MAJORITY STAFF REPORT ON DIRECTOR CORDRAY'S FAILURE TO COMPLY WITH HIS LEGAL OBLIGATIONS UNDER THE COMMITTEE'S *SUBPOENA DUCES TECUM* DATED APRIL 4, 2017, ISSUED IN PART TO FURTHER THE COMMITTEE'S ON-GOING INVESTIGATION INTO THE CFPB'S ARBITRATION RULEMAKING

COMMITTEE ON FINANCIAL SERVICES, U.S. HOUSE OF REPRESENTATIVES
HON. JEB HENSARLING, CHAIRMAN

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
HON. ANN WAGNER, CHAIRMAN

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This report has not been officially adopted by the Committee on Financial Services and may not necessarily reflect the views of its Members.

TABLE OF CONTENTS

The House Committee on Financial Services (the "Committee") has been engaged in active oversight of the Bureau of Consumer Financial Protection ("CFPB") on a range of matters within the Committee's jurisdiction. The CFPB hampers the Committee's legislative and oversight efforts with its refusal to adequately comply with Committee subpoenas for records and other requests for information. This Staff Report details the defiance of the CFPB's Director, Richard Cordray, of two Specifications of a Congressional *subpoena duces tecum* issued to him on April 4, 2017. *See* H. Fin. Servs. Comm. *Subpoena Duces Tecum* to Richard Cordray (Apr. 4, 2017) (the "Subpoena"). These two Specifications, 19 and 20, relate directly to records requests concerning the CFPB's pre-dispute arbitration rule. The underlying requests have been outstanding for 471 days. Majority Committee Staff ("Staff") finds that Director Cordray has failed to comply with Specifications 19 and 20 of the Committee's Subpoena and there is a valid legal and factual basis for instituting contempt of Congress proceedings against Director Cordray to enforce Specifications 19 and 20.[1]

I. Background.

A. The Committee's Oversight of the CFPB.

The Committee is the authorizing Committee for the CFPB and has primary jurisdiction over the CFPB. Pursuant to House Rule X, the Committee is both authorized and *required* to conduct oversight of the CFPB. *See* Rule X, Rules of the House of Representatives, 115th Cong. In discharging that duty, the Committee is exercising the House's inherent constitutional authority under Article I to conduct investigations of the Executive Branch in aid of Congress's legislative purposes. *See, e.g.*, *Barenblatt v. United States*, 360 U.S. 109, 111 (1959); *see infra*, at 14–15. The House has a valid legislative purpose for its investigations when it investigates to gather information for the purposes of legislating (broadly defined to include, among other things, appropriations, contemplated legislation, or declining to legislate after study), overseeing government, informing the public about how the government actually works, or discharging an enumerated power. *See, e.g.*, *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975); *Reed v. Cnty. Comm'rs of Del. Cnty., Pa.*, 277 U.S. 376, 388 (1928); *McGrain v. Daugherty*, 273 U.S. 135, 177–78 (1927); *see, infra*, at 13–14.

[1] This Report discusses only two of the many Specifications in the April 4, 2017, Subpoena. As of the date of this Report, Director Cordray is not in compliance with any of the Subpoena Specifications. The absence of discussion in this Report about the other Specifications of the Subpoena should not be inferred to mean that Director Cordray has otherwise complied with the Subpoena apart from Specification 19 and 20.

In furtherance of its Constitutional duty, and obligation under House Rules, the Committee has conducted, and continues to conduct, oversight of the CFPB on a number of important matters which, among other things, relate directly both to legislation the Committee is considering and efforts by the Committee to better inform the public on issues of great public importance. Of particular relevance in this Report is the Committee's inquiry into whether CFPB rulemakings are in the public interest and for the protection of consumers. A particular focus of this review is, and has been, the CFPB's pre-dispute arbitration rule.[2] The Committee is also constantly reviewing and evaluating whether fundamental reforms to the organization and structure of the CFPB are needed to make it more accountable and transparent, as well as to ensure that the CFPB does not abuse or misuse its authority—including abuse or misuse via rulemakings.

B. The CFPB's Longstanding Failure to Fully Comply with the Committee's On-Going Oversight Regarding Pre-Dispute Arbitration.

1. Director Cordray Fails to Timely Comply in Full with the Committee's Request.

On April 20, 2016—471 days ago—the Committee requested records from the CFPB relating to its pre-dispute arbitration rulemaking. Letter from the Hon. Sean P. Duffy to the Hon. Richard Cordray (Apr. 20, 2016) ("Request"). The Request sought:

> 1) All communications relating to pre-dispute arbitration agreements between the Bureau and the following entities: American Association for Justice, National Consumer Law Center, National Association of Consumer Advocates, Alliance for Justice, and Public Justice;
> 2) All internal Bureau communications relating to pre-dispute arbitration agreements;
> 3) All draft reports concerning arbitration agreements; and
> 4) All records relating to the Small Business Regulatory Enforcement Fairness Act ("SBREFA") process employed in considering any actions pertaining to pre-dispute arbitration agreements.

Request at 1. The Request asked that the records be produced by May 4, 2016. *Id.*

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[2] For example, the Subcommittee on Financial Institutions and Consumer Credit held a hearing to examine whether the CFPB's proposed rule following the CFPB's arbitration study is in the public interest and for the protection of consumers. *See Examining the CFPB's Proposed Rulemaking on Arbitration: Is it in the Public Interest and for the Protection of Consumers?: Hearing Before the Subcomm. on Fin. Institutions and Consumer Credit of the H. Comm. on Fin. Servs.*, 114th Cong. (May 18, 2016).

Director Cordray replied by cover letter dated May 4, 2016. *See* Letter from the Hon. Richard Cordray to the Hon. Sean P. Duffy (May 4, 2016). The CFPB did not seek to meet and confer about the Committee's request or seek an extension of the amount of time granted by the Committee to produce records prior to the return date. The CFPB's May 4 production was admittedly far from complete. It included only a handful of records responsive to the SBREFA Specification[3] as well as 8,665 pages of material that by the CFPB's own admission was "not responsive to the itemized requests" and had previously been produced to another Subcommittee of the Committee. *Id.* at 1, n.1. The letter also expressly committed that the CFPB would "produc[e] certain responsive material on a rolling basis." *Id.* at 1. The letter further sought to meet and confer on the Request (notably for the first time and after the requested response date) stating: "given the substantial breadth of your request, staff-level dialogue will be necessary regarding much of the material sought." *Id.* The letter did not provide any data or analysis supporting the CFPB's claims of burden to fulfil the Request—the claim was entirely Director Cordray's *ipse dixit*.

2. The Committee and CFPB Meet and Confer.

On May 27, 2016, Committee Counsel met and conferred with CFPB Counsel. During this conference, Committee Counsel agreed to *consider* a possible modification of the Request as an accommodation to the CFPB *if* the CFPB "identi[fied] the relevant staff who worked on key aspects of the proposed arbitration rule and provide[d] their visitor and meeting logs with representatives of outside groups." Letter from the Hon. Sean P. Duffy to the Hon. Richard Cordray, at 1 n.1 (Aug. 12, 2016). Committee Counsel made clear to the CFPB that production of this information was a necessary predicate to any narrowing of the Request.

3. CFPB Fails to Make a Complete Production and Fails to Provide Requested Information from the Meet and Confer.

On June 1, 2016, the CFPB produced thousands of pages of records that it admitted were non-responsive to the Request and which were also being produced to another Committee Subcommittee. At the same time, the CFPB did not provide the Committee with the requested data that was required for the Committee to consider a modification of the Request. *See* Letter from Catherine Galicia, Esq. to the Hon. Sean P. Duffy, at 1 (June 1, 2016).

On June 24, 2016, the CFPB made a 2,362 page production of what the Committee believes to be records responsive to Request Specification 1. *See* Letter from Hon. Richard Cordray to the Hon. Jeb Hensarling (June 24, 2016). This

[3] *See* Letter from Richard Cordray to the Hon. Sean P. Duffy (Aug. 26, 2017) (showing CFPB's calculation that 263 pages of material responsive to Request Specification 4 were produced on May 4, 2016).

production was made on its own accord, but was sent under a cover letter from Director Cordray that was a response to a letter from Chairman Hensarling that indicated the Chairman was preparing to issue deposition subpoenas to senior CFPB officials to investigate Director Cordray's default on the Committee's December 18, 2015 *subpoena duces tecum*. *Id.* at 5 ("As a sign of its enduring good faith, the Bureau is producing several thousand pages of material today, in the hope that the Committee will recognize that resuming constructive staff-level dialogue offers a more promising path forward than would issuing deposition subpoenas.").[4] At no time in the June 24, 2016 letter did the CFPB: (1) claim this was a complete production for any Request Specification; (2) request an extension; (3) present the data Committee Counsel had requested as part of the meet and confer process the previous month which was a predicate to the Committee agreeing to consider narrowing the Request; or (4) assert any claim of privilege or protection to justify withholding responsive records.

4. The Committee Reiterates its Call for Full Compliance with the Request.

Despite the CFPB's May 4, 2016 promise of a "rolling" production no additional records were forthcoming for the 49 days following the June 24, 2016 production. Accordingly, on August 12, 2016 the Committee wrote Director Cordray noting that, despite the CFPB's promise of a "rolling" production, the response to the Committee's "April 20, 2016, document request is incomplete." Letter from the Hon. Sean P. Duffy to the Hon. Richard Cordray, at 1 (Aug. 12, 2016). This letter also requested that the CFPB provide, by no later than August 26, 2016, an "assurance that the Bureau will not finalize a rule on arbitration agreements until it has fully and completely responded to the April 20th request and the Committee has had a chance to review the material provided." *Id.* at 2.

5. The CFPB Again Fails to Make a Complete Production.

The CFPB responded on August 26, 2016 stating: "As promised in the Bureau's May 4, 2016 response to the Committee's April 20, 2016 letter, we will continue to produce records responsive to the Committee's inquiry regarding this rulemaking on a rolling basis, and we include with this letter an additional 648 pages of responsive material." Letter from the Hon. Richard Cordray to the Hon. Sean P. Duffy, at 1 (Aug. 26, 2017). This letter went on to assert both that "given the breadth of your request, staff-level dialogue and scoping is essential to additional progress in responding," and to promise additional productions: "we will continue rolling production as we work to satisfy your substantial request of Bureau records." *Id.* at 2. Despite Director Cordray's request that the Committee narrow

[4] The CFPB provided no explanation as to why it apparently viewed partial production under one Specification of the outstanding Request as a "good faith" showing that demonstrated sufficient cause for the Committee to forbear issuing deposition subpoenas relating to default on an unrelated *subpoena duces tecum*.

the Request, his letter provided no response to the Committee's outstanding request for the data necessary for the Committee to consider narrowing the Request as part of the meet and confer process. The letter was silent as to the requested undertaking regarding finalizing arbitration rulemakings. Again, at no time in the August 26, 2016, production did the CFPB claim it was making a complete production for any Request Specification, request an extension, or assert any claim of privilege or protection to justify withholding responsive records.

