breadth in the items requested.'" *Id.* (citations omitted). In short, an agency is not permitted to abuse its investigative authority in pursuit of unreasonable fishing expeditions, and if the agency does not restrain itself, the courts will restrain the agency.

A. The Second CID lacks valid factual or legal foundations.

Even if the Second CID adequately described the conduct and provisions of law at issue, the CID's requests seeks information that lacks reasonable relevance to a legitimate investigative purpose because the CID is premised on several unfounded factual and legal assumptions.

First, the Bureau has defended the Second CID based on its ***assumption*** that oral misrepresentations not only exist but are sufficiently numerous and harmful to justify this massive endeavor. And taking that assumption as fact, the CID seeks mountains of data and information. In starting from that wholly unsupported premise, the Second CID is not reasonable, and thus exceeds the agency's authority. *See Morton Salt*, 338 U.S. at 652-53. Moreover, the information sought is not tailored to uncover information related to purported oral misrepresentations. As explained in more detail in Section III below, the Second CID seeks irrelevant information by requesting data and reports that have nothing to do with oral misrepresentations at the point of sale. Indeed, the Enforcement Staff's representations appear to confirm that they are impermissibly "cast[ing] about for potential wrongdoing," *ACICS*, 854 F.3d at 689 (quotation marks omitted), rather than undertaking a focused investigation that is within the BCFP's authority.

Second, to the extent the Second CID is premised on a legal theory relating to *Synchrony's* responsibilities at the point of sale, the BCFP has yet to articulate that theory. For starters, in nearly all cases where a retail employee may be involved in a credit transaction, Synchrony's only interaction with the consumer at the point of sale is through its unquestionably accurate written disclosures. The Bureau has not identified as incorrect or misleading *any* of Synchrony's disclosures or representations to consumers, all of which are regularly reviewed and monitored by the Bureau for compliance with Regulation Z, and were produced again in

response to the First CID. *See ACICS*, 854 F.3d at 689; *Public Data*, 2018 WL 4258966, at *3 ("[W]e cannot evaluate whether the CFPB requests information that is reasonably relevant to the CFPB's inquiry because we do not know what the inquiry actually is.").

If the BCFP's intent is to pursue an enforcement action even though Synchrony is compliant with federal law governing deferred interest promotions, such an enforcement action would be ultra vires. The BCFP cannot, through an enforcement action, seek to alter the relevant regulations (or how they are interpreted). Nor can the BCFP take the position that notwithstanding Synchrony's compliance with the regulations, deferred interest promotions somehow violate Dodd-Frank. Subjecting Synchrony to unexpected liability in this manner would be blatantly unfair and violate bedrock principles of administrative law, as well as Synchrony's due process rights. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158-59 (2012) ("It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.").

When Synchrony made similar arguments about the agency's inability to regulate by enforcement in response to the First CID, the Bureau did not dispute that it lacked the authority to do so. The agency just asserted that Synchrony was speculating and could not prove that was the Bureau's goal. 2017 Decision & Order at 3. Now, however, the Bureau has had more than a year to analyze mountains of data and information and has yet to articulate any wrongdoing by Synchrony. If the Bureau's goal were to conduct a legitimate investigation, presumably by this point it should be able to specify what Synchrony has done wrong. Its silence speaks volumes. So does the fact that the Second CID is aimed at data and information having nothing to do with what the Enforcement Staff has said it is interested in, *i.e.*, oral misrepresentations at the point of sale. Synchrony's objection that the Second CID is impermissible regulation by enforcement is based on more than speculation. The Second CID itself, along with the Bureau's failure to make use of the substantial data it has already collected, demonstrate that the BCFP's real goal is to impose new costs and requirements on deferred interest promotions using the blunt instrument of an enforcement investigation.

B. The Second CID seeks documents that are not reasonably relevant because they are outside the statute of limitations period.

In addition, the requests for information in the Second CID are unlawful and unreasonably broad because they purport to seek documents from outside the three-year limitations period in 12 U.S.C. § 5564(g)(1), and because they appear designed to aid the BCFP in investigating purported violations of law that predate the limitations period.

The Second CID states that, "[u]nless otherwise directed, the applicable period for the request [for responsive materials] is from January 1, 2015 until the date of this CID." Second CID, at 7. Interrogatory Requests 1 and 3(b) seek information about employment records and trainings dating back to June *2014*. The first request for a written report seeks information about purchases dating back to April *2013*, the second such request seeks information about complaints dating back to June *2013*, and the third and fourth such requests seek information about

purchases dating back to January *2014*. The documents called for by these requests—some of which are now five and a half years old—long predate the statutory limitations period. The requests are therefore improper for the following three reasons.

First, the relevant statute states that the Bureau cannot pursue violations of law older than three years. Specifically, "[e]xcept as otherwise permitted by law or equity, 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." 12 U.S.C. § 5564(g)(1). This means that BCFP is limited to pursuit of violations within three years unless the BCFP can show that a reasonably diligent BCFP could not have uncovered such conduct. Indeed, in *Gabelli v. SEC*, 568 U.S. 442 (2013), the Supreme Court held that a discovery rule does not extend to government enforcement actions because the government, unlike a private party, is in the business of rooting out alleged misconduct and has many tools at its disposal to do so. The BCFP can hardly claim that a three-year statute of limitations is a hardship, given that a limitations period of that length (or shorter) is common and applied to all manner of government enforcement claims. *See, e.g.*, 12 U.S.C. § 2614 (three-year statute of limitations for RESPA violations); 29 U.S.C. § 255 (three-year statute of limitations for willful violations of the Fair Labor Standards Act). A contrary rule would create an effectively infinite statute of limitations for the government—something that cannot be squared with the statute or the Supreme Court's logic in *Gabelli*.

