MEREDITH OSBORN, CA Bar # 250467
Email: meredith.osborn@cfpb.gov
Phone: (415) 645-6615
MAXWELL PELTZ, CA Bar # 183662
Email: maxwell.peltz@cfpb.gov
Phone: (415) 633-1328
MELANIE HIRSCH, DC Bar # 989310
Email: melanie.hirsch@cfpb.gov
Phone: (202) 435-7944
1700 G Street NW
Washington, DC 20552
Fax: (202) 435-7722

Attorneys for Petitioner
Consumer Financial Protection Bureau

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CONSUMER FINANCIAL PROTECTION BUREAU,

Petitioner,

v.

GREAT PLAINS LENDING, LLC, MOBILOANS, LLC & PLAIN GREEN, LLC,

Respondents.

Case No. 2:14-cv-02090-MWF-PLA

PETITIONER'S REPLY MEMORANDUM OF LAW IN SUPPORT OF PETITION TO ENFORCE CIVIL INVESTIGATIVE DEMANDS

Date: May 12, 2014
Time: 11:30 a.m.
Room: 1600
Judge: Hon. Michael W. Fitzgerald

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

Constitutional Provisions

INTRODUCTION

Contrary to decades of controlling Ninth Circuit precedent, Respondents contend that they are exempt from provisions of the Consumer Financial Protection Act of 2010 (CFPA)[1] because they are "arms" of Indian tribes. In particular, Respondents urge this Court to ignore the well-established framework of Indian law providing that tribes and tribal entities *are* presumptively subject to generally applicable federal laws. Instead, they propose the adoption of an interpretive presumption – that the term "person" does not include the sovereign – that no court has ever applied to the instant context. Respondents thereby invite this Court to rule that three decades of Ninth Circuit cases were wrongly decided. The Court should decline that invitation.

Respondents' efforts to avoid application of the CFPA fail for several reasons. To begin, Respondents, as "companies," fall squarely within the definition of "persons" subject to civil investigative demands (CIDs) under the CFPA. This is true even if, *arguendo*, they were arms of tribes. Under controlling Ninth Circuit precedent, Respondents – even if arms of tribes – would presumptively be subject to the CFPA because it is a federal law of general applicability silent as to its applicability to tribes. And Ninth Circuit case law makes clear that nothing would rebut that presumption here. Further, even if the contrary presumption advanced by Respondents could apply in this context, the CFPA nonetheless would apply to Respondents, and they would not be exempt from complying with the CIDs. Respondents' additional arguments based on canons of statutory construction and principles of sovereign immunity have also been squarely foreclosed by Ninth Circuit precedent. Finally, Respondents fail to identify any legal deficiencies in the CIDs themselves. Accordingly, their opposition to the petition must fail.

[1] 12 U.S.C. § 5481 *et seq.*

ARGUMENT

I. RESPONDENTS OMIT THE PROPER STANDARD OF REVIEW: CIDS MUST BE ENFORCED UNLESS JURISDICTION IS "PLAINLY LACKING."

Under the applicable standard of review for a jurisdictional challenge to a federal agency subpoena, the challenge must fail unless the agency "plainly lacks" jurisdiction.[2] Put another way, "[a]s long as the evidence sought is relevant, material and there is some plausible ground for jurisdiction . . . the court should enforce the subpoena."[3] The Ninth Circuit has "emphasized the strictly limited role of the district court when an agency subpoena is attacked for lack of jurisdiction."[4] This "limited role" is designed to prevent interference with federal agency investigations and avert delays in resolving the ultimate question of whether a federal law has been violated.[5] As demonstrated below, the Consumer Financial Protection Bureau (Bureau) has jurisdiction over Respondents, and there is certainly no basis to conclude that the Bureau's jurisdiction is "plainly lacking."

II. THE BUREAU HAS AUTHORITY TO ISSUE CIDS TO RESPONDENTS.

A. Respondents Fall Squarely Within the CFPA's Definition of "Person."

Respondents, all of whom are limited liability companies, fall within the plain terms of the Bureau's CID authority. The CFPA broadly authorizes the Bureau to issue a CID to "any person."[6] The Act defines "person" to mean "an individual, partnership, *company*, corporation, association (incorporated or unincorporated), trust,

---

[2] *See NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 997 (9th Cir. 2003); *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1077 (9th Cir. 2001).
[3] *Karuk Tribe Hous. Auth.*, 260 F.3d at 1077 (internal quotation marks omitted).
[4] *EEOC v. Fed. Exp. Corp.*, 558 F.3d 842, 848 (9th Cir. 2009) (internal quotation marks omitted).
[5] *Id.* (citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 81 n.38 (1984)).
[6] 12 U.S.C. § 5562(c)(1).

estate, cooperative organization, or other entity."[7] As limited liability companies, Respondents qualify as "companies" within this definition.[8]

Respondents nevertheless contend that for purposes of federal law, they are not "companies," but tribes, which are not included within the definition of "person" – but are included within the definition of "State."[9] But even if, *arguendo*, Respondents qualified as arms of their respective tribes (which the Bureau does not concede), that would be irrelevant: the Act does not exempt tribes or "States" from the definition of "person." Thus, even if Respondents were arms of their tribes, that would at most bring them within the definition of "States"; it would not somehow render them no longer "companies" that fall squarely within the definition of "person." In other words, an arm of a tribe can be *both* a "State" and a "person" under the CFPA. Respondents are therefore subject to the Bureau's CID authority unless principles of Indian law exempt them from the Act's coverage. As discussed below, those principles do not exempt Respondents here.

B. Respondents Cannot Avoid the Controlling Framework of Indian Law Set Forth in *Tuscarora* and *Coeur d'Alene*.

1. Under controlling Ninth Circuit precedent, generally applicable laws such as the CFPA presumptively apply to tribes and tribal entities.

Respondents propose the application of an interpretive presumption that flatly contradicts decades of Ninth Circuit precedent. A bedrock of Indian law in the Ninth and other federal circuits is the principle, enunciated in *Donovan v. Coeur d'Alene Tribal Farm*, that a law of general applicability silent on the issue of applicability to Indian

---

[7] 12 U.S.C. § 5481(19) (emphasis added).
[8] In addition, the definition's inclusion of "other entities" – a deliberately broad term – demonstrates Congress's intent that the Act apply broadly. *Cf. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 705 (1995) ("An obviously broad word that the Senate went out of its way to add to an important statutory definition is precisely the sort of provision that deserves a respectful reading.").
[9] *See* 12 U.S.C. § 5481(27).

tribes presumptively applies to tribes, arms of tribes, and other tribally affiliated entities unless one of three exceptions is met.[10] In particular, the law will apply to tribal entities just as it would to any private entity unless (1) applying the law would interfere with the tribe's right of self-governance on internal matters; (2) applying the law would abrogate treaty rights; or (3) there is proof that Congress intended to exempt tribes. That framework provides special protections for tribes' sovereignty, but it also means that, as a general matter, tribal entities conducting business outside their reservations must abide by the same rules as other businesses.

