

**UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU**

**ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029**

In the Matter of:)	BUREAU'S RESPONSE TO THE ORDER REQUIRING THE BUREAU TO SUBMIT ADDITIONAL INFORMATION
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,)	
Respondents.)	

**BUREAU'S RESPONSE TO THE ORDER REQUIRING
THE BUREAU TO SUBMIT ADDITIONAL INFORMATION**

Pursuant to the Order Requiring the Bureau to Submit Additional Information, entered February 8, 2016, the Consumer Financial Protection Bureau's (Bureau) Enforcement Counsel respectfully submits the following response to the six questions set forth in the Order.¹

Enforcement Counsel has requested the subpoena for two purposes:

- (1) The Notice of Charges alleges, among other claims, that Integrity Advance's loan agreements were made in violation of the Truth in Lending Act. If that

¹ The briefing schedule outlined in the Order appears to take the place of the motion to quash provisions contained in Rule 208(h) (12 C.F.R. §1081.208(h)).

charge is proven, the information requested will be necessary to identify all the consumers harmed and quantify the amount of that harm;² and

(2) In their Answer, Respondents denied using demand drafts when consumers had withdrawn their ACH authorization. That denial is contrary to statements made by the Respondents during the course of the investigation. Accordingly, Enforcement Counsel requested two new fields of data that relate to the demand draft claim in order to refute the newly-denied facts.

As fully set forth in the subpoena request, the information sought is relevant and its scope reasonable.

The Order presented six questions, which are addressed in more detail below. In sum,

- (1) The CID requires preservation of the information sought by the subpoena;
- (2) Respondents' obligation to preserve the requested information is ongoing;
- (3) Enforcement Counsel believes that the requested data dictionary(ies) already exist and that if they do not, the subpoena would not require Respondents to create them;
- (4) The subpoena is not untimely, excessive, or unduly burdensome because it requests identical types of data—with two exceptions—that Integrity Advance produced already for a limited set of consumers in response to a CID, and Respondents have not proffered any evidence as to why they cannot simply re-do that same process, but for the entire set of consumers, in response to

² Integrity Advance originated payday loans between May 2008 and December 2012. The Bureau is seeking information related to those loans. The alleged TILA violations concern illegal conduct pertaining to the entire period Integrity Advance originated payday loans.

the subpoena. Integrity Advance did not raise any burden claims related to the data previously produced in response to the CID, even though the company was no longer operating at that time;

- (5) Enforcement Counsel disputes Respondents' assertion that it would be "near impossible" to comply with the subpoena now, especially as Respondents have failed to proffer any actual evidence of undue burden; and
- (6) Enforcement Counsel strongly disagrees with Respondents' claim that the subpoena is not appropriate or disfavored by the rules, as the rules expressly allow subpoenas in an administrative proceeding.

For all the reasons stated herein, Enforcement Counsel respectfully requests that the subpoena be issued.

1) The Document Preservation Requirement in the January 2013 CID Covers the Data and Information Sought by Enforcement Counsel's Subpoena.

On January 7, 2013, a Civil Investigative Demand (CID) issued to Integrity Advance.³ That CID required Integrity Advance to maintain the data⁴ sought by the subpoena at issue. Instruction E of the CID provides in full (bold and underline in original):

Document Retention: You are required to retain all documents and other tangible things that were relied upon or used in the preparation of the responses to this CID. In addition, during the pendency of this investigation and any related enforcement action, the Bureau may require

³ CID (CFPB000077-000116).

⁴ Whether the prior statements by potential witnesses sought by the third request in the subpoena would be covered by the preservation requirement depends on the specific statements; however Respondents have not objected to the issuance of a subpoena for these statements.

the submission of additional documents or tangible things. Accordingly, during the pendency of this investigation and any related enforcement action, you must suspend any routine or non-routine procedures that may result in the destruction of documents or tangible things that are in any way potentially relevant to this investigation, as described in the CID's Notification of Purpose pursuant to 12 C.F.R. § 1080.5. You are required to prevent the unlawful destruction of relevant material irrespective of whether you believe such material is protected from future disclosure or discovery by privilege or otherwise. See 18 U.S.C. §§ 1505, 1519.⁵

The information sought in the requested subpoena was likely relied upon in the preparation of the response to the Bureau's CID and is potentially relevant to the investigation. In response to the CID, Integrity Advance produced a file containing, with two exceptions, data fields identical to those sought by the subpoena.⁶ Another request specifically asked for “[a]ll data dictionaries ... identified in response to Interrogatory 8,”⁷ which requests “each database or recordkeeping system used by [Integrity Advance] that contains information related to the extension or repayment of credit.”⁸ Thus, the complete consumer transaction data sources, and any data dictionaries used⁹ in the production, were among the documents and things “relied upon or used in the preparation of the responses” to the CID, and Instruction E clearly mandates their preservation. Respondents have not stated whether the two newly

⁵ CID, Instruction E (CFPB000082).