Second, even if a discovery rule applied here, the BCFP has long possessed the information it needs to discover any violation. In addition to regular supervision by the BCFP, Synchrony has *already* produced to the Bureau data, documents, and other information about deferred interest promotions, including consumer complaints and complaint data. Assuming the Bureau did not request this data for the sole purpose of harassment, if there was something to discover, it should have been discovered long before now. The BCFP has claimed in the past that if a violation has not yet been discovered, then the statute of limitations has not yet begun to run. 2017 Decision & Order at 5. But if a violation has not yet been discovered, given all of the information the BCFP already possesses, it is unreasonable to expect that one will be discovered now, much less one dating back well before the three-year statutory limit.

Third, the BCFP has previously indicated that it believes it is entitled to obtain information from outside the limitations period so long as "such information is relevant to conduct for which liability can be lawfully imposed." *In re Nat'l Asset Advisors, LLC & Nat'l Asset Mortg. LLC*, 2016-MISC-National Asset Advisors and National Asset Mortgage-0001, Decision and Order on Petition by Nat'l Asset Advisors, LLC & Nat'l Asset Mortg. LLC to Set Aside or Modify Civil Investigative Demand, at 4 (C.F.P.B. Nov. 1, 2016) (quotation marks omitted); 2017 Decision & Order at 4-5. Even if the BCFP claims similar latitude here, BCFP must demonstrate some particularized reason for believing that those documents are relevant to an investigation of unlawful conduct *within* the limitations period. It cannot make such an argument with respect to all data and transactions that occurred prior to the limitations period; such data will show what customers bought products and when they paid, but will not provide any insight into whether any actionable oral misrepresentation was made or anything about the policies and procedures of Synchrony relevant to conduct within the limitations period. If the BCFP reasonably believes that some specific category of documents from outside the limitations period might be relevant to claims that are not statutorily barred, Synchrony would be open to working with the agency to collect, produce, and analyze those documents. But the agency can

have no reasonable basis for believing that, as to *all* of its requests for information, stale documents are relevant.

For these reasons, the BCFP should be barred from seeking documents and information prior to three years before the date of the Second CID. Alternatively, the interrogatories, document requests, and requests for written reports should be limited to data on transactions that occurred within three years prior to the date of the Second CID.

III. Complying with the Second CID would impose an excessive burden on Synchrony.

The Second CID should be set aside or modified if its requests are "unduly burdensome or unreasonably broad," *see ACICS*, 854 F.3d at 689, or if responding would "unduly disrupt or seriously hinder" Synchrony's operations, *see FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977). The BCFP's Policies and Procedures direct that "[a] CID should be narrowly tailored to solicit the information necessary for the investigation." CFPB, Office of Enforcement, *Policies and Procedures Manual*, at 58 (May 2017).[27] When evaluating whether discovery meets this standard, courts apply a balancing test to limit discovery "if the burden outweighs its likely benefit." *Prasad v. George Washington Univ.*, 323 F.R.D. 88, 91 (D.D.C. 2017) (internal quotation marks omitted).[28] On one side of the scale are the need for and relevance of the information; on the other side are the burden of production, whether the information could be obtained in another manner, and the disruption that providing the discovery will cause. *See Sourgoutsis v. U.S. Capitol Police*, 323 F.R.D. 100, 115 (D.D.C. 2017) (citing *Watts v. S.E.C.*, 482 F.3d 501, 509 (D.C. Cir. 2007)).

It is incumbent upon the Director to apply these balancing principles here and give meaning to the BCFP's requirements that CIDs should not be "overly burdensome" and should be "narrowly tailored." The Second CID, as originally drafted, imposed enormous burdens upon Synchrony. The Modification Letter did not sufficiently reduce those burdens. It applied modifications to reduce the gross volume of information demanded for production while ignoring the complicated and novel processes required to retrieve and analyze that information in the way the BCFP demands. Indeed, in its decades of business, Synchrony has never produced information in the manner and scope demanded by the BCFP for any state or federal investigation, supervisory exam, or private litigation. Ex. B, Beaman Decl. ¶ 10; Ex. E, Koehler Decl. ¶ 2.

When balanced against this burden, the BCFP's "need" for the information sought does not even move the scale. Importantly, any evaluation of whether ***more*** information from Synchrony is "necessary" must consider that the BCFP already has voluminous information about Synchrony's deferred interest promotions. The BCFP has over 7 terabytes of account-level and aggregate data and analyses from its 2015 and 2017 Research and Markets demands, Synchrony presentations to the BCFP, and the documents, interrogatory responses, and written

[27] https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201710_cfpb_enforcement-policies-and-procedures-memo_version-3.0.pdf.

[28] *See also Sourgoutsis v. U.S. Capitol Police*, 323 F.R.D. 100, 115 (D.D.C. 2017) (quashing subpoena after employing "a balancing test, weighing the burdensomeness to the moving party against the deponent's need for, and the relevance of, the information being sought" (internal quotation marks omitted)).

reports produced in response to the First CID. Ex. F, Lyons Decl. ¶¶ 6, 10, 29.[29] With this wealth of information available for review and analysis, the BCFP does not need yet again to broadly canvass Synchrony's deferred interest promotions and require that Synchrony review and analyze 6-8 more terabytes of data. *See id.* ¶ 29. And to the extent that the BCFP is investigating potential oral misrepresentations made at the point of sale, the Second CID should be targeted to information relevant to determine if oral misrepresentations were made and whether consumers were harmed as a result. The Second CID is not so targeted.