The *Coeur d'Alene* framework evolved out of the Supreme Court's pronouncement in *Federal Power Commission v. Tuscarora Indian Nation* that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."[11] *Tuscarora* has become a mainstay of Indian law, and the federal courts of appeals have uniformly applied its rule to tribes and tribally affiliated entities.[12] The *Coeur d'Alene* framework applies with full force here, because the CFPA is such a statute of general applicability. Accordingly, even if, *arguendo*, Respondents were arms of tribes, they would still be subject to the CFPA.

---

[10] 751 F.2d 1113, 1115-16 (9th Cir. 1985); *see also Karuk Tribe Housing Auth.*, 260 F.3d at 1078-79; *U.S. Dep't of Labor v. Occupational Safety & Health Review Comm'n*, 935 F.2d 182, 184-87 (9th Cir. 1991).

[11] 362 U.S. 99, 116 (1960) (1960) (citing cases).

[12] *See, e.g.*, *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1311 (D.C. Cir. 2007) (applying *Tuscarora* to casino owned and operated by tribe); *Fla. Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1129 (11th Cir. 1999) (applying *Tuscarora* to tribe); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 177-79 (2d Cir. 1996) (applying *Tuscarora* to business owned and operated by tribe); *EEOC v. Fond du Lac Heavy Equip. & Constr. Co., Inc.*, 986 F.2d 246, 248-49 (8th Cir. 1993) (applying *Tuscarora* to company owned and operated by tribe); *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1462-63 (10th Cir. 1989) (applying *Tuscarora* to tribe and tribal officials); *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 932-33 (7th Cir. 1989) (applying *Tuscarora* to business owned and operated by tribe).

2. The Court should not accept Respondents' invitation to apply the *Stevens* presumption, rather than *Coeur d'Alene*, in derogation of decades of Ninth Circuit precedent.

Respondents instead propose the application of an interpretive presumption that flies in the face of decades of Ninth Circuit precedent, displacing well-established principles of Indian law consistently employed by courts in this and other circuits. Under Respondents' favored presumption, stated by the Supreme Court in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the term "person" is presumed not to include the sovereign.[13] But even though this interpretive presumption pre-dates the 1960 *Tuscarora* decision,[14] the Ninth Circuit has never applied it to an interpretive question like this and instead has consistently applied a framework based on *Tuscarora* – and on its progeny, *Coeur d'Alene* – to determine whether a tribe or tribal entity is subject to liability, regulation, or agency subpoena under a generally applicable statute. As described below, this is true even when the statute applied to "persons."

In no case has a court concluded that the *Tuscarora-Coeur d'Alene* framework did not apply because of a statute's use of the term "person." In other words, no court has ever ruled that the *Stevens* interpretive presumption trumps *Coeur d'Alene*. Indeed, the Ninth Circuit has emphasized that *Coeur d'Alene*, as a "doctrine specific to Indian law," applies *in lieu* of "the normal rules of statutory construction."[15] Respondents' proposed displacement of *Coeur d'Alene* by *Stevens* would not only be contrary to Ninth Circuit precedent, it would radically alter the state of Indian law employed for years by the Ninth and other federal circuits and suddenly immunize tribally affiliated businesses from key federal statutes – such as the American with Disabilities Act, the

---

[13] 529 U.S. 765, 780-81 (2000) (citing, *inter alia, United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941) (superseded by statute on other grounds).
[14] *See, e.g.*, *Cooper Corp.*, 312 U.S. at 604 n.5 (citing *United States v. Fox*, 94 U.S. 315 (1876)).
[15] *Karuk Tribe Hous. Auth.*, 260 F.3d at 1082.

Occupational Safety and Health Act, and the Age Discrimination in Employment Act – that courts have repeatedly held apply to Indian tribes and tribal entities.

Contrary to a central premise of Respondents' argument, the Ninth Circuit and other courts have applied *Coeur d'Alene* – not the presumption that "person" does not include the sovereign, articulated in cases like *Stevens* – when assessing whether tribes and tribal entities are subject to statutes applicable to "persons." For example, in *Coeur d'Alene* itself, the Ninth Circuit held that the Occupational Health and Safety Act (OSHA) applied to a farm owned and operated by a tribe.[16] In so holding, the Ninth Circuit concluded that a tribal farm was an "employer," defined by OSHA as "a *person* engaged in a business affecting commerce who has employees . . . ."[17] The Second and Seventh Circuits reached the same conclusion.[18] Similarly, in *Lumber Industry Pension Fund v. Warm Springs Forest Products Industries*,[19] the Ninth Circuit applied the *Coeur d'Alene* framework to ERISA, concluding that a tribally owned and operated sawmill was covered by that statute as an "employer,"[20] defined as "any *person* acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan . . . ."[21] The Ninth Circuit in *NLRB v. Chapa De Indian Health Program, Inc.* employed the *Coeur d'Alene* framework in enforcing a subpoena issued to

---

[16] 751 F.2d at 1114.

[17] 29 U.S.C. § 652(5) (emphasis added). "Person" is defined as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." 29 U.S.C. § 652(4). *See also Occupational Safety & Health Review Comm'n*, 935 F.2d at 183-84 (applying OSHA to a lumber mill owned and operated by a tribe).

[17] 939 F.2d 683 (9th Cir. 1991).

[18] *See Reich*, 95 F.3d at 182 (applying OSHA to construction business owned and operated by tribe); *Menominee Tribal Enters. v. Solis*, 601 F.3d 669, 674 (7th Cir. 2010) (applying OSHA to tribal enterprise).

[19] 939 F.2d 683 (9th Cir. 1991).

[20] *Id.* at 685. *Accord Smart*, 868 F.2d at 933.