⁶ It is Enforcement Counsel's understanding that Integrity Advance produced that file (CFPB003126) by exporting data from existing electronic data sources that contained all of the consumer transaction data.

⁷ CID, Request for Documents No. 19 (CFPB000092).

⁸ CID, Interrogatory No. 8, (CFPB000086).

⁹ Integrity Advance produced a number of data dictionaries in response to Request for Documents No. 19, but it did not connect those dictionaries to the data file it produced (CFPB003126). If Integrity Advance already produced the data dictionaries responsive to the subpoena, it can simply indicate where in the production each field is defined as part of its response to the subpoena.

requested fields also are contained in those same electronic data stores. If they are, they should have been preserved as well.

Even if the requested material were not specifically relied upon or used, Instruction E still requires their preservation because they are potentially relevant to the investigation, as required by Instruction E (recipient must “suspend any routine or non-routine procedures that may result in the destruction of documents or tangible things that are *in any way potentially relevant to this investigation* (underline in original, italics added).” Data regarding the actual loans, including the requested transaction data, goes straight to the heart of the investigation into Respondents’ practices related to the origination and collection of those loans.¹⁰ Thus, the data sought by the subpoena regarding these loans is clearly and foreseeably “potentially relevant” to the investigation, and therefore Integrity Advance was under an obligation to preserve the data.

¹⁰ The Notification of Purpose provides, in full: “The purpose of this investigation is to determine whether online lenders or other unnamed persons have engaged or are engaging in unlawful practices in 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, *et seq.*, the Electronic Fund[] Transfer Act, 15 U.S.C. § 1693, *et seq.*, the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6802-6809, the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.*, 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.”

2) Respondents Are Under a Continuing Obligation to Preserve the Documents and Information Sought by Enforcement Counsel's Subpoena.

It is well established that entities have an ongoing obligation to preserve relevant evidence in reasonable anticipation of litigation.¹¹ That obligation extends through litigation.¹² Respondents became aware of the duty to preserve evidence relevant to the Bureau's investigation no later than the date of service of the CID, January 7, 2013. In addition to the common law duty to preserve, the CID explicitly stated there was a document retention requirement. Respondents were never relieved of their document retention obligations, and Respondents' ongoing obligation to retain all potentially relevant documents extends through litigation.

3) Enforcement Counsel Believes a Data Dictionary Already Exists in an Acceptable Format.

As noted above in response to Question 1, Enforcement Counsel believes a data dictionary already exists for the consumer transaction data sought by the subpoena. The file Integrity Advance previously produced (CFPB003126) appears to have been simply exported from Integrity Advance's systems and contains various codes for different

¹¹ See, e.g. *John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008); *Surowiec v. Capital Title Agency, Inc.*, 790 F. Supp. 2d 997, 1005 (D. Ariz. 2011); *Ashton v. Knight Transportation, Inc.*, 772 F.Supp.2d 772, 800 (N.D. Tex. 2011); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003). See also Elkan Abramowitz & Jeremy H. Temkin, *Defending Corporations and Individuals in Government Investigations*, §17:10 The Duty to Implement a Litigation Hold (Dec. 2014); A Project of The Sedona Conference Working Group on Electronic Document Retention & Production, *The Sedona Conference Commentary on Legal Holds: The Trigger & the Process*, 11 Sedona Conf. J. 265 (2010).

¹² See, e.g. *Arch Ins. Co. v. Broan-Nutone, LLC*, CIV.A. 09-319-JBC, 2011 WL 3880514 at *2 (E.D. Ky. Aug. 31, 2011).

types of fields.¹³ Enforcement Counsel believes that Integrity Advance must have relied on a data dictionary specifically to determine which fields should be exported in response to the CID and generally to train its staff on the proper interpretation of this data, especially as Integrity Advance frequently relied on third party service providers to interface with consumers and those providers had to understand the data relating to the consumers.¹⁴ Enforcement Counsel's position is that the subpoena would not require Respondents to draft a new data dictionary if one did not already exist.

4) Respondents' Claims that the Bureau's Requests Are Untimely, Excessive, and Unduly Burdensome Are Baseless.

a. Respondents' Claim of Undue Burden Is Meritless.