Synchrony's burden objections were discussed with Enforcement Staff at multiple meet and confer sessions, and are detailed at length in Synchrony's September 28, 2018 modification letter and Synchrony's Declarations. Below we highlight in particular the unreasonable burden associated with certain overbroad requests. In this case, applying the balancing test leads to only one result: The burden the Second CID imposes upon Synchrony far outweighs the "need" or "likely benefit" of the information to the BCFP's investigation. The petition should be set aside. If it is not, however, the petition should be modified. A full list of Synchrony's modification requests is attached hereto as Exhibit A.

A. Requests Concerning Escalated Complaints and Consumer Expressions of Dissatisfaction (Document Requests 1 and 2).

Document Requests 1 and 2 call for the production of documents and information relating to certain consumer interactions. In particular:

- Document Request 1 requests production of ***every*** consumer "Complaint" between January 1, 2015 and August 29, 2018 for which Synchrony personnel assigned one of 10 reason codes. For each such consumer interaction, the BCFP demands that Synchrony locate and produce the original call recording, chat transcript, email, or letter, along with any contemporaneous internal notes made by Synchrony customer service representatives.[30] The Modification Letter limited this request to Complaints made by a consumer within two years after a purchase financed using a Deferred Interest Promotion.[31] Modification Letter, at 3.

- Document Request 2 seeks "[a]ll written communications" with various Synchrony partners "regarding any Complaint produced in response to Document Request #1." The Modification Letter limited the request to communications that include one or more members of a Synchrony client team for thirteen retailers (the "13 Identified

[29] As noted above, Synchrony's response to the First CID resulted in the production of over 13,000 documents and required the participation of hundreds of Synchrony employees and cost millions in professional fees. The massive effort required to prepare the First CID's written reports seriously hindered and disrupted Synchrony's business operations. (*See supra* at 2.)

[30] As Synchrony explained to the BCFP with respect to the First CID, in July 2015 Synchrony started capturing and tracking all consumer "expressions of dissatisfaction" made through any channel—a broader population than what Synchrony had previously tracked as escalated and non-escalated complaints. Ex. B, Beaman Decl. ¶ 6. If an employee categorizes an interaction as an expression of dissatisfaction, he or she assigns a high-level reason code that describes the general topic of the communication. *Id.* The Second CID broadly defines "Complaints" to include expressions of dissatisfaction (of which escalated complaints is a subset). *See* Second CID, Definition E.

[31] In the Modification Letter, the BCFP removed CareCredit and programs that have never offered Deferred Interest Promotions from scope.

Retailers") for (1) any escalated complaints and (2) any non-escalated complaints submitted in January 2016, January 2017, and January 2018. Modification letter, at 4.

Synchrony's initial analysis indicated that, as originally propounded, Document Requests 1 and 2 called for the production of documents related to over 750,000 communications. Ex. B, Beaman Decl. ¶ 9. The modified requests demand that, for each of ***approximately 75,000*** consumer communications, Synchrony produce three things: the communication, the separately-stored servicing notes, and any related communications between the retailer and the Synchrony client team in certain months. *See* Second CID Document Request 2; Ex. B, Beaman Decl. ¶ 9; Ex. E, Koehler Decl. ¶ 3-12. The volume of any responsive retailer communications is currently unknown. But by their terms, these requests call for the production of over 150,000 documents.

The BCFP's broad Complaints-related demands do not withstand scrutiny.

First, there is no reasonable justification for a broad review of Complaints-related documents by the Enforcement Staff. The BCFP's ***presumption*** that oral misrepresentations have occurred at the retailer point of sale in a material number of transactions and that consumers relied upon those misrepresentations to their detriment is contradicted by all available evidence:

- The data indicate that Complaints about deferred interest promotions are rare, and a comparison of Synchrony's consumer payoff rates to the industry's rates indicates that Synchrony consumers have a better understanding of deferred interest promotions than other consumers. (*See supra* at 2-3.)

- Consumers receive Synchrony's written disclosures and billing statements explaining the promotion. BCFP Supervisory Staff has determined Synchrony's disclosures and billing statements are in full compliance with Regulation Z. Indeed, notwithstanding that finding, Synchrony complied with the First CID's demand to produce a wide array of disclosures and billing statements to the Enforcement Staff, which presumably reviewed them and also have not raised any issues.[32]

- Enforcement Staff have not raised any issues with respect to Synchrony's training and marketing materials, which also were produced in response to the First CID.

- Synchrony's customer service practices mitigate any potential point of sale confusion by mandating that Synchrony waive deferred interest for any consumer raising an issue who pays the promotion balance within 30 days of promotion expiration.

In other words, the BCFP's First CID did not uncover evidence supporting the BCFP's hypothesis that there was a systemic issue concerning misrepresentations at the point of sale. Rather than accept the evidence it procured, however, the BCFP issued the Second CID to try to find something in the Complaints that could justify enforcement action against Synchrony. In fact, the Second CID's original Complaints-related requests were so overbroad they included,

[32] The Enforcement Staff's actions with respect to deferred interest promotions reflect the perspective that the BCFP's supervisory and regulatory divisions have failed to construct a sufficient regulatory scheme. That may be Enforcement Staff's view, but that is not a legitimate basis upon which to investigate Synchrony. As Synchrony has said many times, it is happy to engage with the Bureau to discuss industry-wide rulemaking efforts that could improve customer experiences going forward.

among other things, programs that never offered deferred interest promotions and consumers who never used them.