[21] 29 U.S.C. § 1002(5). The statute defines "person" as "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization." 29 U.S.C. § 1002(9).

a tribal health organization under the National Labor Relations Act,[22] which authorized an agency to issue subpoenas to "any person."[23] Also, in *EEOC v. Karuk Tribe Housing Authority*, the Ninth Circuit employed the *Coeur d'Alene* framework to determine whether the Age Discrimination in Employment Act (ADEA) applied to a tribal government employer.[24] Under the ADEA, an "employer" subject to the Act is defined to be "a *person* engaged in an industry affecting commerce . . ."[25] In *Florida Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida*, the Eleventh Circuit employed the *Coeur d'Alene* framework to determine that the Americans with Disabilities Act (ADA) applied to an Indian tribe that owned and operated a restaurant and entertainment facility.[26] The ADA covers "any *person* who owns, leases (or leases to), or operates a place of public accommodation."[27] If, as Respondents

---

[22] 316 F.3d at 999, 1101.

[23] 29 U.S.C. § 161. "Person" is defined as "one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees . . . ." 29 U.S.C. § 152(1). Contrary to Respondents' suggestion that *Chapa De* can be distinguished because the tribal health organization was not an "arm of the tribe" Resp'ts Br. at 18 n.3, the court expressly identified the organization as a tribal organization under the Indian Self-Determination Act, 316 F.3d at 997, and all of the arguments and analysis in the opinion equate Chapa De with the tribe. *See e.g.*, *id.* at 999 ("Under *Coeur d'Alene*, a statute that is silent with respect to its applicability to Indian tribes applies to Indian tribes unless [citing three-part test].").

[24] 260 F.3d at 1080-81.

[25] 29 U.S.C. § 630(b) (emphasis added). "Person" is defined as "one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons." 29 U.S.C. § 630(a).

[26] 166 F.3d at 1128-30; *see also Hollynn D'Lil v. Cher-Ae Heights Indian Cmty. of Trinidad Rancheria*, C 01-1638 TEH, 2002 WL 33942761, at *3-5 (N.D. Cal. Mar. 11, 2002) (employing *Coeur d'Alene* to conclude that ADA applied to tribally owned inn). The *Florida Paraplegic* court also concluded that as a "'person or group of persons'" under the statute, Indian tribes could be sued by the U.S. Attorney General for failing to comply with the ADA "just as it may enforce the act against any other entity that violates the statute." 166 F.3d at 1134-35.

[27] 42 U.S.C. § 12182(a) (emphasis added). Regarding yet another federal statute, a district court applied *Tuscarora* in determining that the Federal Communications Act, which subjects a "person" to regulation, applied to a tribe. *Alltel Commc'ns, LLC v. Oglala Sioux Tribe*, CIV. 10-5011-JLV, 2011 WL 796409, at *5 (D.S.D. Feb. 28, 2011).

contend, the *Coeur d'Alene* framework is inapplicable wherever a tribe would be subject to liability or regulation as a "person" under a generally applicable statute, then all of these cases were wrongly decided.[28]

3. Supreme Court and Ninth Circuit cases applying *Stevens* do not compel a narrowing of *Coeur d'Alene*.

The only cases where the Supreme Court or Ninth Circuit have considered the *Stevens* presumption with respect to a tribe or tribal entity involved a question distinct from that before this Court – that is, whether the tribe was a "person" entitled to *bring suit* under a statute.[29] In contrast, the *Coeur d'Alene* framework was developed to answer the question that *is* before this Court: whether a tribe or tribal entity may be sued, regulated, or subpoenaed under a federal law of general applicability.

An examination of the *Coeur d'Alene* test shows that it would apply only to the latter context presented here. As previously mentioned, under *Coeur d'Alene* a generally applicable statute will apply to tribes unless one of three exceptions is met: (1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate treaty-protected rights; or (3) there is proof that Congress intended the law not to apply to tribes.[30] This test would have no logical application in determining whether a tribe can *bring suit* under a statute, so it is unsurprising that courts have not used *Coeur d'Alene* in that context.

---

[28] Indeed, the *Tuscarora-Coeur d'Alene* rule, if it continued to exist at all, would have to be altered to read that a general statute in terms applying to all persons includes tribes and their property interests – *unless the statute actually uses the term "person," in which case, the statute presumptively does not include tribes or their property interests.*

[29] *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701, 708-12 (2003) (considering whether the tribe was "a 'person' who may maintain a particular claim for relief" under 42 U.S.C. § 1983); *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 514 (9th Cir. 2005) (same). In fact, in *Inyo*, the Supreme Court arguably did not apply the *Stevens* presumption at all. Although it mentioned the presumption in describing the government's arguments, the Court concluded that the tribes did not qualify as "persons" under that § 1983 based on "the legislative environment in which the word appears." *Inyo*, 538 U.S. at 710-11.

[30] *Coeur d'Alene*, 751 F.2d at 1116.

And there is yet another reason why the *Stevens* presumption would not apply here. Although the Supreme Court has applied the person-does-not-include-the-sovereign presumption to *states* as defendants (where *Coeur d'Alene*, as a doctrine specific to Indian law, would not apply), it has never applied that presumption where the United States is the plaintiff (or petitioner) bringing an action to enforce federal law.[31] And *Stevens* itself has left open the question "whether the word 'person' encompasses states when the United States itself sues under the False Claims Act."[32] This makes eminent sense because the person presumption is particularly motivated by sovereign immunity concerns.[33] Those concerns are not implicated when the federal government sues, because states (like tribes, as explained further below) have no sovereign immunity as against the federal government.[34]

Finally, the Supreme Court and Ninth Circuit have considered the *Stevens* presumption in analyzing a law's applicability to a tribe only when the law would have applied to the tribe in its sovereign capacity – in contrast to the instant context of a tribally affiliated business offering financial products online on the open market. In *Skokomish Indian Tribe v. United States*, where the Ninth Circuit cited the presumption in concluding that the tribe was not a "person" entitled to sue under 42 U.S.C. § 1983, the court expressly made the distinction that "[t]he Tribe here is not suing as an aggrieved purchaser, or in any other capacity resembling a private person. Rather, the Tribe is attempting to assert communal fishing rights reserved to it, as a sovereign, by a treaty it entered into with the United States."[35] Consistent with that reasoning, the

---

[31] *See, e.g.*, *Sims v. United States*, 359 U.S. 108, 112 (1959); *United States v. California*, 297 U.S. 175, 186-87 (1936) (overruled on other grounds).
[32] *Stevens*, 519 U.S. at 789 (Ginsburg, J., concurring).
[33] *See Stoner v. Santa Clara Cnty. Office of Educ.*, 502 F.3d 1116, 1121 (9th Cir. 2007) (explaining that *Stevens* was "driven by canons of statutory construction relating to protection of the state's sovereign immunity").
[34] *See Karuk Tribe Hous. Auth.*, 260 F.3d at 1075 (citing, *inter alia*, *United States v. Mississippi*, 380 U.S. 128, 140-41 (1965)).
[35] 410 F.3d at 514-15 (citing *Inyo*).