On October 18, 2016, the CFPB made an additional production of some 1,130 pages of records responsive almost entirely to Request Specification 4.[5] *See* Letter from Catherine Galicia, Esq. to the Hon. Sean P. Duffy (Oct. 18, 2016). Once again, at no time did the CFPB state this was a complete production for any Request Specification, request an extension, present the data predicate to the Committee agreeing to consider narrowing the Request as part of the meet and confer process, or assert any claim of privilege or protection to justify withholding responsive records. As of this production, the Request had been outstanding for 182 days.

C. The Committee's Subpoena.

On April 4, 2017, despite the CFPB's promise of "rolling" productions, no further records responsive to the Request had been produced for 168 days after the October 2016 production, and the Request itself had been outstanding for 349 days. Faced with the CFPB's continued failure to fully comply with the Request, and other Committee requests for records on other topics, the Committee issued the Subpoena.

In a cover letter accompanying the Subpoena, Chairman Hensarling made clear that: (1) the Subpoena required all records to be produced by May 2, 2017, and that given the CFPB's longstanding failure to comply with prior requests for information sought by the Subpoena, the Committee expected full compliance by the return date and that no extensions would be granted absent extraordinary circumstances; (2) the legally binding Subpoena Instructions would be strictly enforced; and (3) the Committee would issue subpoenas for custodial depositions to investigate any default of the Subpoena and, if necessary, would avail itself of all tools to enforce its process and pursue remedies for obstruction of Congress, which is a felony. Letter from the Hon. Jeb Hensarling to the Hon. Richard Cordray (Apr. 4, 2017).

Two of the twenty-seven specifications in the Subpoena relate to the CFPB's pre-dispute arbitration rulemaking. Subpoena Specification 19 requires production of: "All communications relating to pre-dispute arbitration agreements between the CFPB and any of the following entities: (i) American Association for Justice; (ii)

[5] The June 24, 2016 and October 18, 2016 productions contain approximately 10 records that deal not only with SBREFA, but with Request Specification 2 more broadly.

National Consumer Law Center; (iii) National Association of Consumer Advocates; (iv) Alliance for Justice; or (v) Public Justice." Subpoena Specification 19. Subpoena Specification 20 commands production of: "All communications from one CFPB employee to another CFPB employee relating to pre-dispute arbitration agreements." Subpoena Specification 20.

1. The CFPB Declines to Engage in Negotiations Prior to the Subpoena Return Date.

After service of the Subpoena on April 4, 2017, Committee Counsel emailed CFPB staff on April 13, 2017, in an effort to facilitate compliance through the meet and confer process:

> . . . As we are approaching 10 days from the service of the Subpoena below we wanted to reach out to you to emphasize that we are always available to meet and confer on any aspects of the Subpoena, and to attempt to provide other assistance to facilitate the CFPB's complete production by the Return Date. If you wish to meet and confer on the Subpoena we request that you do so as early in the process as possible and be prepared to discuss details regarding your processes, such as data sources, custodians, and search terms. Please do not hesitate to reach out via email or phone to talk at any time, including outside of business hours and on holidays and weekends. If you ever need information from the Majority staff and cannot reach us via email or our office phones, please do not hesitate to call me, any time, on my cellular phone . . . .

Email from Committee Counsel to Patrick O'Brien, Catherine Galicia, Esq., and Anne H. Tindall, Esq. (Apr. 13, 2017).

On April 18, 2017, fourteen days before all responsive records were required to be produced under the Subpoena, CFPB Counsel emailed Committee Counsel to inquire as to whether Committee Counsel would be available to discuss the Subpoena later that week, preferably on April 20 or 21, 2017. Email from Anne H. Tindall, Esq. to Committee Counsel (Apr. 18, 2017; 4:36 p.m. EST). Within one hour, Committee Counsel responded to CFPB Counsel to inform her that Committee Counsel would be available to meet and confer at the CFPB's convenience. *See* Email from Committee Counsel to Anne H. Tindall, Esq. (Apr. 18, 2017; 5:17 p.m. EST). Committee Counsel also advised the CFPB as follows:

> As I mentioned in my prior email, in order to proceed most efficiently, please be prepared to discuss details regarding your process of preservation, review, collection, data sources, current and historical organizational charts (by name of incumbent), custodians, and search terms. *Cf.* 12 C.F.R. § 1080.6(c). To the extent you intend to request relief from full compliance with any Specification on grounds sounding in burden, please produce comprehensive search term reports and other detailed supporting data. *Cf.* Decision and

> Order on Petition by Harbour Portfolio LLC to Set Aside or Modify Civil Investigative Demand, In the Matter of Harbour Portfolio Advisors, LLC, 2016-MISC-Harbour Portfolio-0001, at *4 (CFPB Nov. 1, 2016); Decision and Order on Petition by National Asset Advisors LLC and National Asset Mortgage LLC to Set Aside or Modify Civil Investigative Demand, In the Matter of National Asset Advisors LLC, 1026-MISC-National Asset Advisors and National Asset Mortgage-001, at *4 (CFPB Nov. 1, 2016); Decision and Order on PHH Corporation's Petition Modify or Set Aside Civil Investigative Demand, In the Matter of PHH Corporation, 2012-MISC-PHH Corp-001, at *6 (CFPB Sept. 20, 2012).

Id. Last, Committee Counsel advised CFPB Counsel that the meet and confer would be "on the record." *Id.* CFPB Counsel then inquired as to what "on the record" meant. Email from Anne H. Tindall, Esq. to Committee Counsel (Apr. 18, 2017; 6:11 p.m. EST). Committee Counsel replied "[b]y on the record, I mean that the call will be transcribed as is often done with discovery conferences in civil litigation. We will, of course, make the transcript available to the CFPB." Email from Committee Counsel to Anne H. Tindal, Esq. (Apr. 18, 2016; 6:30 p.m. EST).

On April 20, 2017, CFPB Counsel indicated to Committee Counsel that "[t]ranscription [of the meet and confer conference] would be a substantial departure from past accommodations process" and advised that "[w]e'll need to discuss internally and will be in touch" about whether to discuss the Subpoena with Committee staff on the record. Email from Anne H. Tindall, Esq. to Committee Counsel (Apr. 20, 2017). On April 24, 2017, eight days before all responsive records were required to be produced under the Subpoena, CFPB Counsel advised Committee Counsel as follows:

> We've discussed your proposal to transcribe any negotiations between your staff and ours regarding compliance with the Committee's April 4, 2017 subpoena, and we must decline. Subjecting negotiations between staff to written transcription would mark a significant and unwarranted departure from accommodations processes developed and maintained over the course of many decades, and would be out of step with the time-honored and constitutionally based comity between coequal and independent branches of government. Further, the chilling effect this approach would have on staff discussions would diminish their utility. We hope you will reconsider this abrupt change in staff-to-staff negotiations. Until such time, *we will communicate about the Committee's subpoena and the Bureau's response via email.*

Email from Anne H. Tindall, Esq. to Committee Counsel (Apr. 24, 2017) (emphasis added).

The following day, on April 25, 2017, Committee Counsel advised CFPB Counsel that:

First. As we stated weeks ago, we are willing to meet and confer on the subpoena at any time that is convenient to the CFPB. That offer was and is without regard to modality of communication. Should you wish to meet and confer via email, we await any future communications from you and re-renew o[u]r prior commit[ment] to be responsive afterhours and on weekends.

Second. We are disappointed to learn that the Bureau is unwilling to speak with us on the phone if that conversation will be transcribed. You state that a transcript would be "chilling" to staff level discussions. We disagree. We feel that speaking on the record is liberating: It allows us to have precision and protects all on the call from misunderstandings or a lack of clarity, thereby efficiently advancing resolution. We have offered to provide the CFPB with access to the transcript precisely because we have no concern regarding you having a transcript of exactly what we have said on a call. We welcome it. We wonder why the CFPB does not take the same position. We hope that you will reconsider.

Third. We are beyond the accommodations process attendant to requests. A subpoena has issued.

Email from Committee Counsel to Anne H. Tindall, Esq. (Apr. 25, 2017). The CFPB did not respond to this email, nor did anyone from the CFPB ever contact the Committee again about the Subpoena before the CFPB hand-delivered the Return to the Committee office approximately 1 hour before the Subpoena deadline on May 2, 2017.

2. Director Cordray Defaults on the Subpoena.

On the Subpoena return date of May 2, 2017, for Specification 19 the CFPB merely reproduced records that it had already produced to the Committee on June 24, 2016, and directed the Committee to certain notices of *ex parte* communications in the CFPB arbitration rulemaking record. Letter from the Hon. Richard Cordray to the Hon. Jeb Hensarling, at 14 (May 2, 2017) ("Return"). The CFPB did not produce any records in response to Specification 20 with the Return. *Id.* At no time has the CFPB sought an extension of the Subpoena's return date or taken the Committee up on its repeated offers (in this case long predating the Subpoena) to provide the predicate detailed showing necessary to support possible modifications of Specifications 19 or 20 via a key custodian or other approach. And, as detailed below, as to Specifications 19 and 20, the Return presented no cognizable legal arguments sounding in privilege, protection, or otherwise, that would relieve Director Cordray of his legal obligation to produce all records responsive to the Subpoena. *See, infra*, at 18–34.[6]

[6] To be sure, the Return sought staff level discussions to "scope" the Subpoena in an effort to reduce the CFPB's putative burden. But the CFPB did not provide the necessary supporting data, data the Committee had instructed the CFPB to provide prior to default (during meet and confer): "to the

On May 11, 2017, Committee Counsel informed the CFPB that the Committee considered Director Cordray to have made "complete default" as to the Subpoena. Email from Committee Counsel to Steven Bressler, Esq. (May 11, 2017).