The BCFP will claim that the Modification Letter significantly narrowed the Complaints-related requests by reducing the number of responsive Complaints by approximately 90%. The fact that the modified requests demand comparatively fewer documents does not mean the requests are narrowly tailored to target the discovery of potentially relevant evidence. They are not.

As modified, the BCFP's requests still are not targeted to reliably identify oral misrepresentations at the point of sale. The BCFP demands the Complaints to try to find unreliable hearsay reports of oral communications with the retailer that occurred up to two years after the point of sale interaction. Moreover, the modified requests still cover retailers that operate exclusively online, where there are no point of sale consumer interactions other than the written materials.[33] The requests also still ignore whether deferred interest was applied and thus include consumers who never incurred any deferred interest at all. Finally, the requests seek communications between Synchrony and the 13 Identified Retailers (including online retailers) regardless of whether the actual content of the Complaint concerned any alleged oral misrepresentation.

Second, the burden these broad requests impose on Synchrony is great. To respond, Synchrony will need to undertake a three-step process. Synchrony will need to (1) identify the individual accounts containing responsive expressions of dissatisfaction; (2) collect and review up to 150,000 related consumer communications and notes; and (3) conduct "needle in a haystack" ESI searches attempting to locate communications between Synchrony client teams and the 13 Identified Retailers. Each of these steps is complicated, time consuming, and expensive.

Identifying the Accounts. Synchrony estimates that it will take weeks of work for its analytics team to identify the accounts with responsive Complaints within two years of a promotional purchase. *See* Ex. F, Lyons Decl. ¶ 11. This is a well-informed estimate, because the analysis will be similar to the work the team already completed to respond to Written Report 4 of the First CID. *Id.*

In First CID Written Report 4, Synchrony identified 44,000 expressions of dissatisfaction made within 2 years of a promotional purchase in programs that offered deferred interest promotions between 2013 and 2016. *See* Synchrony Response to First CID Written Report 4. The BCFP previously recognized the scope of this work, and set the due date for First CID Written Report 4 at 10 weeks after the decision on Synchrony's petition to set aside the First CID.

To respond to the Second CID, however, Synchrony cannot just use the work previously done to prepare First CID Written Report 4. That is because the Second CID requires that Synchrony identify responsive Complaints from a different population—namely, Complaints that occurred concerning promotional purchases made during a different time period (January 1, 2015 to August 29, 2018). Accordingly, the BCFP now demands that Synchrony effectively re-do the

[33] If Document Request 1 were further limited to just the ten specific retailers identified in the Second CID that have brick and mortar locations, it is estimated that the number of responsive Complaints would decrease to approximately 45,000. Ex. B, Beaman Decl. ¶ 9.

work it did to prepare First Written Report 4, while giving Synchrony far less time to complete it. *See* Modification Letter, at 9 (setting 13-week deadline, in which Synchrony must complete the work that took 10 weeks for the First CID, leaving only 3 weeks to produce over 100,000 documents).

Finding and Producing the Consumer Communications and Servicing Notes. After Synchrony identifies the individual accounts containing expressions of dissatisfaction responsive to the Second CID, the bulk of the burden associated with responding to Document Request 1 will still remain. Synchrony will need to locate the original call recordings, chats, emails, or letters, and identify the relevant customer service notes. Synchrony estimates that, once the accounts are identified, it would take over 300 person-weeks to accomplish this project if the servicing notes were produced from Synchrony's system of record, and even longer to produce the notes from the Workstation system as BCFP demands. *See* Ex. D, Dunn Decl. ¶ 6; Ex. E, Koehler Decl. ¶¶ 13-16.[34]

Here, too, Synchrony's time estimates are well-informed based upon its prior experiences dealing with similar requests. Synchrony has a team that—on a much smaller scale—retrieves account records for litigation and investigations. Ex. D, Dunn Decl. ¶¶ 3-6; Ex. E, Koehler Decl. ¶¶ 1, 2. This process involves obtaining data from several different sources that are not linked electronically. Therefore, the in-place processes the team uses to find consumer communications and notes involve searches made on an account-by-account basis. Ex. C, Castle Decl. ¶ 3; Ex. D, Dunn Decl. ¶¶ 4, 6; Ex. E, Koehler Decl. ¶¶ 4, 8, 10.

For example, Synchrony believes approximately 90% of the potentially responsive communications are call recordings. Ex. B, Beaman Decl. ¶ 9.[35] Call recordings are stored in a relatively new system called VERINT. Ex. C, Castle Decl. ¶ 6. Using the in-place process, Synchrony will need to manually retrieve many thousands of call recordings from VERINT. Ex. E, Koehler Decl. ¶ 4. This process, which to date has always been sufficient to meet litigation and regulatory needs, is described further in the Declaration of Martha Koehler.

Retrieving the smaller portion of expressions of dissatisfaction that take the form of chat transcripts, emails, and paper mail will also be challenging. Chat transcripts and emails are stored in a system called Moxie, which has limited search functionality. Ex. D, Dunn Decl. ¶¶ 3-4. To find a chat using the in-place process, a Moxie team member uses a separate system to manually find the account and date of any chat coded as an expression of dissatisfaction, and then searches by client and date in Moxie. *Id.* ¶ 4. The team member then scrolls through all chats labeled with that client and date to find the chat with a particular consumer, and manually copies and pastes the text of the chat into a Word document so that it can be viewed outside of Moxie. *Id.* ¶¶ 4-5. The process is similar for secure mail. *Id.* ¶ 5. Yet another process is required for paper mail. Ex. E, Koehler Decl. ¶ 8.