Sixth Circuit has suggested that tribes are not "persons" entitled to sue under § 1983 only when the tribe is asserting its sovereign rights or immunity.[36]

In short, the Supreme Court and Ninth Circuit have never applied *Stevens* in the context here – where a federal agency seeks to apply a federal law to a tribal business.[37] Instead, the Ninth Circuit has consistently applied *Coeur d'Alene*. There is no authority supporting Respondents' proposed extension of *Stevens* to this new context, a leap that would yield radical results contrary to Ninth Circuit precedent.

C. Under the Proper *Tuscarora-Coeur d'Alene* Analysis, Respondents Are Subject to the CFPA.

1. The CFPA is a statute of general applicability silent as to its applicability to tribes.

The *Tuscarora* presumption controls here because the CFPA is a statute of general applicability silent as to its applicability to tribes. Indeed, Respondents do not dispute the CFPA's general applicability. Nor could they. The Ninth Circuit has made clear that a statute is "generally applicable" where its "coverage is comprehensive"[38]

---

[36] *Keweenaw Bay Indian Cmty. v. Rising*, 569 F.3d 589, 596 & n.5 (6th Cir. 2009) (citing *Inyo County v. Paiute-Shoshone Indians*).

[37] Indeed, no court of appeal in any circuit has relied on *Inyo* to hold that a tribal defendant is not subject to suit on the basis of the *Stevens* presumption. Respondents cite two district court cases that apply *Stevens* to determine whether tribes can be sued as "persons" under the False Claims Act. These cases, unlike *Coeur d'Alene*, do not bind this Court. But moreover, they are unpersuasive. One suggests that the *Stevens* presumption applies only in cases where the statute "intersect[s] with sovereign immunity." *United States ex rel. Howard v. Shoshone Paiute Tribes*, No. 2:10–CV–01890, 2012 WL 6725682, at *2 (D. Nev. Dec. 26, 2012). Thus, consistent with the Supreme Court in *Stevens*, the court expressly left open the possibility that the tribes could be "persons" subject to suit under that law if the federal government were the plaintiff, and thus "sovereign immunity [were] not implicated." *Id.* The other likewise indicates that even state entities are "persons" subject to suit by the United States. *See United States v. Menominee Tribal Enters.*, 601 F. Supp. 2d 1061, 1069 n.3 (E.D. Wis. 2009) (citing as examples *United States ex rel. Chittister v. Dep't of Cmty. & Econ. Dev.*, No. 1:CV–99–2057 (M.D. Pa., Sept. 23, 2002) (Dkt. # 208) and *United States v. Univ. Hosp. at Stony Brook*, 2001 WL 1548797 (E.D.N.Y.2001)).

[38] *Coeur d'Alene*, 751 F.2d at 1115.

and its "reach was intended to be broad."[39] A statute may be generally applicable even if it contains exceptions, because "the issue is whether the statute is generally applicable, not whether it is universally applicable."[40]

The CFPA meets this standard. Congress charged the Bureau with "enforc[ing] Federal consumer financial law consistently for the purpose of ensuring . . . that markets for consumer financial products and services are fair, transparent, and competitive."[41] The Bureau's enforcement powers under the statute broadly cover all "person[s]" who offer or provide consumer financial products or services,[42] subject to limited exemptions.[43]

The CFPA also meets *Coeur d'Alene*'s requirement that it be "silent on the issue of applicability to Indian tribes."[44] Respondents contend that the CFPA is not silent, because the Act's inclusion of tribes in the definition of "State" operates to "exclude[] them from the definition of person."[45] But that simply does not follow. The definition of "person" – which controls to whom the Bureau may issue a CID, among other things – does not contain an exemption for "States" or tribes. Rather, it neither expressly includes nor excludes tribes, making the provision silent as to its application to tribes. Respondents incorrectly equate this silence with exclusion.

Perhaps Respondents mean to suggest that the express inclusion of tribes in the definition of "State" implies that they are not included in the definition of "person." But tribes' inclusion in the definition of "State" does not suggest that they and all entities affiliated with them are *exempted* from the definition of "person," even

---

[39] *Chapa De*, 316 F.3d at 998.
[40] *Id.*; *see also, e.g.*, *FTC. v. AMG Servs., Inc.*, No. 2:12-cv-00536, 2014 WL 910302, at *6 (D. Nev. Mar. 7, 2014) (concluding that FTC Act, as generally applicable statute, applied to tribally affiliated lender).
[41] 12 U.S.C. § 5511(a).
[42] *See* 12 U.S.C. §§ 5481(6), 5531(a), 5536(a), 5564(a), 5565(a)(1).
[43] *See, e.g.*, 12 U.S.C. §§ 5517, 5519.
[44] *Coeur d'Alene*, 751 F.2d at 1116.
[45] Resp'ts Br. at 17.

though the definition's plain terms would otherwise include them. In other words, nothing about the inclusion of tribes in the definition of "State" suggests that a company – which falls squarely within the definition of "person" – is no longer covered if it is also a tribe. "Company" still means "company," not "company unless it is an arm of a tribe." No canon of construction demands that two statutory definitions – here "person" and "State" – establish two mutually exclusive categories.[46] A company that is an arm of a tribe can be both a "person" and a "State."

2. Respondents cannot avoid the *Coeur d'Alene* rule because none of its exceptions apply here.

Respondents attempt to sidestep *Tuscarora* altogether. But under well-established Ninth Circuit law, a tribally affiliated entity may avoid application of a generally applicable law only if it meets one of the three exceptions enunciated in *Coeur d'Alene*:

> (1) the law touches exclusive rights of self-governance in purely intramural matters;
>
> (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or
>
> (3) there is proof by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations.[47]

Respondents have failed to show that any of these three exceptions apply here.

---

[46] *Cf. Herman v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 971*, 60 F.3d 1375, 1384-85 (9th Cir. 1995) (holding that an entity could be both an "employer" and a "labor union" under statute that contained separate definitions for those two types of entities).

[47] *Coeur d'Alene*, 751 F.2d at 1116 (internal quotations and alteration omitted).

a) The CFPA does not touch exclusive rights of tribal self-governance in purely intramural matters.