Director Cordray made *no* attempt to cure his default until May 26, 2017, when the CFPB wrote Committee Counsel that "we remain eager and available to discuss the scope of the April 4 subpoena's specifications at a staff level, via continued correspondence or other appropriate means." He produced no additional records. Email from Steven Bressler, Esq. to Committee Counsel (May 26, 2017). Committee Counsel responded later that day later writing:

> As to the April 4 Subpoena, as [an] initial matter, we again note that the default was complete. We also note that you have never requested an extension concerning that Subpoena. All that said, we are happy to meet and confer on this Subpoena as well, but again, the process must occur per the parameters of the second point above. We hope that your reference to this Subpoena indicates an intent to cure the default promptly.

Email from Committee Counsel to Steven Bressler, Esq. (May 26, 2017). The point referenced therein was that:

> We are happy to provide you with "guidance" regarding the . . . Subpoena, but we cannot do it in a void. We need you to engage with us on specifics regarding custodians, search protocols, and search terms. Absent that engagement the Subpoena necessarily must stand as written. We are willing to reduce your burden so long as it does not prejudice the Committee's interests, but you have to work with us to accomplish that end. Again, we cannot blindly make concession. We can only yet again request that you engage on the issue.

Id.

3. Director Cordray Disputes He is In Default.

The CFPB did not respond until June 1, 2017, when the CFPB sent Committee Counsel a lengthy email disputing that there was default, but advancing no legal argument in support of this position. *See* Email from Steven Bressler, Esq. to Committee Counsel (June 1, 2017). The email appears to take the position that all the CFPB was required to do in response to the Subpoena was to make a "robust" production. *Id.* The email also appears to take the position that full

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extent you intend to request relief from full compliance with any Specification on grounds sounding in burden, please produce comprehensive search term reports and other detailed supporting data." *See* Email from Committee Counsel to Anne H. Tindall, Esq. (Apr. 18, 2017; 5:17 p.m. EST).

compliance with the Subpoena was not and is not required. *Id.* It appears to Staff that the CFPB's position was and is that while the CFPB is "eager to cure any inadvertent deficiencies in its productions or simply to provide additional information that would assist the Committee" it is the Committee's duty to "clearly and specifically indentif[y] the records or information it believes are missing from these productions." *Id.* Relevant to Specifications 19 and 20, the email also seems to make the claim that in instances where the CFPB has cited burden, it is the Committee's obligation to "provide" guidance to alleviate that burden. *Id.* As detailed below, Staff concludes that the CFPB's legal positions are directly contrary to Supreme Court precedent.[7] *See, infra*, at 18–34.

4. The Committee Issues Deposition Subpoenas to Investigate Directory Cordray's Default on the Subpoena.

On June 15, 2017, with the CFPB having made no additional productions on *any* Specifications of the Subpoena, the Chairman authorized and issued ten deposition subpoenas to current and former CFPB employees to "further investigate potential obstruction of this Committee's investigations." Email from Committee Counsel to Steven Bressler, Esq. (June 15, 2017). CFPB Counsel clearly understood that these ten deposition subpoenas reflected—in part—the Chairman's profound concern regarding Director Cordray's default on the Subpoena. *See* Email from Stephen Bressler, Esq. to Committee Counsel (June 16, 2017).

5. Director Cordray Fails to Take Adequate Steps to Cure His Default on Specifications 19 and 20.

In correspondence sent subsequent to the issuance of the deposition subpoenas, Committee Counsel made clear that:

> Even at this late of late hours, Staff will work with you and will consider withdrawing some of the referenced deposition subpoenas if the CFPB comes into *full and complete* compliance with the April 4 and 9 Subpoenas. . . . As to subpoena compliance, we have made very clear how the process should work—both as a matter of law and common expectation. We have offered time and again to meet and confer with the CFPB on data sources, custodians, or search terms, or to consider specific showings of burden or specific showings to support modification, but the CFPB has never actually engaged this offer beyond hortatory language and one discrete instance—months after default—in which search terms and unilaterally selected custodians were provided—without any surrounding context—for *possible*

[7] CFPB Counsel sent a so-called "follow-up" email to their June 1, 2017 email on June 14, 2017. Again, this email completely ignored Committee Counsel's prior explanation that the CFPB needed to propose a detailed approach to support any modification of Subpoena Specifications that the CFPB thought were overbroad or unduly burdensome. *See* Email from Stephen Bressler, Esq. to Committee Counsel (June 14, 2017).

> feedback *after* searches were run. Absent the CFPB fully engaging in this process, which governs not only the CFPB's CIDs, but subpoenas in numerous other contexts, the April 4 and 9 Subpoenas stand as written and require literal compliance.

Email from Committee Counsel to Steven Bressler, Esq. (June 16, 2017).

The CFPB responded several days later, and among other things, asked whether the CFPB needed to provide the Committee with any additional information beyond that the CFPB had already provided in order to further meeting and conferring. Email from Steven Bressler, Esq. to Committee Counsel (June 19, 2017). Committee Counsel responded the next day:

> We are disappointed by your request for any additional information that you should be prepared to discuss at a meeting beyond what was provided. In the proceeding email we made clear that we expect any meet and confer process to occur via regular order. We have repeatedly delineated that regular order turns upon the subpoena recipient providing data sufficient to support a narrowing of the subpoena through some commonly used mechanism.

Email from Committee Counsel to Steven Bressler, Esq. (June 20, 2017).

The CFPB responded by, among other things, again seeking "guidance" regarding the Committee's "priorities including guidance regarding the specifications it regards as unsatisfied and scoping guidance within the broad specifications we have identified." Email from Steven Bressler, Esq. to Committee Staff (June 20, 2017). Committee Counsel responded:

> The CFPB's request for additional "guidance" to allow the CFPB to respond to the Subpoena is disappointing. We have repeatedly indicated that absent consent from the Committee there is no place for guidance—literal compliance with the Subpoena is required. It is not us who says it, but the Court. We have repeatedly indicated that the Committee is willing to work with the CFPB and to be reasonable, but we have repeatedly noted that process must occur as it does in the normal course of a subpoena response. It is the *CFPB's* burden to present the case for narrowing on a claim of burden or to support a proposed search protocol tied to search terms and key custodians. The *CFPB* must provide the supporting details. We will not spill further ink on the subject.

In subsequent correspondence, the Committee reiterated its longstanding offer—it would confer with the CFPB at any time and via any modality regarding the Subpoena. All the CFPB needed to do is provide the predicate data. *See* Email from Committee Counsel to Stephen Bressler, Esq. (July 8, 2017); Email from Committee Counsel to Stephen Bressler, Esq. (June 5, 2017); Email from Committee Counsel to Stephen Bressler, Esq. (June 26, 2017).

On July 5, 2017, Chairman Hensarling sent Director Cordray a letter reiterating that the CFPB was in default as to Specifications 19 and 20. Letter from the Hon. Jeb Hensarling to the Hon. Richard Cordray (July 5, 2017). This letter made clear that "[b]y this letter, I notify you that you continue to be in default of the Committee's April 4, 2017 Subpoena. I have directed Committee Staff to prepare a Staff Report for public release detailing your contumacy." *Id.*[8]

On July 10, 2017, Director Cordray responded with a letter disputing that he was in default and generally claiming that the CFPB had not received requested guidance from the Committee to allow the CFPB to "scope" the Committee's Subpoena. Letter from the Hon. Richard Cordray to the Hon. Jeb Hensarling, at 2–4 (July 10, 2017). This letter also argued that the Committee "fail[ed] to explain what more the Bureau could be expected to do in order to respond in a satisfactory manner to the Committee's requests." *Id.* at 1.

Subsequent to this letter exchange, CFPB Counsel emailed Committee Counsel and stated that Specification 20 was unduly burdensome because a search of every CFPB employee's email account for the word "arbitration" returned "more than 1.37 million emails." Email from CFPB Counsel to Committee Counsel (July 18, 2017). The CFPB then simply repeated its request for "additional clarification or guidance as to the documents of interest," and went so far as to suggest that the *Committee* provide "the custodians of interest." The email made no mention of the fact that the Committee's request for information regarding custodians was then outstanding for 434 days. As to Specification 19, CFPB stated it is in the process of making a supplemental review and production. Notably, this occurred only after Director Cordray was threatened with the publication of this Staff Report, 10 deposition subpoenas were issued to past and present CFPB employees, and Director Cordray was threatened with the possibility of being cited for contempt of Congress.

As of this Report, 471 days after the underlying requests and 122 days after the Subpoena issued, Specifications 19 and 20 remain outstanding. As to those Specifications, there has been neither a further production of records nor any requests for an extensions. Finally, the information that Committee Counsel stated was a necessary predicate to potentially accommodating the CFPB—by possibly narrowing the Specifications—has not been provided for more than 434 days.

[8] Chairman Hensarling's letter also stated: "You are hereby advised that any effort by you or another Bureau employee to promulgate any rule affecting arbitration agreements prior to curing your default as to Specifications 19 and 20 of the Committee's April 4, 2017 Subpoena may lead to contempt proceedings." Letter from the Hon. Jeb Hensarling to the Hon. Richard Cordray (July 5, 2017).

II. Director Cordray's Legal Obligations Under the Subpoena.

A. Congress's Inherent Investigative Power Under the Constitution.

1. It is beyond contestation that Congress's investigative powers are exceedingly broad:

> The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.

Barenblatt, 360 U.S. at 111; *accord Eastland*, 421 U.S. at 504; *Sinclair v. United States*, 279 U.S. 263, 291–92 (1929), *overruled on other grounds*, *United States v. Gaudin*, 515 U.S. 506 (1995); *In re Chapman*, 166 U.S. 661, 668–669 (1897).[9] The only limitations on this power are that Congress may not pry into *purely* private affairs, or initiate an investigation that itself directly offends the Constitution. *See, e.g.*, *Eastland*, 421 U.S. at 504; *Barenblatt*, 360 U.S. at 111; *In re Chapman*, 166 U.S. at 668–669.

The Supreme Court has explained the basis for this power at length, holding that it flows *directly* from Article I of the Constitution itself:

> We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American Legislatures before the Constitution was framed and ratified. Both houses of Congress took this view of it early in their history . . . and both houses have employed the power accordingly up to the present time.
>
> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the

[9] This broad power of inquiry may be undertaken for inquiry's sake. *See Eastland*, 421 U.S. at 509 ("Nor is the legitimacy of a congressional inquiry to be defined by what it produces. The very nature of the investigative function—like any research—is that it takes the searchers up some 'blind alleys' and into nonproductive enterprises. To be a valid legislative inquiry there need be no predictable end result."); *Barenblatt*, 360 U.S. at 111; *In re Chapman*, 166 U.S. at 670 ("it was certainly not necessary that the resolution should declare in advance what the senate meditated doing when the investigation was concluded").

> requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry, with enforcing process, was regarded and employed as a necessary and appropriate attribute of the power to legislate indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.

McGrain v. Daugherty, 272 U.S. 135, 174–75 (1927); *accord Eastland*, 421 U.S. at 504; *Barenblatt,* 360 U.S. at 111.

2. In addition to its breadth, Congress's power to investigate carries with it two key principles implicated here. Each House of Congress has inherent and unalienable power that flows directly from Article I of the Constitution to: (1) issue compulsory process in aid of its investigations; and (2) enforce its process via trying and punishing contemnors at its Bar.

a. As to the first point, there is abundant Supreme Court precedent. A Congressional subpoena issues and derives its power not through statutory mandate, but directly from the Constitution. *See, e.g., Eastland*, 421 U.S. at 504 (holding Congress has "power to investigate . . . through compulsory process," and that "[i]ssuance of subpoenas such as the one in question here has long been held to be a legitimate use by Congress of its power to investigate."); *Jurney v. MacCracken*, 294 U.S. 125, 149–50 (1935) ("Here, we are concerned, not with an extension of congressional privilege, but with vindication of the established and essential privilege of requiring the production of evidence."); *Sinclair*, 279 U.S. at 295 (holding Congress has power "directly or through its committees to require pertinent disclosures in aid of its own constitutional power"); *McGrain*, 273 U.S. at 174 (holding "power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function").[10] As this power flows directly from the Constitution, it necessarily is inalienable absent Constitutional Amendment. *See*, *supra*, at 14–15.

b. Similarly, as to the second point, the case law is beyond dispute. *See, e.g.*, *Jurney*, 294 U.S. at 147–48 (holding Congress has inherent power to punish for any

[10] This power flows even more broadly than the power to subpoena. The Supreme Court has held that a House of Congress has power to issue process in the nature of an attachment to have a person before it without ever issuing an intervening subpoena. *See Barry v. U.S. ex rel. Cunningham*, 279 U.S. 597, 616–17 (1929).

contempt that "obstruct[s] the performance of the duties of the Legislature" regardless of whether that obstruction has been completed or has been removed); *In re Chapman*, 166 U.S. at 671–72. As to the inalienability of this power, the Supreme Court has stated: "We grant that congress could not divest itself, or either of its houses, of the essential and inherent power to punish for contempt, in cases to which the power of either house properly extended." *In re Chapman*, 166 U.S. at 471–72; *accord*, *Jurney*, 294 U.S. at 151 (citing foregoing language in *In re Chapman* with approval).

B. Legal Principles Applicable to Congressional Subpoenas.

Director Cordray's legal obligation in response to the Subpoena is simple. On or before the return date, he must either produce all responsive records and a certification of the completeness of the production, produce a privilege log and a certification, provide a certification that no responsive records exist, raise a legal objection to the Subpoena (such as a claim of "impossibility" or constitutionality-based privilege), or some combination of the above. Failure to do so is contumacy. *See, e.g.*, *McPhaul v. United States*, 364 U.S. 372, 378–79 (1960) (holding that failure of respondent to produce the subpoenaed records, state their non-existence, or state claim of privilege on the face of the return constitutes contempt; denying request to charge the jury that the United States was required to prove that the subpoenaed records existed or that the subpoenaed records were within contemnor's possession custody or control because no objection was made before the Committee and "'if (petitioner) had legitimate reasons for failing to produce the records of the association, a decent respect for the House of Representatives, by whose authority the subpoenas had issued, would have required that [he] state [his] reasons for noncompliance upon the return of the writ.'" (citation omitted)); *United States v. Bryan*, 339 U.S. 323, 330–36 (1950) (holding that "when the Government introduced evidence in this case that respondent had been validly served with a lawful subpoena directing her to produce records within her custody and control, and that on the day set out in the subpoena she intentionally failed to comply, it is made out a prima facie case of willful default" which can only be defended against by demonstrating a legal excuse such as "impossibility"); *United States v. Shelton*, 404 F.2d 1292, 1299–1307 (D.C. Cir. 1968) (similar); *S. Perm. Subcomm. on Investigations v. Ferrer*, 199 F. Supp. 3d 125, 145 (D.D.C. 2016) (entering judgement in action to enforce Senate subpoena that "Mr. Ferrer shall *comply* forthwith with the October 1, 2015 Subpoena of the Subcommittee and produce to the Subcommittee *all* documents responsive to requests 1, 2, and 3 of the subpoena no later than 10 days from the date of this Opinion." (emphases added)), *vacated as moot*, 856 F.3d 1080 (D.C. Cir. 2017); Order, *S. Perm. Subcomm. on Invests. v. Ferrer*, No. 1:16-mc-00621 (RMC), at 5 (Sept. 30, 2016) (ECF No. 35) ("The Senate's resort to judicial assistance did not trigger Mr. Ferrer's legal obligation to search for documents and provide a privilege log. In fact, failure to comply with the subpoena by the return date, even without judicial intervention, may have triggered criminal

contempt proceedings against Mr. Ferrer. *See* 2 U.S.C. §§ 192, 194; *see also Shelton*, 404 F.2d 1292."), *stay granted in part*, No. 16-5235 (D.C. Cir. Oct. 17, 2016), *vacated as moot*, 856 F.3d 1080 (D.C. Cir. 2017); *cf. McPhaul*, 364 U.S. at 384–87 (Douglas, J., dissenting) (arguing that the fact that the witness failed to argue that records were not in his custody or control did not discharge the government from proving that the records were in fact in his custody or control).[11][12] The Supreme Court has explained the rationale for this procedure at length:

> Persons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery. A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity.

Bryan, 339 U.S. at 331.[13]

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[11] *All* objections must be made at the time of return—seriatim objections are impermissible. *See, e.g.*, *Hutchenson v. United States*, 369 U.S. 599, 611 (1962) ("But it is surely equally clear that where, as here, the validity of a particular constitutional objection depends in part on the availability of another, both must be adequately raised before the inquiring committee if the former is to be fully preserved for review in this Court. To hold otherwise would enable a witness to toy with a congressional committee in a manner obnoxious to the rule that such committees are entitled to be clearly apprised of the grounds on which a witness asserts a right of refusal to answer.").

[12] The Staff notes that the CFPB has acknowledged the underlying logic of the foregoing opinions in the CFPB's regulations delimiting the obligations of a recipient of Civil Investigative Demands ("CIDs"). *See e.g.*, 12 C.F.R. § 1080.6(a)(1)(ii) ("Production of documentary material in response to a civil investigative demand shall be made under a sworn certificate, in such form as the demand designates, by the person to whom the demand is directed or, if not a natural person, by any person having knowledge of the facts and circumstances relating to such production, to the effect that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian."). *See also* Consumer Financial Protection Bureau, Civil Investigative Demand to UniRush LLC's at Instruction D (Oct. 27, 2015), (requiring privilege logs by the return date), Instruction E (requiring retention of all materials "that are in any way relevant to the investigation"), Instruction H (requiring return of attached certifications that CID response is true and complete), and Certificates of Compliance (forms for required sworn certifications). This certification requirement is *more* demanding than that of Subpoena Instruction 16.

[13] The CFPB has disputed that these principles apply here: "The cases that you cite concern subpoenas served by a Congressional committee, the House Committee on Un-American Activities, on private parties and are thus inapposite. For example, they do not account for the constitutionally-rooted negotiation and accommodation process that has no place in such disputes between Congress and a private party, but is essential between entities of the legislative and executive branches. *See, e.g.*, *Comm. on Judiciary of U.S. House of Representatives v. Miers*, 542 F.3d 909, 912 (D.C. Cir. 2008); *United States v. AT&T*, 567 F.2d 121, 127 (D.C. Cir. 1977); *accord Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 389 (2004)." Email from Stephen Bressler, Esq. to

Committee Counsel (July 11, 2017); *see also*, Letter from the Hon. Richard Cordary to the Hon. Jeb Hensarling, at 4 (July 10, 2017). This submission—that one set of rules applies to the CFPB—and another to private parties is in manifest error for a multitude of reasons, some of which Staff discuss below.

First. Courts have long noted that while Executive officials may be able to claim certain privileges that are unique to the government (such as common law deliberate due process privilege against a subpoena in federal civil litigation or executive privilege against a Congressional subpoena) those Executive officials are otherwise "subject to the general rules [governing compulsory process] which apply to others." *United States v. Burr*, 25 F.Cas. 187, 191 (C.C.D. Va. 1807) (No. 14,694) (Marshal, C.J.). That is why authority Staff cite above has been applied by a court to non-private individuals. *See Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 99–100, (D.D.C. July 31, 2008) (applying *Bryan* to former White House Counsel), *stay granted*, 542 F.3d 909 (D.C. Cir. 2008), *appeal dismissed*, No. 09-5327, 2009 WL 3568649 (D.C. Cir. Oct. 14, 2009); *see also*, *Marshal v. Gordon*, 243 U.S. 521, 540–42 (1917) (holding that the House possessed "a power implied to deal with contempt in so far as that authority was necessary to preserve and carry about the legislative authority given" and that this authority extended to the attachment of the United States District Attorney for the Southern District of New York, irrespective of his official title or whether the conduct for which his was attached to answer for by the House arose in the course of an official act, but granting habeas because the Attorney's actions did not rise to the level of impeding the functioning of the House); Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. Chi. L. Rev., 1083, 1135–37 (2009) (recounting House's attachment of the Minister to China to answer for failure to comply with *subpoena duces tecum* without any regard to his status as an Executive Branch superior officer); *see also*, Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. Chi. L. Rev., 1083, 1103–04 (2009) (House of Commons holding that the House had absolute authority to issue warrant requiring production of papers from the King's signet-office regardless of King's claim of absolute immunity); *id.* at 1103–04, (House of Commons holding it had authority to compel the Attorney General and officers of customs to give evidence before it regardless of the King's claim of complete privilege); *id.* at 1121 (South Carolina House of Commons attached the Chief Justice for "refusing to appear before the House"); *id.* (North Carolina Assembly attaching a Receiver of Power Money for refusing to submit accounts to the Assembly);

Second. *AT&T* is completely inapposite here. The discussion of the "accommodation process" in that case arose in the context of a claim of executive privilege. *See AT&T*, 567 F.2d at 122–24; *United States v. AT&T*, 551 F.2d 384, 387–88, 392–93 (D.C. Cir. 1976). In that Executive privilege had already been invoked, the case is entirely inapposite here where no privilege has been claimed, and all that is at issue is standard rules applicable to a subpoena response. As an aside, the Staff agrees with the CFPB that some of the cited language in *AT&T* does accurately reflect the fact that the Committee should engage in accommodation and negotiation with the CFPB as a prudential matter. And the Committee has done so—a private party who dealt with the Committee in as cavalier a manner as the CFPB would have been cited for criminal contempt long ago. But the notion that the Committee and the CFPB should as a prudential matter attempt to resolve impasses through private negotiation has nothing to do with the basic legal obligations imposed by the Subpoena. *See Miers*, 558 F.Supp.2d at 99–100; *see also United States v. House of Representatives*, 556 F.Supp. 150, 152–53 (D.D.C. 1983) (refusing to take jurisdiction over lawsuit seeking declaratory judgement as to the validity of a Congressional subpoena so as to allow possibility of settlement through voluntary negotiations and reading *AT&T* for proposition that branches should seek negotiated settlement outside of legal process).