[34] The Synchrony employee who oversees and has the most experience producing documents for litigation and investigations estimates that the average time overall to obtain documents for an account with an expression of dissatisfaction prior to mid-2016 is nine minutes and after mid-2016 is eight minutes. Ex. E, Koehler Decl. ¶¶ 14-16. Using the estimate of 75,000 communications there would be (35,000 x 9) + (40,000 x 8) = 635,000 minutes divided by 35 hour weeks (breaks are mandatory) would be 302 weeks of work.

[35] Call recordings from approximately mid-2016 forward are available on VERINT. Ex. C, Castle Dec. ¶ 6.

There also is an in-place process to obtain customer service notes. As Synchrony explained to the Enforcement Staff, customer service notes are created in its customer service interface, Workstation, and records of the notes are transferred to its system of record, First Data ("FD").[36] Synchrony has always retrieved records of customer service notes from FD. *Id.* ¶¶ 9-12. Nevertheless, the Modification Letter remarkably precludes Synchrony from using this process, and demands that Synchrony produce records of the notes directly from Workstation. ***At the time of this writing, Synchrony has not identified a process that would allow it to meet the BCFP's demand.***

In the meet-and-confer process, Enforcement Staff asked questions aimed at identifying whether Synchrony could replace its in-place, manual search and matching process with an electronic search solution. They asked whether Synchrony could establish new functionality in its systems, could extract years of data, or could buy hardware and set up a parallel system from which searches could be made. They demanded that Synchrony assess and make representations concerning the time and expense involved with developing this software functionality or shadow system. Completely scoping such a project would take months for just one of the several changes Enforcement Staff have demanded. Ex. C, Castle Decl. ¶¶ 7-8. For VERINT alone, the project would be unprecedented and not within Synchrony's control; it could take six months to create a solution. *Id.* The project would cost Synchrony at least hundreds of thousands of dollars of costs, in addition to the resources that Synchrony itself would have to apply. *Id.* ¶ 8.

Thus, whether Synchrony uses its in-place manual processes or accedes to Enforcement Staff's demands for it to build new software functionality and systems which have never been needed for business or supervisory purposes, Synchrony will not be able to retrieve the communications and notes demanded by Document Request 1 without incurring immense burdens over a lengthy time period. Synchrony cannot meet the deadline set by the Modification Letter and would need at least 7 months.

Searching for Sporadic, Complaint-Specific Communications with Retailers. After Synchrony identifies the individual Complaints responsive to Document Request 1, it also will need to implement an electronic search protocol to determine if there are communications with the 13 Identified Retailers concerning those Complaints responsive to Document Request 2. As Synchrony has explained, each retailer has an assigned client team that addresses issues relating to the resolution of individual Complaints with its retailer from time to time, on an as-needed basis. The size of the client teams varies from retailer to retailer and the composition of the teams (particularly at the non-management levels) fluctuates. Nevertheless, the BCFP demands that Synchrony locate responsive communications including anyone on the client team, and denied Synchrony's request to limit production to the current client team member primarily responsible for managing Synchrony's communications with the retailer. Modification Letter, at 4. Searching for possible responsive communications from every member of the 13 teams could involve dozens or hundreds of custodians, and Synchrony believes that, particularly for expressions of dissatisfaction that are not escalated complaints, the significant majority of documents will not be relevant to the investigation.

[36] More specifically, Workstation creates records of consumer interactions that are referred to as "notes." These notes are system generated, but a final note can be typed by the representatives into free text fields. Ex. E, Koehler Decl. ¶ 9. Depending upon the type of note, either the entire note is transferred from Workstation to FD, or a summary note is added to FD. *Id.*

Moreover, the other modifications to this request again focus upon superficially limiting the overall volume of documents responsive to a broad request, instead of substantively modifying the request so it targets specific, identified issues. The Modification Letter limits Document Request 2 to communications concerning (1) all escalated complaints, and (2) any "non-escalated complaints ***submitted*** in January 2016, January 2017, and January 2018." *Id.* (emphasis added). Notably, the BCFP does not limit the request to communications that occurred in January of each year. Expressions of dissatisfaction "submitted" in January could have been discussed several months after they were made, and communications about these consumer inquiries do not always include full account numbers that would be susceptible to electronic searching. Therefore, notwithstanding the Modification Letter, Synchrony likely would need to conduct a broad review of communications to locate any responsive documents.

Third, the BCFP did not reasonably limit the Second CID's burden upon Synchrony. Requiring the production of "expressions of dissatisfaction" captures far more than what would be commonly considered a complaint. To focus the requests upon complaints, Synchrony requested that Document Requests 1 and 2 be limited to escalated complaints. The BCFP rejected this reasonable proposal out of hand. For the 10 complaint drivers identified by the BCFP, Synchrony received approximately 1,200 escalated complaints for programs in the Retail Card and Payment Solutions platforms that offered deferred interest promotions (without limiting the population to complaints made within two years of the promotional purchase). Ex. B, Beaman Decl. ¶ 9. Synchrony maintains readily accessible files concerning escalated complaints, which would also contain records of any retailer communications responsive to Document Request 2. *Id.* ¶¶ 11-12. Producing these files would be manageable, and would give BCFP a reasonable basis upon which to assess whether the escalated complaints show any systemic issues concerning oral misrepresentations at the point of sale. Indeed, Synchrony and regulators—including the BCFP—regularly review escalated complaint files to identify and understand potential issues.