As noted above, except for two fields, Integrity Advance has already produced a file containing identical fields, albeit for a subset of its consumers. If the data is maintained electronically, there is no reason that Respondents cannot simply repeat the export Integrity Advance completed in response to the January 7, 2013 CID. Indeed, this export likely would be even simpler as Respondents would not have to cull the response only to select consumers who were in collections at a given point in time (as was required of the CID). Instead it could simply export all the relevant data. If the two

¹³ For example, the Excel file includes a field labeled "Pmt_Type" with the following options: C, E, F, G, N, P, R, S, W.

¹⁴ It is possible that portions of "Updated File Exports," Section 7.9 of a Loan Management System Operations Manual (CFPB039775-39790) may serve as a data dictionary for interpreting the data in CFPB003126. If this is the case, Enforcement Counsel requests that Integrity Advance, in response to Request No. 2, simply verify the portions of Section 7.9 that may be relied on as an appropriate data dictionary.

newly requested fields are stored with the other transaction data, it should be relatively easy to slightly adjust the process to include those fields as well.¹⁵

Respondents have offered no explanation as to why it would be unduly burdensome for them to produce the requested material. Prior to filing the subpoena request, Enforcement Counsel conferred with Respondents, and Respondents failed to provide any specific facts to support their claim as to burden. Indeed, Respondents have not even stated whether the requested information is in an electronic format or whether it still exists. Further, Integrity Advance raised no claims of burden when it produced the original file even though the company was not operating at that time either. Absent specific evidence supporting Respondents' claim of undue burden, the subpoena should issue.¹⁶

Furthermore, if Respondents have taken some action since the earlier production that makes it harder for them to comply with the subpoena (e.g., archiving the material), Respondents cannot now rely on such self-imposed changes as grounds for a claim of undue burden, especially as Integrity Advance was under an explicit obligation to preserve the material. *Cf. Sefic*, 9 O.C.A.H.O. 1123, 2007 WL 4928773 at *15 (Feb. 15, 2007) (holding that if a company "chose to archive the company's records in a manner that made them difficult to retrieve, the burden thus created should not be permitted to

¹⁵ Enforcement Counsel would accept the relevant original database in its entirety if that would expedite the production of data so long as the original database is accompanied by documents and materials needed to process the database.

¹⁶ In *BDO China Dahua CPA Co.*, on which Respondents rely (Resp. Obj. at 3), the administrative judge denied Respondents' motion to quash a subpoena request where Respondents similarly "argue[d], with no specific support, that [a discovery request] is overly burdensome." *BDO China Dahua Cpa Co., Ltd., et al.*, 106 S.E.C. Dkt. 3015, 2013 WL 11113054 at *2 (June 26, 2013).

serve as an excuse for failure to respond to discovery requests"); *cf. also Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76 (D. Mass. 1976); *Tropicana Casino & Resort*, 9 O.C.A.H.O. 1060, 2000 WL 33113961 at *6 (Sept. 8, 2000) (observing that whatever burden fell upon Respondent to produce records was a result of its own recordkeeping system). To allow Respondents to avoid production of the material due to self-imposed "burdens" would eviscerate the preservation requirements.

b. Enforcement Counsel's Request for Data Is Limited in Scope.

As noted above, Enforcement Counsel's request for data is limited to data that Integrity Advance maintained during its ordinary course of business. If the data are stored electronically, the precise number of records being requested does not affect the scope of the request. In fact, producing more data with fewer restrictions often is simpler than limiting the data exported from such sources. Because Integrity Advance has already produced some of the data for all but two of the data fields sought by the subpoena, the request for data is specific and limited.¹⁷

c. Enforcement Counsel's Request Is Not Untimely.

Rule 208 permits Enforcement to make subpoena requests directed to Respondents. See *PHH Corp.*, 2014-CFPB-0002, Order Granting in Part Request for Issuance of Subpoena Requiring Production of Documents at 1 (May 15, 2014); 12 C.F.R. § 1081.208. Rule 208 does not prohibit Enforcement Counsel from requesting a subpoena because the requested documents were potentially available prior to the filing

¹⁷ By contrast in *BDO China Dahua CPA Co.*, on which Respondents rely (Resp. Obj. at 3), requests were deemed overbroad because they could "reach a very large number of documents of only marginal relevance." *BDO China Dahua CPA Co.*, 2013 WL 11113054 at *2.

of a notice of charges, and the commentary to the rule does not discuss any such prohibition either. While Enforcement Counsel could have requested this same information through a CID, it was not required to do so.¹⁸ As previously noted, one of the impetuses for requesting the information is a position taken by Respondents in their Answer, which is contrary to statements made during the investigation. Enforcement Counsel should be given the opportunity to obtain additional evidence to rebut that newly-denied fact.