Third. The CFPB's citation to *Miers* is both inaccurate and inapposite. The CFPB fails to note that the opinion it cites is not the opinion of the court, but rather is the opinion of Circuit Judge Tatel "concurring in the disposition of the motions." *Miers*, 542 F.3d at 912 (Tatel, J., concurring in

III. Director Cordray is in Default of Specification 19.

Specification 19 requires production of: "All communications relating to pre-dispute arbitration agreements between the CFPB and any of the following entities: (i) American Association for Justice; (ii) National Consumer Law Center; (iii) National Association of Consumer Advocates; (iv) Alliance for Justice; or (v) Public Justice." Subpoena Specification 19. The term "pre-dispute arbitration agreements" refers to "the meaning set forth in a proposed rule published in 81 Fed. Reg. 32,830" and is defined with specific reference to that proposed rule to include "agreements that provide for the arbitration of any future disputes between consumers and providers of certain consumer financial products and services." Subpoena Definition 25.

The CFPB's response to Specification 19 in the Return states:

> Items 19 and 20 are substantially similar to requests 1 and 2 of an April 20, 2016 letter from former Oversight and Investigations Subcommittee Chairman Sean Duffy. Based on scoping guidance provided by the Committee to the Bureau regarding that letter's first request, the Bureau agreed to search the email accounts of certain Bureau custodians for correspondence containing the domain names of the specified external groups. As a result of that search, the Bureau produced 2,363 pages of responsive material on June 24, 2016, regarding which the Committee has provided neither comment nor follow-up questions. The Bureau is reproducing those documents today for the Committee's convenience. Additionally, the Bureau notes that *ex parte* filings reflecting the Bureau's interactions with outside groups regarding the proposed arbitration rule are available on the Federal Register website. Together, these materials should provide a comprehensive view of the Bureau's interactions with the specified groups. The Bureau remains ready to discuss any questions or concerns the Committee has regarding this production.

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the disposition of the motions). In any event, Circuit Judge Tatel's concurrence cited the language from *AT&T*, also cited by the CFPB, in support of his view that expedited argument was inappropriate if a stay was issued because he hoped that the forthcoming arrival of new House and new President would allow the parties themselves to reach a negotiated settlement *out of court*. *Id.* at 912. It had nothing to do with the legal standard applicable to the persons involved in the case (the former White House Counsel or current White House Chief of Staff). Indeed, Judge Tatel was explicit in his concurrence in *rejecting* the Executive's argument, grounded in part in arguments citing the so-called "accommodation" process, that high ranking Executive Branch officials enjoyed absolute immunity from compelled Congressional testimony. *Id.*

Fourth. The CFPB's citation of *Cheney* is entirely inapposite. Whatever the Supreme Court's highly cryptic opinion in *Cheney* means, as the D.C. Circuit has explained, it is cabined to its peculiar facts—personal involvement of the President or Vice-President. *Citizens for Responsibility and Ethics v. United States Dep't of Homeland Sec.*, 532 F.3d 860, 865–66 (D.C. Cir. 2008).

Return at 14.[14] To say the least, the Return is both vague and confusing as to the CFPB's position *vis-a-vis* Specification 19. As Staff understand it, the Return appears to raise the following points. First, the Subpoena was unnecessary because *some* material sought by Specification 19 was already produced prior to the Subpoena and the Committee never expressed dissatisfaction with this production. Second, the CFPB is not required to make a complete production unless the Committee details specific defects in the CFPB's productions. And third, the CFPB is only required to produce records sufficient to "provide a comprehensive view of the Bureau's interactions with the specific groups" to discharge its legal obligations under Specification 19. Return at 14.

These points are in error. Specification 19 is yet another instance in which the Committee has long sought complete information on a matter of important public policy—but has been unable to obtain it. The history demonstrates both obstruction and delay, and the CFPB's response is legally deficient both by its own admission and the omission of the required certification under Subpoena Instruction 16.

1. In the view of Staff, far from aiding the CFPB, the history of Specification 19 undermines its position. As detailed above, the Request underlying Specification 19 has now been outstanding for 472 days. And the "agreement" referenced in the Return *never occurred*. Committee Counsel has been waiting for 434 days for the information it told the CFPB was a necessary predicate to any so-called "scoping guidance."[15] Moreover, far from being "satisfied" with the 2016 productions, the Committee issued the Subpoena to compel production of those records that were then outstanding for 349 days. Furthermore, the CFPB's sole response to Specification 19 was to produce records it had already produced and to point to

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[14] *See also* Letter from the Hon. Richard Cordray to the Hon. Jeb Hensarling, at 3–4 (July 10, 2017) (doubling down on prior position and suggesting that it was the duty of the Committee to specifically point out defects in production in response to in each Specification); CFPB, Su*mmary of Bureau Response to April 4 Subpoena & Related Staff-Level Discussions* (June 1, 2017) ("The Bureau had previously produced 2,363 pages of responsive material on June 24, 2016, based on scoping guidance provided by Committee staff. The Bureau reproduced this material in response to the April 4 subpoena, and also stated in its narrative response to that subpoena that *ex parte* filings reflecting the Bureau's interactions with the specified groups are available on the Federal Register website. The materials produced and those available on the Federal Register website provide a comprehensive view of the Bureau's interactions with specified groups.").

[15] For this reason, the CFPB's repeated promises of a "rolling" production, and the Committee's letter of August 12, 2016, admonishing the CFPB for its "incomplete" production, Staff simply does not understand the CFPB's claim that the Committee did not provide "comment or follow-up questions" on the June 23, 2016, production. Return at 14. First, the August 12 letter *was* ample comment—the Committee viewed the production as incomplete. Second, taking the CFPB at their word, comment was not needed as the CFPB had not certified compliance per Request Instruction 19 and the CFPB had promised a "rolling" production. Third, as discussed, *supra*, at 12–17, the legal standard is clear. Fourth, as to "comment" or "follow-up" on the Request—the Subpoena issued. *Res ispa loquitor*.

records in the public record. Specification 19 itself has been outstanding for 122 days. As to the question of "what more the Bureau could be expected to do in order to respond in a satisfactory manner to the subpoena,"[16] the Committee has repeatedly been clear: Comply with the legal obligations imposed by the Subpoena and produce *all* responsive non-privileged records. Regardless of the volume of records or level of resources involved, 472 days is more than enough time to make a complete production and certification.

2. The CFPB's position appears to be that its continued default is justified because until "Chairman Hensarling's July 5, 2017 letter, we heard nothing further from the Committee or Staff regarding this specification." *See* Letter from the Hon. Richard Cordray to the Hon. Jeb Hensarling, at 3 (July 10, 2017).[17] It appears that the CFPB views a letter "renewing" interest in compliance with the Subpoena after each partial production as a necessary condition to full compliance. *Id.* That position is not only directly contrary to controlling law (*see, supra*, at 15–17), but also is highly misleading. As the record recounted above reflects, the Committee *repeatedly* informed the CFPB that the Committee considered Director Cordray to be in default of *all* Specifications in the Subpoena. *See, supra*, at 7–12. The Committee also *repeatedly* made clear that for it to consider modifying any Specifications to reduce the CFPB's putative burden, it was the *CFPB's* duty to come forward with details supporting its claim of burden, including data regarding search terms, custodians, and data sources to allow the parties to negotiate possible narrowing. The Committee's instructions to Director Cordray regarding Specification 19 (and 20) were crystal clear—comply with all legal obligations under the Subpoena and support any request for narrowing with detailed evidence.

To be sure, the CFPB has now stated that it will in the future make an additional production of emails responsive to Specification 19. *See* Email from Craig Cowie, Esq. to Committee Counsel (July 28, 2017). But that is too little too late, and the CFPB has failed to provide any indication as to whether this production will provide a complete response to Specification 19.

3. The CFPB *itself* seems to admit, as a practical matter, that the production in response to Specification 19 is incomplete: "Together these materials [(the 2,632 pages and the ex parte notices)] should provide a comprehensive view of the Bureau's interaction with the specified groups." Return at 14; *see also*, Email from Craig Cowie, Esq. to Committee Counsel (July 28, 2017) (CFPB noting identification

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[16] Letter from the Hon. Richard Cordray to the Hon. Jeb Hensarling, at 1 (July 10, 2017).

[17] The CFPB does acknowledge Committee Counsel's May 11, 2017 email, but seems to take the position that notification of default is not adequate unless it provides detailed specifics for each Specification. *See* Letter from the Hon. Richard Cordray to the Hon. Jeb Hensarling, at 3 n.9 (July 10, 2017). No authority is provided for this proposition, and in any event, the Committee gave detailed guidance for each Specification as discussed in the accompanying text.

of an additional "well over 1,000 potentially responsive documents").[18] It is unclear exactly what that language means, but it is clear that all records responsive to Specification 19 have not been produced.[19] Indeed, on July 10, 2017, the CFPB indicated that it "will make rolling productions responsive to . . . [Specifications 19 and 20] in particular, which we will transmit as soon as possible." Letter from the Hon. Richard Cordray to the Hon. Jeb Hensarling, at 3 (July 10, 2017). As detailed above, absent interposing a timely legal objection, the CFPB is legally required to produce *all* responsive records. *See, supra*, at 15–17.

4. To be sure, the CFPB has produced 2,362 pages of records.[20] But not only has the CFPB seemingly admitted that this production is incomplete, but the CFPB has failed to produce any sort of documentation that would allow Staff to assess for itself whether the 2,362 pages are a complete production in response to Specification 19.

Moreover, the Committee has no visibility from whence the 2,362 pages came. The CFPB claims that this production originated from an agreed upon search in response to the Request of 9 CFPB employee's email accounts for communications with the domain names of certain external groups. Return at 14. But that statement is wrong. No such agreement was reached. *See, supra*, at 5. Indeed, Staff *never* received the information it requested from the CFPB as a necessary predicate to its agreement to *consider* narrowing the scope of the Request.