Alternatively, if the BCFP has a justified reason why the escalated complaint files are not sufficient here, then the BCFP should modify its requests to first require production of documents related to a manageable sample (such as 5%) of the responsive expressions of dissatisfaction. From that limited review, the BCFP could assess in the first instance whether there is a factual basis for its presumption that expressions of dissatisfaction exist in any material number concerning oral misrepresentations at the point of sale. To the extent any additional productions could be necessary after the review of such a sample, the BCFP could narrowly tailor those requests to particular reason codes or retailers indicated as potentially relevant by the initial review.

* * *

In sum, the BCFP's demands for a vast production of "Complaints" and related documents calls for the search for over 150,000 documents that will take many months. The BCFP has no legitimate need for yet another production broadly canvassing Synchrony's deferred interest promotions for potential issues, and the Second CID's blunderbuss Complaints requests are not narrowly tailored to identify consumers who may have been harmed by oral misrepresentations at the point of sale. When Synchrony's burden is measured against the BCFP's need, the scales weigh so heavily towards unreasonable burden that the Second CID should be set aside with respect to these requests. If production is going forward, the requests

should be limited and the deadlines adjusted as set forth on Exhibit A. Generally, Document Request 1 should be limited to escalated complaints. Document Request 2 should be held in abeyance until the BCFP reviews the documents produced in response to Document Request 1 and identifies any that are actually of interest, or should be limited to the Synchrony client team member primarily responsible for retailer communications concerning expressions of dissatisfaction.

B. Requests for Transaction-Level Data (Written Reports 1, 2 and 4).

These requests demand that Synchrony produce Written Reports showing information for all consumers that financed a purchase with a deferred interest promotion from each Billing Cycle between April 2013 and May 2018. These redundant and overbroad Written Reports should be set aside. Retrieving the data for Written Report 1 alone is a massive exercise requiring queries from multiple sources to obtain and analyze an anticipated 6 to 8 terabytes of data. Ex. F, Lyons Decl. ¶ 29. Synchrony estimates that in addition to coding and other work, the process of retrieving data will take up to 33 weeks, the account number sampling analysis will take 2-4 weeks, and validating the draft final report will take an additional 4 to 6 weeks. *Id.* ¶¶ 15, 19. This massive project will interfere with work needed to run Synchrony's business. *Id.* ¶ 11.

Once again, Synchrony's estimate of the time required for it to prepare these new Written Reports is informed by its experiences responding to the BCFP's prior requests. All of these Written Reports are requests similar to the May 2014 account-level data request from BCFP Research and Markets, which required Synchrony to devote 13 months of work. *Id.* ¶ 29.

In addition, it took Synchrony seven months to write the code necessary to prepare the First CID's Written Reports. *Id.* ¶ 10. Synchrony reasonably believes that writing code for the Second CID could take that long again, because Written Report 1 of the Second CID cannot simply use the code written for the First CID. *Id.* ¶ 15. The Second CID demands reports setting forth different data elements, over a different period of time, which analyze each single account's data and present them on a monthly basis. *Id.* This analysis must be performed by a small team of specialized Synchrony analysts who have experience pulling and understanding promotional data. *Id.* ¶ 28. Adding outside analysts or even other internal data analysts would not make the process more efficient as they would lack the base level of knowledge needed to accomplish the project. *Id.* Nor will adding additional people to the coding or data retrieval processes decrease the time it takes to complete those tasks. *Id.*

The BCFP will likely argue that its Modification Letter sufficiently addressed Synchrony's burden objections. In particular, the BCFP will point to the "sampling" protocol it introduced in the Modification Letter to purportedly "reduce Synchrony's burden."[37] Modification Letter, at 8-9. However, ***the sampling protocol actually increases the amount of work Synchrony must incur to prepare the reports.***

In order to conduct the BCFP's sampling, Synchrony must first pull all 6-8 terabytes of data it otherwise would have pulled prior to the modification, and then summarize the data to determine whether each particular permutation (retailer, financial product, promotion length, and

[37] In the Modification Letter, the BCFP also dropped one field and made several technical changes to conform Written Reports 1, 2, and 4 to information Synchrony has available. *See* Modification Letter, at 6-9.

year) contains more than 10,000 accounts. Ex. F, Lyons Decl. ¶¶ 16-19. If the 10,000 account threshold is met, Synchrony must then de-tokenize account numbers to locate the account numbers the BCFP specifically requests. *Id.* ¶ 19. This will add two to four weeks of data work for the preparation of the Written Reports, adding to Synchrony's initial estimate of ten months for Written Report 1 and twelve months for Written Reports 2 and 4. *Id.* ¶ 19.