The CFPA's requirement that Respondents comply with the Bureau's CIDs does not touch "exclusive rights of self-governance in purely intramural matters," which the Ninth Circuit has held to involve matters such as tribal membership, inheritance rules, and domestic relations.[48] Courts including the Ninth Circuit have overwhelmingly held that exclusive rights of self-governance in purely intramural matters do not encompass commercial relations between a tribally affiliated entity and non-Indians.[49] Where, as here, online lending operations extend nationwide to non-Indian consumers seeking financial products on the open market, such exclusive rights of self-governance in purely intramural affairs are not implicated.

The fact that the tribes themselves may regulate Respondents' commercial activities does not mean that enforcement of the Bureau's CIDs would interfere with tribes' rights to "self-government" within the meaning of the first *Coeur d'Alene* exception, as courts have repeatedly explained.[50] A tribe's sovereign power to adopt regulations – and even to enforce those regulations through a tribal regulator – does

---

[48] *Id.*

[49] *See, e.g.*, *id.* at 1114, 1116-17 (applying OSHA to tribal farm employing non-Indians and selling on the open market); *Occupational Safety & Health Review Comm'n*, 935 F.2d at 183, 184 (applying OSHA to tribal commercial timber mill employing many non-Indians and selling most of its goods to non-Indians); *Reich*, 95 F.3d at 175, 179-81 (applying OSHA to tribal construction business hiring non-Indians and building casino that would operate in interstate commerce); S*an Manuel Indian Bingo & Casino*, 475 F.3d at 1308, 1312-15 (applying NLRA to tribal casino with mostly non-Indian employees and customers); *Fla. Paraplegic*, 166 F.3d at 1127, 1129 (applying ADA to tribal restaurant and entertainment facility open to non-Indians and operating in interstate commerce); *cf. Karuk*, 260 F.3d at 1079-81 (observing that under third *Coeur d'Alene* exception, tribal housing authority "occupies role quintessentially related to self-governance," unlike "commercial activities undertaken by tribes," and concluding that ADEA did not apply to an employment dispute between tribe member employee and tribal government employer acting in role as provider of government service).

[50] *Reich*, 95 F.3d at 179; *Smart*, 868 F.2d at 935.

not "preempt[] the application of a federal regulatory scheme which is silent on its application to Indians."[51] A tribally affiliated entity operating in interstate commerce may simultaneously be within the jurisdiction of a tribal regulator and be subject to investigation and regulation by a federal agency. If the existence of a tribal regulator meant that all federal investigation of the regulated entity constituted interference in tribal self-governance, this *Coeur d'Alene* exception could swallow the *Tuscarora* rule.[52]

b) The CFPA does not abrogate any treaty-protected rights.

The second Coeur *d'Alene* exception likewise does not apply. There has been no suggestion that subjecting Respondents to the Bureau's investigation would abrogate any rights guaranteed by Indian treaties, and the Bureau is not aware of any such treaty-protected rights.

c) Congress did not intend to bar the Bureau from issuing CIDs to tribally affiliated businesses.

The third *Coeur d'Alene* exception does not apply because there is no "proof by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations."[53] Nothing in the CFPA's language or legislative history demonstrates a congressional intent to exclude tribally affiliated businesses from the Bureau's CID authority.

Contrary to Respondents' contention, the fact that the CFPA defines "States" to include federally recognized Indian tribes is of no import.[54] By including tribes in the definition of "State," the Act simply makes tribes "States" for purposes of the

---

[51] *Reich*, 95 F.3d at 179.
[52] *See id.*; *accord Smart*, 868 F.2d at 935 (explaining that this exception does not apply whenever a law "merely affects self-governance as broadly conceived" because "[a]ny federal statute applied to an Indian on a reservation or to a Tribe has the arguable effect of eviscerating self-governance since it amounts to a subordination of the Indian government. But Indian Tribes are not possessed of absolute sovereignty.").
[53] *Coeur d'Alene*, 751 F.2d at 1116.
[54] 12 U.S.C. § 5481(27) .

provisions that use that term, such as provisions relating to supervisory coordination between the Bureau and other regulators and the preservation of States' enforcement powers.[55] Those provisions do not exempt "States" from regulation, as Respondents wish, but instead simply recognize the role that "States" play in regulating conduct within their respective jurisdictions. That Congress recognized this regulatory role does not suggest that it *also* intended to immunize tribes and their businesses from the law when they operate in interstate commerce. Contrary to Respondents' suggestions, there is no conflict between recognizing tribes' regulatory role and subjecting tribal businesses operating in interstate commerce to regulation.

Relatedly, the fact that tribes are expressly included in the definition of "State" but not mentioned in the definition of "person"[56] does not reveal a congressional intent to exclude them from the definition of "persons." (Indeed, Respondents go so far as to assert that the definition of "person" *excludes* tribes,[57] which is plainly not the case.) As explained above, even if Respondents were arms of tribes, that could at most bring them within the definition of "States"; it would not somehow render them no longer "companies." An arm of the tribe can be *both* a "State" (because it is the tribe) and a "person" (because it is a company) under the CFPA.

Finally, the legislative history of the CFPA demonstrates an intent by Congress to bring Indian tribes within the definition of "person." An early draft of the CFPA contained a definition of "person" that expressly excluded states.[58] The CFPA's

---

[55] 12 U.S.C. §§ 5495; 5514(b); 5552(a)(1).
[56] 12 U.S.C. § 5481(19), (27).
[57] Resp'ts Br. at 17.
[58] Restoring American Financial Stability Act of 2009, S. ----, 111th Cong. Tit. X, § 1002(20) (Comm. Print 2009) *available at* http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=943242e1-ca66-411c-89e2-8954eb3fc085http://banking.senate.gov/public/index.cfm%3fFuseAction=Files.View&FileStore_id=943242e1-ca66-411c-89e2-8954eb3fc085 ("The term 'person' means an individual, partnership, company, corporation, association (incorporated or

drafters *struck* that excluding language from the definition of "person" in a subsequent version of the bill,[59] producing the definition as it currently appears in the statute.[60] And, in fact, the Senate struck that language at the same time it added a definition for "State" that included Indian tribes.[61] That Congress removed the exclusion for states from the definition of "person" at the same time it defined "State" to include Indian tribes suggests that Congress took care *not* to exempt tribes from the definition of "person." The Supreme Court has explained that when "Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."[62]

For all of these reasons, Respondents cannot show that any *Coeur d'Alene* exceptions apply here – and Respondents accordingly are subject to the Bureau's CID authority.