5. Finally, the CFPB's response to Specification 19 is incomplete because Director Cordray has not certified compliance thereto in accordance with Subpoena Instruction 16.[21] *If the CFPB believes it has complied with Specification 19 then all Director Cordray need do is so certify*. Certifying that the CFPB has produced all responsive records is all the CFPB needs to do "to respond in a satisfactory manner

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[18] To be sure, these potentially responsive documents have not been de-duplicated against the prior productions, but it is likely that at least some appreciable fraction of them have not been previously produced.

[19] Staff notes that the definitional task at issue here is compounded by the fact that Director Cordray has previously adopted a definition of "comprehensive" that seems to be at odds with the plain meaning of that word. *See* Letter from the Hon. Richard Cordray to the Hon. Jeb Hensarling, at 3–4 (June 14, 2017).

[20] Much of the volume produced to date relate to petitions that run for hundreds of pages. *See, e.g.*, HFSC_CFPB_20170404_61793–63338.

[21] Subpoena Instruction 16 states: "Upon completion of the record production, you must submit a certificate, in a form compliant with 28 U.S.C. § 1746, signed by you and your counsel regarding your record production, stating that: (a) a diligent search has been completed of all records in your possession, custody, or control which reasonably could contain responsive records; (b) the search complies with good forensic practices; (c) records responsive to this subpoena have not been destroyed, modified, removed, transferred, or otherwise made inaccessible to the Committee since the date of receiving the Committee's subpoena or in anticipation of receiving the Committee's subpoena; and (d) all records located during the search that are responsive have been produced to the Committee or withheld in whole or in part on the basis of an assertion of a claim of privilege or protection in compliance with these Instructions."

to the Committee's requests." Letter from the Hon. Richard Cordray to the Hon. Jeb Hensarling, at 1 (July 10, 2017).

To be sure, the CFPB has previously made the carefully worded assertion that "[t]he Bureau is not aware of any legal basis for the Committee to impose [the certification requirement in Subpoena Instruction 16]." Letter from the Hon. Richard Cordray to the Hon. Jeb Hensarling, at 6 (May 31, 2017). However, Staff strongly disagree with this conclusion. The Committee has a clear legal right under the House's constitutional rulemaking authority to require certification.

The House of Representatives has inherent power to "determine the rules of its proceedings." U.S. Const. Art. I, Sec. 5, cl. 2. This power is exceedingly broad and is not open to question on grounds of prudence—it is limited only by the negative personal liberty granted by the Constitution. *See, e.g.*, *United States v. Ballin*, 144 U.S. 1, 5 (1892) ("The constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just."); *Vander Jagt. v. O'Neill*, 699 F.2d 1166, 1173 (D.C. Cir. 1982).

Congressional rules of procedure are legally binding and can create substantive rights. *See, e.g.*, *Yellin v. United States*, 374 U.S. 109, 116–17, 120–22 (1963); *Randolph v. Willis*, 220 F.Supp. 355, 358 (S.D. Cal. 1963). The House's Rules have the force of law.[22]

Delineating the particulars of how subpoenas issue and the specific requirements for compliance therewith is within the ambit of the House of Representative's rulemaking power. The House of Representatives has delegated the power to authorize and issue subpoenas (and thereby the lesser power to set rules for compliance therewith) to its Committees. Rule XI(m)(1)(B), Rules of the House of Representatives, 115th Cong. The Committee has in turn delegated that power to the Chairman. Rule 3 (e)(1), Rules for the H. Comm. on Fin. Servs., 115th Cong.

It follows from the foregoing that Subpoena Instruction 16's certification requirement derives its authority from the House's rulemaking power. Accordingly, it is binding, and therefore must be obeyed. *See* Order, *S. Perm. Subcomm. on*

[22] The inherent power to create legally binding rules of proceedings to implement express or implied constitutional authority is not confined to Congress; it reaches across the Constitution. For example, the first action undertaken by the Supreme Court at its first term was to proscribe rules governing its process and the admission of attorneys and counselors before it. *See Appointment of Justices*, 2 (2 Dall.) U.S. 399, 399–400 (1790).

Invest. v. Ferrer, No. 1:16-mc-00621 (RMC), at 4 (Sept. 16, 2016) (ECF No. 29) ("The October 1, 2015 subpoena required Mr. Ferrer to file a privilege log. . . . This was not a suggestion or a recommendation. The filing of a privilege log in response to a documentary subpoena is required by courts and the Federal Rules of Civil Procedure." (internal citations omitted) (emphasis added)), *stay granted in part*, No. 16-5235 (D.C. Cir. Oct. 17, 2016), *vacated as moot*, 856 F.3d 1080 (D.C. Cir. 2017); *Lilley v. United States*, 14 Ct. Cl. 539, 542 (1878) (rejecting claim for additional witness appearance fees on the grounds that while the universal rule in civil litigation is that witness fees must be paid, "either House of Congress, in the discharge of the great powers and duties devolved upon it by the Constitution and as necessarily incident thereto, has the undoubted right to require the personal attendance before its committees, as a witness or otherwise, of any citizen of the country, to be paid or not according to its own will and pleasure.").[23]

IV. Director Cordray is in Default of Specification 20.

Specification 20 commands production of: "All communications from one CFPB employee to another CFPB employee relating to pre-dispute arbitration agreements." Subpoena Specification 20. The term "pre-dispute arbitration agreements" refers to "the meaning set forth in a proposed rule published in 81 Fed. Reg. 32,830" and is defined with specific reference to that rule to include "agreements that provide for the arbitration of any future disputes between consumers and providers of certain consumer financial products and services." Subpoena Definition 25.

The Return states that:

> Item 20 would require loading and searching records in the custody of all current and former Bureau employees. Just the initial administrative component of such an undertaking-let alone review and production-would continue months beyond the April 4, 2017 subpoena's return date. A search for the term "arbitration" in accounts of agreed-to custodians for Item 19 generated over 10,000 items for review; expanding review to all current and former Bureau employees would be impracticable. Additional guidance is

[23] To be sure, in *Comm. on Judiciary v. Miers,* the court reserved on the question of whether an instruction to provide a privilege log was legally binding. 558 F.Supp.2d 53, 107 (D.D.C. 2008). Staff also notes that while the Director's May 31 Letter categorically states that the "Bureau is not aware of any legal basis for the Committee" to impose the certification requirement in Subpoena Instruction 16, (Letter from the Hon. Richard Cordray to the Hon. Jeb Hensarling, at 6 (May 31, 2017)), the Letter does not address the Committee's prior citation of the *Ferrer* Order: "*See, e.g.,* Order at 4, in *S. Permanent Subcomm. On Investigations v. Ferrer,* No. 1:16-mc-00621(RMC) (D.D.C. Sept. 16, 2016) (ECF No. 29) (holding subpoena instruction legally binding and noting it was neither 'a suggestion or a recommendation') (subsequent history omitted)." Letter from the Hon. Jen Hensarling to the Hon. Richard Cordray, at 1 n.1 (Apr. 4, 2017).

> needed to productively tailor any search to the Committee's particular oversight interests.

Return at 14. CFPB Staff have further stated:

> As the Bureau has advised the Committee, the Bureau cannot make a meaningful review and production on this request without further scoping guidance from Committee staff. As written, review for this request would require loading and searching records in the custody of all current and former Bureau employees, which alone would take several weeks. A simple search for "arbitration" within that dataset would result in a massive volume of records, which would require months (or likely years) of review and production and likely would bury the Committee staff in extraneous material. Committee staff did begin scoping discussions with the Bureau by requesting that the Bureau provide information about search results from the custodians identified for Item 19, which the Bureau has done. Although the Bureau appreciates this constructive step, Committee staff has not yet provided guidance based on this information, so Bureau staff has been unable to proceed with review or production for this request.. If the Committee will identify its specific interests with regard to pre-dispute arbitration, the Bureau will be happy to propose appropriate custodians, search terms, and date ranges for review.

CFPB, *Summary of Bureau Response to April 4 Subpoena & Related Staff-Level Discussions* (June 1, 2017).

Again, the CFPB's response to the lawful command of Specification 20 is enigmatic. The Return appears to take the position that because the CFPB believes the Specification is burdensome, the CFPB is entirely excused not only from producing records, but even from searching for and identifying sources of records in an effort to quantify the putative burden. Staff believes this view is in profound legal error. The CFPB has not made out a colorable claim of burden. And the record is clear that the CFPB is improperly withholding records responsive to Specification 20.

1. To the extent the Return alludes to the prior history underlying Specification 20, the record is entirely unhelpful to the CFPB. And Staff views the CFPB's claims that the Committee has not responded to its requests for "guidance" (*see*, *e.g.*, Letter from the Hon. Richard Cordray to the Hon. Jeb Hensarling, at 3 (July 10, 2017), as terminological inexactitudes.

The Committee has been seeking records responsive to Specification 20 for over a year—472 days to be precise. In that time the CFPB has managed to

produce approximately 10 responsive records.[24] Instead of producing records—even on a rolling basis—all the CFPB has done is to make vague arguments sounding in burden.

As to the CFPB's claims that its request for "guidance" remains unanswered, the Committee still does not have basic information that it requested—434 days ago—as a necessary predicate to considering narrowing its inquiry as an accommodation to the CFPB.[25] And the Committee has *repeatedly* indicated that it is willing to consider modifying the Subpoena to reduce the *CFPB's* burden—even post default—*if* the CFPB would simply provide the Committee with the necessary information to sustain its claim of burden and facilitate further negotiations. These facts make the CFPB's offer to propose appropriate search terms, custodians, and date ranges if the Committee identifies more narrow interests quite odd. The Committee has identified its interests—in the call of Specification 20. And it is the *CFPB*—not the Committee—that has repeatedly refused to engage in the process predicate to reducing the *CFPB's* burden. Indeed, the CFPB appears to have the process entirely backwards. It is the CFPB that knows the details of its records systems and process and therefore it is the CFPB—not the Committee—which must come forward with proposals to modify the Subpoenas (such as via the use of a key custodians approach). If the CFPB's position is in fact that the Committee must blindly narrow its Subpoena until the *CFPB* deems it subjectively reasonable—and only then will the CFPB engage in the time honored process of negotiation over custodians, data sources, and search terms—it is advancing a position alien to the applicable law. It is not, and cannot be, the law that Congress is required to negotiate against itself until the CFPB receives what the CFPB subjectively believes is a good deal.