Further, the BCFP hypothesizes that its sampling protocol will "capture approximately 5% of the accounts originally implicated by Written Report 1." Modification Letter, at 8. Synchrony believes that may not be the case, because a single account can have multiple promotions and thus may appear in more than one permutation. Ex. F, Lyons Decl. ¶¶ 16, 18. For example, a cardholder with an account ending in "17" could have five 6-month promotional period promotions purchased in 2013, two 12-month promotional period promotions purchased in 2013, and four 6-month promotional period promotions from 2014. *Id.* ¶ 18. This one accountholder would show up in the Written Reports eleven times for several billing cycles. *Id.*

Thus, Synchrony will need even longer to produce Written Reports 1, 2, and 4 than requested prior to the sampling modification, even though the amount of data provided in the end will be significantly less. There is no basis to put Synchrony to this burden, especially where the BCFP has no explanation as to why this data is needed in this format. Indeed, sampling the data in the way the BCFP demands may cause the data to be skewed. *Id.* ¶ 16. More fundamentally, the data will not provide information about oral statements at point of sale—the only issue the BCFP has told Synchrony it is investigating with the Second CID. For example, these reports request monthly data concerning payment allocations—a topic that is exceedingly unlikely to be discussed at the point of sale. At the meet and confer, the Bureau hypothesized an example of a consumer discussing payment allocation at the point of sale. It is a mystery whether such a conversation occurred, and if so what exactly was said and to whom. It is certain, however, that monthly payment allocation data will not shed any light upon the content of any point of sale conversations.

The burden associated with these broadly-drafted requests clearly outweighs the BCFP's need for the information, and these Written Reports should be set aside. If not set aside, the Written Reports should be modified as set forth on Exhibit A, and the time periods to prepare them should be modified to eleven months for Written Report 1 and thirteen months for Written Reports 2 and 4.

C. Data Concerning Requested Deferred Interest Waivers for Two Retailers (Written Report 3).

Written Report 3 requests a comparison of data concerning a subset of deferred interest waivers executed in two specific retailers' credit card programs (one an online retailer and one a brick-and-mortar chain). In particular, Written Report 3 demands that Synchrony identify accounts for which Synchrony representatives used the customer service interface Workstation to complete a workflow that executes waivers of fees and finance charges, including but not limited to deferred interest waivers. Written Report 3 originally requested 17 items of CSV-formatted data about waivers sought by the two retailers' customers. As modified, the report requires that Synchrony prepare a list of all accounts for which customer service representatives conducted a waiver in Workstation during which they selected "Promotions" as the "Reason for Waiver" in one of Workstation's dropdown menus, and then identified the "Reason Details" as "Paid in full within 30 days of expiration," "Didn't understand promotion" or "Payment applied to wrong

promo or sale." Modification Letter, at 4-6. Even as modified, Written Report 3 would cause Synchrony to spend approximately 10 months creating a new process to search for and produce the data requested. Ex. F, Lyons Decl. ¶ 29. And it ignores that the data will be simultaneously under- and over-inclusive, and will be ultimately irrelevant to the BCFP's purported investigatory purposes because it will reflect only granted waivers (so the consumer will not have incurred the waived deferred interest or other fees).

In connection with the First CID and again at the various meet-and-confer sessions for the Second CID, Synchrony has explained that Workstation cannot produce reliable data concerning waivers of deferred interest. Workstation waiver data is under-inclusive because not all waivers are processed through Workstation. *Id.* ¶ 25. At the same time, Workstation waiver data is over-inclusive because Workstation uses the same workflow process for multiple kinds of waivers. *Id.* For example, only one of the "Reason Details" selected by the BCFP for the modified request is specific to deferred interest promotions ("Paid in full within 30 days of expiration"), and even those waivers will not exclusively identify waived accrued deferred interest because the waivers performed could include any type of fee or finance charge. In addition, deferred interest waivers can be categorized with other "Reason for Waiver" dropdown reasons and other "Reason Details" than those selected by the BCFP. *Id.* ¶¶ 24-25.

The BCFP cannot establish that an unreliable report of Workstation waiver data is somehow "necessary" to its investigation. Enforcement Staff has claimed that the purpose of Written Report 3 is to provide a comparison between the two retailers. But the BCFP already has data sufficient to compare waivers on the two programs. In response to the First CID, Synchrony produced a written report estimating waiver data for these two programs (and many more). *See* First CID Written Report 3 subparts (k), (l), and (m). In preparing this report, Synchrony explained the limitations upon its ability to produce reliable waiver data, and the BCFP directed that Synchrony use a reasonable estimation.[38] Ex. F, Lyons Decl. ¶ 22.

Whatever additional comparison the BCFP seeks with Second CID Written Report 3, it is clear that it will be invalid. The data as requested will omit a significant amount of non-Workstation waivers, and will include waivers of finance charges from other promotions and interest amounts for non-promotional balances. Even if data could be pulled and culled for deferred interest waivers—which has never been done—the data would represent a skewed partial subset that is neither a random nor representative sample of each retailer's transactions. *Id.* ¶¶ 24-26. Nor can the differences in the programs be baselined to permit a valid comparison.

On the other side of the discovery balancing scale, the burden to prepare this flawed report would be great. To meet the BCFP's demands, Synchrony will need to create a new process for searching Workstation data. A new process is required because Synchrony does not use Workstation data to analyze promotions. Workstation is a user interface meant to process small amounts of information quickly, not to be an analytical tool. Ex. C, Castle Decl. ¶ 12. The dropdown information is recorded in a "note" in Workstation, and some or all of the note is transferred to the system of record. Ex. E, Koehler Decl. ¶¶ 9-12. Notes are not queried in Workstation. Enforcement Staff has suggested that, to address these issues, Synchrony could

[38] In fact, when Synchrony raised this issue with regard to the 2017 CID, the BCFP explicitly granted a modification under which Synchrony estimated waivers based upon information from its data warehouse. Synchrony estimates that, even if it were able to match the relevant data points, only approximately 40-60% of deferred interest waivers could ever be found, and the data relating to that subset would likely be skewed. Ex. F, Lyons Decl. ¶¶ 24-26.

download all notes from Workstation to a location from which they could be searched. But anything that would slow down Workstation, such as downloading large amounts of data from it, would seriously impair Synchrony's customer service operations and prevent customers' inquiries from being handled on a timely basis. Ex. C, Castle Decl. ¶ 12.