D. Even If, *Arguendo*, the *Stevens* Presumption Applied, Respondents Would Not Be Exempt from Complying with the CFPA.

For the reasons explained above, *Coeur d'Alene* – not *Stevens* – applies in this case. But even if the *Stevens* presumption *did* apply in this context, Respondents would still be subject to the Bureau's CIDs, for two independent reasons. First, by its own

---

unincorporated), trust, estate, cooperative organization, or other entity, *except that 'person' shall not include the United States Government or any State or local government*.") (emphasis added).

[59] Restoring American Financial Stability Act of 2010, S. 3217, 111th Cong. Tit. X, § 1002(17) (2010), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-111s3217pcs/pdf/BILLS-111s3217pcs.pdf ("The term 'person' means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.").

[60] Consumer Financial Protection Act of 2010, Pub. L. No.111-203, § 1002(19); 12 U.S.C. § 5481(19).

[61] Restoring American Financial Stability Act of 2010, S. 3217, 111th Cong. Tit. X, § 1002(25) (2010), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-111s3217pcs/pdf/BILLS-111s3217pcs.pdf.

[62] *Russello v. United States*, 464 U.S. 16, 23-24 (1983); *see also Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) ("[T]o adopt the Tribes' interpretation would read back into the Act the very word . . . that the Senate committee deleted.").

terms, the presumption applies only to sovereigns and arms of the sovereign.[63] The Ninth Circuit has employed a five-factor test in assessing whether a sovereign-affiliated entity benefits from the *Stevens* presumption: (1) whether a money judgment would be satisfied out of the funds of the sovereign; (2) whether the entity performs central governmental functions; (3) whether the entity may sue or be sued; (4) whether the entity has the power to take property in its own name or only in the name of the sovereign; and (5) the corporate status of the entity.[64]

Here, based on available facts and the documents attached to Respondents' opposition, all five factors weigh against treating Respondents as an "arm" of the sovereign: (1) tribes would not be liable for judgments against Respondents[65]; (2) Respondent consumer lending companies do not perform "central government functions"; (3) Respondents may sue and be sued separately from their associated tribes[66]; (4) Respondents can take money and property in their own names, rather than just in the name of their tribes[67]; and (5) Respondents are organized as limited liability companies.[68] Although the factual record is incomplete because Respondents

---

[63] *See Stoner,* 502 F.3d at 1121-22 ("*Stevens* teaches that our Eleventh Amendment case law should guide our determination of whether an entity is a state agency and thus not a 'person,'" for the purpose of the presumption that "person" does not include the sovereign).

[64] *See United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1147 (9th Cir. 2004).

[65] *See* Morsette Decl., Ex. A, at 7-9 (articles of organization for Plain Green Lending provide that "any recovery against the Company shall be limited to the assets of the Company"); Pierite Decl., Ex. B, at 14 (limited liability company operating agreement of MobiLoans provide that "[n]o activity of the Company nor any indebtedness incurred by it shall implicate or in any way involve any assets of the Tribe not expressly assigned to the Company in writing").

[66] *See* Morsette Decl., Ex. A, at 3 (Plain Green may sue and be sued); Shotton Decl., Ex. A, at 17 (tribe's limited liability company act allows a company, like Great Plains Lending, to sue and be sued).

[67] *See* Morsette Decl., Ex. A, at 2 (Plain Green may "purchase" and "dispose of" property); Shotton Decl., Ex. A, at 17 (tribe's limited liability company act allows a company, like Plain Green Lending, to purchase or sell property in its own name).

[68] *See* Morsette Decl., Ex. A, at 1; Pierite Decl., Ex. B, at 1; Shotton Decl., Ex. B, at 1.

have failed to comply with the CIDs, there are strong indications that Respondents do not qualify as "arms" of the sovereign under this test.

Respondents likewise have not established that they are "arms" under the arm-of-the-tribe test favored by Respondents, which the Ninth Circuit has employed to assess whether an entity benefits from a tribe's sovereign immunity – that is, whether the entity has immunity from suits by private parties and States.[69] Putting aside the fact that Respondents cite no case applying this test to determine whether a tribal entity may benefit from the *Stevens* presumption, they also do not sufficiently prove that they would qualify as arms under this test. Although they submit various documents that purport to show that they satisfy the test, without a response to the Bureau's CIDs, the Bureau has not had the opportunity to obtain information to assess whether those documents reflect reality. Resolving this factual dispute at this stage – particularly where the Bureau has not yet had an opportunity to obtain evidence – would be inappropriate.[70] At the very least, if the *Stevens* presumption applied to arms of tribes here – which it does not – the Bureau would be entitled to limited discovery.[71]

Second, even if *Stevens* applied in this context, and even if Respondents had shown that they are "arms" of the tribe subject to that presumption, they would not prevail for another reason. *Stevens* establishes only a *presumption*, not a "hard and fast rule of exclusion."[72] Here, that presumption is overcome in light of the legislative

---

[69] *See Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718 (9th Cir. 2008); *Allen v. Gold Country Casino*, 464 F.3d 1044 (9th Cir. 2006). As discussed below, tribes do not enjoy sovereign immunity from federal agency compulsory process or from suits by the Federal Government.

[70] *Cf. FTC v. AMG Servs., Inc.*, No. 2:12-cv-00536, 2012 WL 3730561, at *6 (D. Nev. Aug. 28, 2012).

[71] *See Somerlott v. Cherokee Nation Distribs., Inc.*, 686 F.3d 1144, 1147 (10th Cir. 2012) (noting that district court granted limited discovery on whether tribal company was arm of tribe).

[72] *Stevens*, 529 U.S. at 781.

history discussed above, as well the CFPA's purpose and the policy intended to be served by its enactment[73]: Congress directed the Bureau to "enforce Federal consumer financial law consistently for the purpose of ensuring . . . that markets for consumer financial products and services are fair, transparent, and competitive,"[74] and to "establish a basic, minimum federal level playing field," regardless of type of provider of financial products or services.[75] Excluding lenders due to their tribal affiliation would undercut these purposes. It would exempt some lenders from complying with federal law, thereby undermining both consumer protection and fair competition. In similar circumstances, the Supreme Court declined to extend the presumption "to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action."[76]

Ignoring these purposes, Respondents contend that Congress intended to exclude tribes (and arms of tribes) from coverage under the CFPA in two ways. Both contentions fall wide of the mark. First, Respondents claim that tribes may act free from federal regulation because the CFPA "erects a clear demarcation between" regulated entities and regulators – and makes tribes the latter.[77] But Respondents' desired "clear demarcation" simply does not exist. As explained above, giving tribes a regulatory role in no way implies that business arms of the tribe cannot be subject to regulation by other sovereigns when they act in those sovereigns' territory. And

---

[73] *See Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 83 (1991); *Pfizer, Inc. v. Gov't of India,* 434 U.S. 308, 316 (1978).
[74] 12 U.S.C. § 5511(a).
[75] S. Rep. No. 111-176, at 11 (2010).
[76] *United States v. California*, 297 U.S. at 186. Further, it is important to note that the provision at issue concerns only the federal government's – not a private party's – ability to enforce a CID against a tribal entity. Thus, the instant case raises neither constitutional balance concerns, *see Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989), nor sovereign immunity concerns.
[77] Resp'ts Br. at 13.