2. The CFPB's appears to again take the position that its continued default is justified because until "Director Cordray's July 5, 2017 letter, we heard nothing further from the Committee or Staff regarding this specification." *See* Letter from the Hon. Richard Cordray to the Hon. Jeb Hensarling, at 3 (July 10, 2017). This argument fails for the reasons discussed, *supra*, at 20.

3. a. The CFPB's own Return impliedly admits that that it has withheld responsive records. For example, the Return admits that the CFPB ran the search term "arbitration" against the nine (unknown) custodians used to generate the original June 24, 2016, production response and this search generated over 10,000 items for review. (The Staff judges this number to be relatively small when measured against the scope and importance of the issue under investigation as well

[24] Other records previously produced may be responsive to Specification 20 as a secondary matter, but are primarily responsive to other Specifications.

[25] The CFPB has claimed that "Committee staff did begin scoping discussions with the Bureau by requesting that the Bureau provide information about search results from the custodians identified for Item 19, which the Bureau has done." CFPB, *Summary of Bureau Response to April 4 Subpoena & Related Staff-Level Discussions* (June 1, 2017). That is not true, and noticeably the CFPB does not cite to a single record to support its claim.

as the standards of civil discovery). Responsive records captured by this search do not appear to have been produced. On July 10, 2017, the CFPB all but admitted this: "[the CFPB] will make rolling productions responsive to . . . [Specifications 19 and 20] in particular, which we will transmit as soon as possible." Letter from the Hon. Richard Cordray to the Hon. Jeb Hensarling, at 3 (July 10, 2017).

To take another example, the prior productions responsive to Request Specification 4 regarding the arbitration rulemaking SBREFA process strongly suggests that the CFPB failed to search what may be the most fertile source of records responsive to Specification 20. Records from the prior CFPB SBREFA productions reveal that some of the CFPB employees Committee Staff believe to be central to the arbitration rulemaking were routinely editing and commenting on what appear to be key SBREFA records in a shared drive, specifically, the path "Z:\Research, Markets & Regulations\Regulations\Rulemaking Folders\Arbitration\ . . . ." Internal CFPB Email, HFSC_CFPB_ARB_033276 (July 30, 2015). Staff believe this to be a key data source for responding to the Subpoena given the extent to which it was apparently used by CFPB employees to communicate when drafting what appear to be key records.

It also appears this shared drive was used as a centralized location at the CFPB to make a record of correspondence on at least one aspect of the arbitration rulemaking. Senior Counsel Owen Bonheimer ("Bonheimer") (a CFPB regulatory attorney listed as a contact on the arbitration notice of proposed rulemaking "NPRM")[26] told another CFPB employee that the "[b]est thing to do is to put the doc somewhere on the Z drive Regs arb folder and then email everyone a link so we don't have to resend each time it gets updated." Internal CFPB Email, HFSC_CFPB_ARB_033030 (July 23, 2015). The CFPB employee then responded "No problem. Do you know where on the Z: would be to keep the entire arb SBREFA info." *Id.* Bonheimer then replied: "Z\Research, Markets & Regulations\Regulations\Rulemaking Folders\Arbitration\SBREFA." *Id.* Bonheimer also instructed CFPB Senior Counsel Eric Goldberg and CFPB Counsel Cady Benjamin, (both of whom are also listed as contacts on the NPRM)[27], in an email entitled "Location for saving correspondence to SER recruitment": "So we have a better record of who we wrote to when and what they said back, I created a subfolder at Z:\Research, Markets & Regulations\Rulemaking Folders\Arbitration\SBREFA SER recruiting correspondence." CFPB Internal Email, HFSC_CRPB_ARB_033004, at HFSC_CFPB_ARB_033004 (July 24, 2015).[28]

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[26] *See* CFPB, *Arbitration Agreements*, 81 Fed. Reg. 32,830, 32,830 (May 24, 2017).

[27] *See* CFPB, *Arbitration Agreements*, 81 Fed. Reg. 32,830, 32,830 (May 24, 2017).

[28] *See also*, Internal CFPB Email, HFSC_CFPB_ARB_033279 (July 31, 2015; 6:44 p.m.) (reflecting editing in shared drive of outline to govern SBREFA arbitration process); Internal CFPB Email, HFSC_CFPB_ARB_033178–79 (July 31, 2015; 4:48 p.m.) (similar); Internal CFPB Email, HFSC_CFPB_ARB_033274 (July 31, 2015; 4:27 p.m.) (similar); Internal CFPB Email, HFSC_CFPB_ARB_033281–82 (July 31, 2015; 4:11 p.m.) (similar); Internal CFPB Email,

It is entirely unclear as to why this shared folder for the arbitration rulemaking could not have been quickly searched to produce certain core records—even prior to initiating email searches. It is also unclear why the CFPB has never mentioned this shared drive as a potential custodian for possible responsive records.[29]

In other instances, records produced refer to other records that appear to be of critical import to the arbitration rulemaking process, but which were not produced. For example, the bulk of the records directly responsive to Specification 20 that the CFPB has produced are four calendars setting forth dates for key aspects of the arbitration rulemaking. These calendars appear to repeatedly refer to the creation of important-sounding memoranda for Director Cordray and other CFPB leadership. For example, there are repeated references to: an "RMR memo"[30]; circulation of an "Options Memo to RMR Mgm't,"[31]; "slides to REM Management & Legal" and "slides to PC" (PC presumably referring to Policy Committee)[32]; extended discussion of a "RC memo" (RC presumably referring to Richard Cordray)[33]; a "[p]olicy option memo to RC"[34]; a reference to two "RC

HFSC_CFPB_ARB_022095 (July 31, 2015; 1:16 a.m.) (similar); Internal CFPB Email, HFSC_CFPB_ARB_033182 (June 15, 2015) (same); Internal CFPB Email, HFSC_CFPB_ARB_033268 (July 23, 2015) (linking to proposals under consideration in shared drive); Internal CFPB Email, HFSC_CFPB_ARB_033109 (June 10, 2015) (discussing editing of outline in shared drive for SBREFA internal coverage options).

[29] The previously produced CFPB records also raise the question of why the CFPB produced numerous emails discussing a SBREFA outline, but never produced that the outline itself.

[30] CFPB Internal Email, HFSC_CFPB_ARB_033240 (June 4, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033241, at HFSC_CFPB_ARB_033245; CFPB Internal Email, HFSC_CFPB_ARB_033074 (June 3, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033075, at HFSC_CFPB_ARB_033079

[31] CFPB Internal Email, HFSC_CFPB_ARB_033240 (June 4, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033241, at HFSC_CFPB_ARB_033247; CFPB Internal Email, HFSC_CFPB_ARB_033074 (June 4, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033075, at HFSC_CFPB_ARB_033081.

[32] CFPB Internal Email, HFSC_CFPB_ARB_033240 (June 4, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HRFC_CFPB_ARB_033241, at HFSC_CFPB_ARB_033247; CFPB Internal Email, HFSC_CFPB_ARB_033074 (June 4, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033075, at HFSC_CFPB_ARB_033081.

[33] CFPB Internal Email, HFSC_CFPB_ARB_033233 (June 5, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033234, at HFSC_CFB_ARB_03324–5; CFPB Internal Email, HFSC_CFPB_ARB_033215 (June 5, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033216, at HFSC_CFPB_ARB_033216–17; CFPB Internal Email, HFSC_CFPB_ARB_033240 (June 4, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033241, at HFSC_CFPB_ARB_033247, HFSC_CFPB_ARB_033249, and HFSC_CFPB_ARB_033251; CFPB Internal Email, HFSC_CFPB_ARB_033074 (June 4, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033075, at HFSC_CFPB_ARB_033081, HFSC_CFPB_ARB_033083, and HFSC_CFB_ARB_022085;

[34] CFPB Internal Email, HFSC_CFPB_ARB_033233 (June 5, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033234, at HFSC_CFB_ARB_03324; CFPB Internal Email, HFSC_CFPB_ARB_033215 (June 5, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033216, at HFSC_CFPB_ARB_033216; CFPB Internal

Briefing[s],"[35]; a reference to a "RC Meeting,"[36]; and a discussion of a "SBREFA" going to "REMR Mgm't," "clearance,"[37] and "RC."[38] *See also* Internal CFPB Email, HFSC_CFPB_ARB_0332529 (Aug. 6, 2015) (discussing SBREFA materials going into CFPB's "clearance" process). Staff presumes that memos to the Director of an agency and other senior officials relating to important rulemakings that are calendared well in advance are among some of the most highly relevant records—but they appear to not have been produced.

b. Regardless of the strong suggestion in the record that the CFPB has failed to produce highly relevant records, Director Cordray has failed to certify compliance pursuant to Subpoena Instruction 16. That alone is default.

4. As the CFPB's claim of burden, it fails on several grounds. First, the CFPB seems to misconstrue the scope of Specification 20. Second, the CFPB has failed to establish burden under controlling Supreme Court precedent. Finally Staff feels the CFPB's claim of burden is not only logically inconsistent with the realities of modern e-discovery, but also contrary to the CFPB's actions in enforcing its own Civil Investigative Demands ("CID's").

Email, HFSC_CFPB_ARB_033240 (June 4, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033241, at HFSC_CFPB_ARB_033249; CFPB Internal Email, HFSC_CFPB_ARB_033074 (June 4, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033075, at HFSC_CFPB_ARB_033083.

[35] CFPB Internal Email, HFSC_CFPB_ARB_033233 (June 5, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033234, at HFSC_CFB_ARB_03324; CFPB Internal Email, HFSC_CFPB_ARB_033215 (June 5, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033216, at HFSC_CFPB_ARB_033216; CFPB Internal Email, HFSC_CFPB_ARB_033240 (June 4, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033241, at HFSC_CFPB_ARB_033249; CFPB Internal Email, HFSC_CFPB_ARB_033074 (June 4, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033075, at HFSC_CFPB_ARB_033083.

[36] CFPB Internal Email, HFSC_CFPB_ARB_033233 (June 5, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033234, at HFSC_CFB_ARB_03325; CFPB Internal Email, HFSC_CFPB_ARB_033215 (June 5, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033216, at HFSC_CFPB_ARB_033217; CFPB Internal Email, HFSC_CFPB_ARB_033240 (June 4, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033241, at HFSC_CFPB_ARB_033251; CFPB Internal Email, HFSC_CFPB_ARB_033074 (June 4, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033075, at HFSC_CFPB_ARB_033085.