In sum, to prepare Written Report 3, Synchrony would need approximately 10 months, and even then the report it could produce would not even appear to fulfill the BCFP's purported requirements. *See* Ex. F, Lyons Decl. ¶ 29. The burden imposed upon Synchrony by Written Report 3 thus outweighs any investigatory need for the report.

Requests Concerning Retailer Training (Interrogatories 1 & 3 and Document Request 5). Interrogatories 1 and 3 and Document Request 5 seek information and documents concerning Synchrony's involvement in the training of retailer personnel. This is not a new area of investigation for the BCFP. In response to the First CID, Synchrony produced all of the documentation provided to consumers at point of sale for every program with deferred interest promotions in the scope of the First CID, as well as documents "sufficient to show" the training materials that Synchrony provides to retailers. *See* First CID, Document Request 3. The Bureau has expressed no issue with the documentation at point of sale, the credit card agreements or the training materials provided.

Nevertheless, the BCFP included more training-related requests in the Second CID, drafting them so broadly that the requests were not limited to training concerning deferred interest promotions and applied to online retailers with no physical "point of sale" presence at all. The Second CID unreasonably demanded that Synchrony identify every training on any topic ever conducted over a four year period at the 13 Identified Retailers (though it will not explain why they were selected); produce all training documents (though Synchrony already produced documents sufficient to show the deferred interest promotion training materials for the First CID time frame); and identify all of the people at Synchrony involved in training (for purposes unknown).

Given what Synchrony has already produced, the Second CID should have reflected a narrowing of the investigation, not an expansion of topics already covered by the First CID. The Modification Letter does not sufficiently remedy the Second CID's unreasonable approach to its training-related requests. The primary modifications the BCFP granted were to limit Interrogatory 1 to "training regarding the offering of Deferred Interest Promotions," and to limit Interrogatory 3 to "training regarding the offering of Deferred Interest Promotions or the offering of any credit card through which Purchases can be made with a Deferred Interest Promotion." Modification Letter, at 2-3. The modification to Interrogatory 1 simply eliminates training that would be irrelevant to an investigation of deferred interest promotions, while the modification to Interrogatory 3 does not even take that unremarkable step. As modified, Interrogatory 3 still insists upon the production of irrelevant materials. Its demand for production of training relating generally to the "offering of any credit card" that can be used to make promotional purchases is not limited to training concerning those promotions, and so it really is no limitation at all.

The Modification Letter does not put forth any reasons why Synchrony should be put to the burden of responding to ***more*** training-related requests. There are no reasonable justifications for the Second CID's training-related requests, and they should be withdrawn. To the extent they are not, the requests should be further modified as summarized on Exhibit A.

CONCLUSION

The CID should be set aside or modified as set forth above and in the summary attached as Exhibit A.

Dated: October 22, 2018

JENNER & BLOCK LLP

By: */s/ Thomas J. Perrelli*

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MEET AND CONFER STATEMENT

Pursuant to 12 C.F.R. § 1080.6(c), Synchrony Financial ("Synchrony") has conferred with counsel for the Bureau of Consumer Financial Protection ("BCFP") in a good faith effort to resolve the issues raised by this petition, but was unable to reach an agreement thereon.

On September 17, 2018 at approximately 1:00 p.m. Eastern Time, counsel for Synchrony, Jenner & Block LLP, along with representatives from Synchrony, conferred in person for several hours with counsel for the BCFP, Joanna Shalleck-Klein, Ben Clark, and Patrick Gushue, concerning the civil investigative demand ("CID") dated August 29, 2018.

At that conference, counsel for Synchrony requested that the CID be set aside because the requests were overly broad and unduly burdensome and because Synchrony had already provided much of the requested information to the BCFP through other means.

Synchrony and the BCFP also discussed individual objections with regard to specific interrogatories, document requests and written reports. Synchrony stated that it would petition for an order to set aside the CID, if necessary.

On October 11, 2018, Synchrony and BCFP met again telephonically to discuss changes to the CID, the nature of Synchrony's proposed modifications, and technical issues concerning Synchrony's systems. Synchrony's counsel was joined by Gregory Castle, Synchrony VP, IT Leader – Application Technologies, who has knowledge about Synchrony's electronic systems and responded to the BCFP's questions concerning them.

On October 16, 2018, BCFP provided Synchrony with a modification letter which modified certain of the CID's requests. The modification letter granted only some of the modifications Synchrony requested, and included certain modifications the BCFP had never discussed with Synchrony in the meet and confers.

Because no agreement has been reached with respect to Synchrony's objections to the CID, Synchrony now submits the instant Petition.

Dated: October 22, 2018

JENNER & BLOCK LLP

By: */s/ Thomas J. Perrelli*

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing *Combined Petition To Set Aside and Petition To Modify August 29, 2018 Civil Investigative Demand Issued To Synchrony Financial* and its attachments and exhibits was filed and served via electronic mail this 22nd day of October, 2018, on the following:

BCFP Executive Secretary
ExecSec@cfpb.gov

Enforcement Director
Enforcement@cfpb.gov

Joanna Shalleck-Klein
Joanna.Shalleck-Klein@cfpb.gov

By: */s/ Thomas J. Perrelli*
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