Respondents' second contention – that Congress's choice not to mention tribes in the definition of "person" "must be understood as intentional"[78] – is squarely foreclosed by Ninth Circuit precedent that rejected that very argument.[79]

E. The Canon that Statutory Ambiguities Are Resolved in Favor of Tribes Does Not Apply Here.

Contrary to Respondents' assertion, the canon that ambiguities in statutes must be resolved in favor of Indians does not apply.[80] In *NLRB v. Chapa De Indian Health Program, Inc.*, the Ninth Circuit rejected the application of the canon of construction "requiring that statutes be construed for the benefit of Indian interests" when the effect of the canon would be to suggest that a generally applicable statute does not apply to Indian tribes if the statute is silent as to them.[81] The court explained that to apply the canon in that way "would be effectively to overrule *Coeur d'Alene,* which, of course, this panel cannot do."[82]

Similarly, the D.C. Circuit has pointed out that courts have applied the canon that ambiguities in a federal statute must be resolved in favor of Indians only in cases "involv[ing] construction of a statute or provision of a statute Congress enacted specifically for the benefit of Indians or for the regulation of Indian affairs."[83] That

---

[78] Resp'ts Br. at 16.

[79] *See Chapa De*, 316 F.3d at 998 (rejecting, as foreclosed by *Coeur d'Alene* and *Tuscarora*, the argument that law did not apply to a tribe "because the statute does not expressly state that it does"); *Coeur d'Alene*, 751 F.2d at 1115 (rejecting contention that statute would not apply to tribal entity "absent an express congressional decision to that effect").

[80] *See Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation,* 502 U.S. 251, 269 (1992) (stating canon).

[81] *Chapa De*, 316 F.3d at 999.

[82] *Id.* Respondents' suggestion that the Ninth Circuit has applied this rule *in lieu* of *Coeur d'Alene* is unavailing. Resp'ts Br. at 21. In *Karuk*, although the Ninth Circuit cited the pro-Indian canons, it thereafter explained, "Thus we do not apply the normal rules of statutory construction here, but, instead, must be guided by doctrine specific to Indian law – the *Coeur d'Alene* exception that we applied above." *Karuk Tribe Hous. Auth.*, 260 F.3d at 1082.

[83] *San Manuel Indian Bingo & Casino*, 475 F.3d at 1312.

"principal of pro-Indian construction" does not apply "when resolving an ambiguity in a statute of general application,"[84] such as the CFPA.

F. Respondents Cannot Avoid Compliance with the CIDs Based upon a Claim of Tribal Sovereign Immunity.

Respondents' broad assertion of tribal sovereign immunity again asks this Court to disregard controlling Ninth Circuit precedent. As stated most recently by the Ninth Circuit in *EEOC v. Karuk Tribe Housing Authority*, tribes do not "enjoy sovereign immunity from suits brought by the federal government."[85] Every other court of appeals to address tribes' assertion of sovereign immunity against the federal government has agreed.[86]

Respondents' reliance on cases such as *Santa Clara Pueblo v. Martinez*[87] and *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*[88] is misplaced. Those cases addressed tribes' immunity from suits by private parties, not the federal government. Similarly, *Blatchford v. Native Village of Noatak*[89] does not suggest that Ninth Circuit cases on tribes' lack of immunity from suits by the federal government are no longer good law. *Blatchford* involved the wholly different circumstance of a state's immunity from suit by a tribe, and its analysis accordingly addresses only the relationship between states and tribes.[90] Its discussion of the constitutional convention has no bearing on whether the federal government may sue a tribe, because the federal government's authority to

---

[84] *Id.*
[85] *Karuk Tribe Hous. Auth.*, 260 F.3d at 1075 (citing *Quileute Indian Tribe v. Babbitt,* 18 F.3d 1456, 1459-60 (9th Cir. 1994); *United States v. Yakima Tribal Court,* 806 F.2d 853, 861 (9th Cir. 1986)).
[86] *See id.*; *Fla. Paraplegic*, 166 F.3d at 1135; *Reich*, 95 F.3d at 182; *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 383 (8th Cir. 1987).
[87] 436 U.S. 49 (1978).
[88] 523 U.S. 751 (1998).
[89] 501 U.S. 775 (1991).
[90] *Id.* at 782. In *Blatchford*, the Court concluded that "if the convention could not surrender *the tribes'* immunity for the benefit of the *States*, we do not believe that it surrendered the States' immunity for the benefit of the tribes." *Id.*

do so comes from a different source: tribes' status as domestic dependent nations. As stated by the Ninth Circuit, a "[t]ribe's own sovereignty does not extend to preventing the federal government from exercising its *superior sovereign powers*."[91] Moreover, as acknowledged by Respondents, *Karuk*'s pronouncement that tribes do not "enjoy sovereign immunity from suits brought by the federal government" came after *Blatchford*, as have other Ninth Circuit cases reaffirming that rule.[92]

III. RESPONDENTS FAIL TO IDENTIFY DEFECTS IN THE CIDS.

Contrary to Respondents' assertions, the Bureau's CIDs provide adequate notice of their purpose and are sufficiently tailored to meet legal standards.

A. Respondents Are Incorrect in Their Assertion that the Bureau's CIDs Failed To Provide Adequate Notice.

Respondents contend that the Bureau's CIDs should be set aside because they fail to provide adequate notice. This argument is unavailing. The CFPA requires a CID to "state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation."[93] Respondents are simply wrong to assert that this provision requires the Bureau to specify a particular violation. Some agencies – such as the EEOC, as described in a case cited by Respondents – are required to do so by their statutes, but the CFPA

---

[91] *United States v. White Mountain Apache Tribe*, 784 F.2d 917, 920 (9th Cir. 1986) (emphasis added); *see also Red Lake Band of Chippewa Indians*, 827 F.2d at 382-83 ("[I]t is an inherent implication of the superior power exercised by the United States over the Indian tribes that a tribe may not interpose its sovereign immunity against the United States . . . . Tribal immunity from suit without their consent is among those fundamental attributes of sovereignty that may be divested as an implicit result of their dependent status.").