5) Respondents' Assertion that it Would Be "Near Impossible" to Comply with Enforcement Counsel's Requests for Data and a Data Dictionary Is Vague and Conclusory.

Enforcement Counsel disputes Respondents' conclusory claim that “[a]t this point, it would be near impossible for Respondents to comply with Request Nos. 1 and 2[.]” Resp. Obj. at 2. For all the reasons discussed above, Respondents have offered no explanation as to why they could not simply export the same fields—but for all consumers—as Integrity Advance did in response to the CID. The fact that Integrity Advance ceased operations in December 2012 has not previously hindered the company from producing similar data. Respondents have pointed to no concrete reasons why it is “near impossible” to comply with the requests.

6) The Data and Data Dictionary Sought by Enforcement Counsel Are Within the Types of Discovery Contemplated Under Rule 208.

Respondents' claims that the subpoena is “not appropriate” for an administrative proceeding and is “disfavor[ed]” by the Bureau’s rules are utterly without merit. “The

¹⁸ Instruction E to the CID specifically states that “the Bureau may require the submission of additional documents or tangible things.”

plain language of Rule 208 permits Enforcement to request subpoenas directed to Respondents.” *PHH Corp.*, 2014-CFPB-0002, Order Granting in Part Request for Issuance of Subpoena Requiring Production of Documents at 1 (May 15, 2014); *see id.* C.F.R. § 1081.208 (“[A] party may request the issuance of one or more subpoenas requiring ... the production of documentary or other tangible evidence . . . ”). In accordance with Rule 208, Enforcement Counsel has requested the production of specific documentary evidence directly relevant to Respondents’ conduct and a data dictionary that should already be in Respondents’ possession.

Contrary to Respondents’ assertion (Resp. Obj. at 2), nothing in the Rules “disfavor[s]” the type of discovery request that Enforcement Counsel has made. Respondents erroneously extend the Commentary to Rule 206, requiring that the Office of Enforcement make available for inspection and copying certain categories of documents, to Rule 208, which governs discovery in the Bureau’s administrative proceedings. The Commentary to Rule 206 states that the rule requires the Office of Enforcement to make documents available to Respondents for inspection and copying, “[b]ecause this approach renders traditional document discovery largely unnecessary, [and] it will lead to a faster and more efficient resolution of Bureau administrative proceedings.” Rules of Practice for Adjudication Proceedings, 77 Fed. Reg. 39,058, 39,070 (June 29, 2012). However, as noted above, Rule 208 expressly provides for the issuance of subpoenas for documentary or other tangible evidence, and commentary to another provision in the rules cannot override the express approval of subpoenas in Rule 208, especially when the commentary in question is directed at Respondents’ need for additional discovery, not Enforcement Counsel’s. Respondents’ claim that “[t]he Commentary to rule 208 further highlights this approach [set forth in Rule 206] and

does not support the Bureau's efforts" to seek issuance of the subpoena (Resp. Obj. at 3) is a bare assertion that is not firmly grounded in any part of the commentary to Rule 208. Rules of Practice for Adjudication Proceedings, 77 Fed. Reg. at 39075-76.

**ENFORCEMENT COUNSEL'S REQUEST
FOR PRODUCTION OF WITNESS STATEMENTS**

Respondents raised no objections to producing statements responsive to Enforcement Counsel's Request No. 3, but asserted that they would not produce such statements until March 31, 2016. The Order Granting in Part and Denying in Part Respondents' Motion for Production of Witness Statements issued January 8, 2016 requires that the Bureau begin producing, on a rolling basis, Rule 207 witness statements on February 11, 2016. Thus, as a matter of equity, Enforcement Counsel respectfully requests that Respondents produce their witnesses' statements by no later than 20 days of the service of the subpoena, as set forth in Enforcement Counsel's Proposed Order Granting Request for Issuance of Subpoena Requiring Production of Documents filed on February 2, 2016, with a similar continuing obligation to produce statements as new potential witnesses are identified.

CONCLUSION

For all the reasons stated above, Enforcement Counsel respectfully requests the issuance of the subpoena and an Order requiring Respondents to respond in full within 20 days of service of the subpoena.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of February 2016, I caused a copy of the foregoing Bureau's Response to the Order Requiring The Bureau to Submit Additional Information to be filed by electronic transmission (e-mail) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), the U.S. Coast Guard Hearing Docket Clerk (aljdocketcenter@uscg.mil), Administrative Law Judge Parlen L. McKenna (cindy.j.melendres@uscg.mil), Heather L. MacClintock (Heather.L.MacClintock@uscg.mil), and served by email on the Respondents' counsel at the following addresses:

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