[92] *See EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 781 (9th Cir. 2005) ("Tribal sovereign immunity does not act as a shield against the United States.") (internal quotation marks omitted); *Quileute Indian Tribe v. Babbitt*, 18 F. 3d 1456, 1459-60 (9th Cir. 1997) ("tribes cannot impose sovereign immunity to bar the federal government" from bringing suit).

[93] 12 U.S.C. § 5562(c)(2); *accord* 12 C.F.R. § 1080.5.

imposes no such requirement on the Bureau.[94] Instead, the proper rule is the general one, as stated by the Ninth Circuit, that an agency issuing a subpoena "need not allege that it has a suspicion or has knowledge of any facts indicating that the law has been violated."[95] The Bureau may "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."[96] As courts have noted with respect to identical language in the FTC Act, it is well settled that the boundaries of an investigation "may be drawn quite generally,"[97] and it is typically sufficient for the subpoena's statement of purpose to "recite[] the statutory provisions which the agency thinks may have been violated."[98] Simply put, "an investigating agency is under no obligation to propound a narrowly focused theory of a possible future case" when seeking to enforce an administrative subpoena.[99]

Here, the CIDs that the Bureau issued to Respondents easily meet the notice-of-purpose requirement. Each CID stated in its "Notification of Purpose" that the investigation was initiated

> . . . *to determine whether small-dollar online lenders or other unnamed persons have engaged or are engaging in unlawful acts or practices relating to the advertising, marketing, provision, or collection of small-dollar loan products*, in violation of Section 1036 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5536, the Truth in Lending Act, 15 U.S.C. § 1601, the Electronic Funds Transfer Act, 15 U.S.C. § 1693, the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6802-6809, or any other Federal

---

[94] Respondents cite *General Insurance Co. of America v. EEOC*, 491 F.2d 133 (9th Cir. 1974), but in contrast to the Bureau, the EEOC may only issue subpoenas "in connection with an investigation of a charge" and therefore must be "relevant to that charge." *EPA v. Alyeska Pipeline Serv. Co.*, 836 F.2d 443, 447 (9th Cir. 1988).
[95] *Alyeska Pipeline Serv. Co.*, 836 F.2d at 447.
[96] *Id.* (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950)).
[97] *FTC v. O'Connell Assocs., Inc.*, 828 F. Supp. 165, 171 (E.D.N.Y. 1993).
[98] *FTC v. Green*, 252 F. Supp. 153, 156 (S.D.N.Y. 1966) (citing cases).
[99] *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977) (en banc).

> 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.[100]

In accordance with the CFPA, the notification contains the two requisite components: the nature of the conduct constituting the alleged violations under investigation and the provisions of law applicable to such violations.[101] Nothing more is required. Indeed, the Ninth Circuit and other courts regularly enforce CIDs with comparable statements of purpose.[102]

B. Respondents' Arguments that the CIDs Are Indefinite and Overly Broad Are Without Merit.

Respondents incorrectly contend that the Bureau's CIDs are indefinite and overbroad. Pursuant to the CFPA, a CID must describe responsive information "with such definiteness and certainty" as to allow the recipient to identify the desired materials.[103] Respondents do not state that they have been unable to identify the

---

[100] Osborn Decl., Ex. A (CIDs) (emphasis added).

[101] 12 U.S.C. § 5562(c)(2); 12 C.F.R. § 1080.5. The phrase "Federal consumer financial law" is defined in the CFPA, 12 U.S.C. § 5481(14), to mean "the provisions of this title, the enumerated consumer laws, the laws for which any authorities are transferred under subtitles F and H" and rules prescribed under those authorities. The case Respondents cite for this point, *In re Sealed Case*, 42 F.3d 1412 (D.C. Cir. 1994) is distinguishable. There, the subpoena's stated purpose was to determine whether "the information may reveal other wrongdoing, as yet unknown." *Id.* at 1415.

[102] *Hyster Co. v. United States*, 338 F.2d 183, 184 n.4 (9th Cir. 1964) (subpoena directed at "concerted action with manufacturers of tractor equipment, accessories and parts to control production and distribution, and restrictions upon pricing and distribution of those products"); *see also, e.g.*, *O'Connell Assocs.*, 828 F. Supp. at 170-71 (subpoena "[t]o determine whether unnamed consumer reporting agencies or others are or may be engaged in acts or practices in violation of [two statutes]"); *Finnell v. United States*, 535 F. Supp. 410, 412 (D. Kan. 1982) (subpoena directed at "restraints of trade in the sale of used automotive parts").

[103] *See* 12 U.S.C. § 5562(c)(3).

desired materials. Instead, they suggest that a CID must be "narrow and specific,"[104] when neither the Ninth Circuit nor the CFPA imposes such a requirement.

Moreover, with respect to breadth, it has long been the rule in the Ninth Circuit that a subpoena "should be enforced unless the party being investigated *proves* the inquiry is unreasonable because it is overbroad or unduly burdensome."[105] To meet that burden of proof, the challenging party must show that "compliance threatens to unduly disrupt or seriously hinder normal operations of a business."[106] Respondents have made no such showing here.

Finally, this case raises no Fourth Amendment concerns. It is well-settled that "the Fourth Amendment's restrictions are limited" in the context of an administrative subpoena; the Fourth Amendment is satisfied "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."[107] As shown above, those requirements are met here.

CONCLUSION

For the foregoing reasons, the Bureau respectfully requests that this Court grant the petition and enter an order requiring Respondents to comply in full with the civil investigative demands.

Dated: April 25, 2014

Respectfully submitted,

ANTHONY ALEXIS
Acting Enforcement Director
DEBORAH MORRIS
Deputy Enforcement Director

By: /s/ Maxwell Peltz
MAXWELL PELTZ

---

[104] Resp'ts Br. at 25. *United States v. Golden Valley*, 689 F.3d 1108, 1115 (9th Cir. 2012), does not require that a subpoena be "narrow and specific."
[105] *FDIC v. Garner*, 126 F.3d 1138, 1143 (9th Cir. 1997) (emphasis added).
[106] *Texaco*, 555 F.2d at 882.
[107] *Reich v. Mont. Sulphur & Chemical Co.*, 32 F.3d 440, 448 (9th Cir. 1994) (citing *Morton Salt*, 335 U.S. at 652-53).

MEREDITH OSBORN
MELANIE HIRSCH
Attorneys for Petitioner
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552
Phone: (415) 633-1328
Fax: (202) 435-7722
Email: maxwell.peltz@cfpb.gov