[37] The CFPB's clearance process involves formal review of important records at the highest levels of the CFPB.

[38] CFPB Internal Email, HFSC_CFPB_ARB_033233 (June 5, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033234, at HFSC_CFB_ARB_03325; CFPB Internal Email, HFSC_CFPB_ARB_033215 (June 5, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033216, at HFSC_CFPB_ARB_033217; CFPB Internal Email, HFSC_CFPB_ARB_033240 (June 4, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033241, at HFSC_CFPB_ARB_033249, HFSC_CFPB_ARB_033251; CFPB Internal Email, HFSC_CFPB_ARB_033074 (June 4, 2015), *and accompanying attachment*, CFPB, *Arbitration Calendar*, HFSC_CFPB_ARB_033075, at HFSC_CFPB_ARB_033083.

a. Contrary to the CFPB's position, Specification 20 should not require the CFPB to search every email of every employee. The Subpoena only requires searches of places that "reasonably could contain responsive records." Subpoena Instruction 16. Thus the CFPB likely only needs to search the emails of CFPB employees who worked on pre-dispute arbitration agreements. (Unless every employee worked on the matter—something Staff finds improbable in the extreme). Yet the CFPB has not even identified to the Committee the number of employees who were involved with this matter or even provided to the Committee the names of the key custodians requested over a year ago.

b. If Specification 20 were truly overbroad, the CFPB should have explained to the Committee with specificity the burden imposed by the Specification and asked for specific extensions, modifications, or limitations. Indeed, the Committee expressly advised the CFPB prior to the Subpoena return date: "to the extent you intend to request relief from full compliance with any Specification on grounds sounding in burden, please produce comprehensive search term reports and other detailed supporting data." Email from Committee Counsel to Anne H. Tindall, Esq. (Apr. 18, 2017; 5:17 p.m. EST). The CFBP's mere claim that the Specification is too onerous because it would require searching all email ever generated at the Bureau and take an indefinite amount of time to do so is not specific. Nor is this claim factual. To take the CFPB's claim at face value, legal discovery for litigation at any large company or organization would be impossible. Yet this is plainly not so. Which employees hold records and what records they are likely to have is important information to provide to the Committee when making a claim of overbreadth of a subpoena, and the Supreme Court has recognized this. Since Congress is at an informational disadvantage to an agency when requesting records, information regarding the agency's record systems and relative burden must be provided by the agency before a subpoena can be modified or a time extension can be granted. For example, why was the shared drive apparently not searched, or an explanation for failing to search the shared drive provided?

i. To the extent CFPB's objection is that some of the material sought may not be relevant, Staff finds this objection foreclosed by precedent.

As a matter of law, the CFPB cannot question the scope of the Subpoena by arguing that certain records within relevant categories may prove irrelevant to the specific inquiry at hand. All that the Committee need show is that a "'reasonable possibility that the *category* of materials the [Committee] . . . seeks will produce information relevant to the general subject of the . . . investigation.'" *S. Select Comm. on Ethics v. Packwood*, 845 F.Supp. 17, 21 (D.D.C. 1994) (internal citation omitted) (emphasis added), *stay denied*, 510 U.S. 1319 (1994) (Rhenquist, C.J., in Chambers); *see also McPhaul*, 364 U.S. at 381–82 (rejecting similar relevancy argument because, "[i]t thus appears that the records called for by the subpoena were not 'plainly incompetent or irrelevant to any lawful purpose (of the Subcommittee) in the discharge of (its) duties,' *Endicott Johnson Corp. v. Perkins*,

317 U.S. 501, 509 (1943), but, on the contrary, were reasonably 'relevant to the inquiry,' *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946)." The CFPB has admitted that the *category* of records sought relates to the subject under inquiry. *See, supra*, at 24–25. That is all the law requires.

ii. As to overbreadth and burden in their own right, Supreme Court precedent makes clear that the Subpoena is neither overbroad nor unduly burdensome.

In the leading case on this issue, *McPhaul*, a subcommittee of Congress had issued a subpoena to the executive secretary of an organization for "all records" related to three broad subjects, and the Court ruled that the subpoena was not overbroad with respect to the protections granted by the Fourth Amendment of the Constitution. *McPhaul*, 364 U.S. at 382–83.

In answering the argument that the subpoena was so overbroad as to be unreasonable, the Court wrote:

> "(A)dequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry," *Oklahoma Press Publishing Co.*, 327 U.S. at 209. The Subcommittee's inquiry here was a relatively broad one—whether "there has been Communist activity in this vital defense area (Detroit), and if so, the nature, extent, character and objects thereof"—and the permissible scope of materials that could reasonably be sought was necessarily equally broad.

Id. at 283; *see also Packwood*, 510 U.S. at 1320 (Rhenquist, C.J., in Chambers) (applying same precedent to deny a stay of District Court order enforcing Senate *subpoena duces tecum*); *Shelton*, 404 F.2d at 1300–01 ("Moreover, we have no basis for concluding that the scope of the subpoena was so broad as to violate the Fourth Amendment. In this connection we advert to our discussion above of the breadth of the investigation itself, limited as it was, however, to the Klan organizations. The breadth of the investigation points to the likelihood of relevance to it of the records sought, and this in turn supports the reasonableness under the Fourth Amendment of the demand for them. The investigation was not directed to any specific activity of the Klan organizations. It was a general investigation of their organization and activities in areas of legitimate concern to the Congress.").

With respect to the particular wording of the subpoena, the *McPhaul* Court stated that "[i]t is not reasonable to suppose that the Subcommittee knew precisely what books and records were kept by the [organization], and therefore the subpoena could only 'specif(y) . . . with reasonable particularity the subjects to which the documents . . . relate.'" *McPhaul*, 364 U.S. at 382 (*citing Brown v. United States*, 276 U.S. 134, 143 (1928)). The Court explained that a subpoena requiring "all records, correspondence and memoranda" relating to particular subjects "describes

them 'with all of the particularity the nature of the inquiry and the (Subcommittee's) situation would permit.'" *Id.* at 382 (*citing Oklahoma Press Publishing Co.*, 327 U.S. at 210, n. 48). The Court continued that "'[t]he description contained in the subpoena was sufficient to enable (petitioner) to know what particular documents were required and to select them accordingly.'" *Id.* (*citing Brown*, 276 U.S. at 143). The Court concluded that "[i]f petitioner was in doubt as to what records were required by the subpoena, or found it unduly burdensome, or found it to call for records unrelated to the inquiry, he could and should have so advised the Subcommittee, where the defect, if any, 'could easily have been remedied.'" *Id.* (*citing Bryan*, 339 U.S. at 333).

As to burden itself, any subpoena results in burden. *See Ferrer*, 199 F.Supp.3d at 143. Accordingly the cases have made clear that "'The burden of showing that the request is unreasonable is on the subpoenaed party,' and this 'burden is not easily met where, as here, the [Subcommittee's] inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose.'" *Id.* at 143–44 (internal citation omitted); *see also Shelton*, 404 F.2d at 1301.

Under this controlling precedent, the Subpoena is neither overbroad nor unduly burdensome. The topic of the CFPB's proposed pre-dispute arbitration rule and related issues are exceedingly complex and far ranging. Congress required extensive study before the CFPB could regulate in this area (*see* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010), section 1028(a)), and the CFPB itself admits to the massive scope of the undertaking—the Study runs 728 manuscript pages (*see* CFPB, *Arbitration Study: Report to Congress, Pursuant to the DOD-Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (Mar. 2015)), the NPRM runs a substantial 77 pages in the Federal Register (*see* CFPB, *Arbitration Agreements*, 81 Fed. Reg. 32,830 (May 24, 2017)), and the Final Rule runs 225 pages in the Federal Register (*see* CFPB, *Arbitration Agreements*, 82 Fed. Reg. 33,210 (July 19, 2017)). *See also* Letter from the Hon. Richard Cordray to the Hon. Jeb Hensarling, at 2 (Jul. 10, 2017) (detailing complexity of rulemaking process). Specification 20 sweeps fairly broadly on the specific topic of pre-dispute arbitration precisely because the subject matter under inquiry is so complex and sweeping. Accordingly, Specification 20 is far from overbroad. *Compare McPhaul*, 364 U.S. at 377, 382 (sustaining House *subpoena duces tecum* broadly seeking three different classes of records of the Civil Rights Congress); *Shelton*, 404 F.2d at 1300–01 (sustaining House subpoena seeking virtually all corporate records of the Klu Klux Klan as part of a broad investigation into Klan organizations); *Ferrer*, 199 F.Supp.3d at 144 (enforcing Senate Subpoena and overruling overbreadth challenge holding "[t]hat there is nothing unusual, unreasonable, or overly broad about requiring a party to search for all responsive documents on a specific subject or topic"), *with Hearst v. Black*, 87 F.2d 68, 314, 316 (D.C. Cir. 1936) (Senate *subpoenas duces tecum* directed to all telegraph companies doing business in D.C. requiring production of all messages transmitted through

those companies for a 9 month period were likely impermissible "dragnet seizure[s]").

As to the language of the Specification, it is clear under the standard in *McPhaul*. And in any event, the CFPB has never suggested that it does not understand what has been called for; it simply deems the articulated interest too broad and hence burdensome. *See, supra*, at 24.

As to burden, the CFPB has presented no evidence to sustain its claim as to why this Specification is unnecessarily burdensome against the tableau of modern civil discovery or in light of the 472 days the CFPB has had to comply. The evidence in the record is that an email search of nine custodians who the CFPB believes to be important for the word "arbitration" produced 10,000 records for review.[39] Far from proving burden, that proves that that search is reasonable in comparison to recent Congressional subpoenas. *See, e.g.*, Declaration of Breena M. Roos, *S. Permanent Subcomm. on Invests. v. Ferrer*, at 3, 1:16-mc-00621 (RMC) (D.D.C. Nov. 30, 2016)) (ECF No. 42-1) (District Court enforced a Senate subpoena requiring production of "552,983 documents compromising 1,112,826 pages"); S. Aging Comm., *Sudden Price Spikes in Off-Patent Prescription Drugs: The Monopoly Business Model that Harms Patients, Taxpayers, and the U.S. Health Care System*, S. Rep. 114-429, 114th Cong. 2d Sess., at 12 (Dec. 20, 2016) (noting 4 companies collectively produced over 1,000,000 pages of records). Indeed, earlier this year, the Department of Justice *voluntarily* produced 174,905 pages of records in 18 days in response to a Senate Judiciary Committee *request*. *See* https://www.judiciary.senate.gov/nominations/supreme/pn55-115 (last visited July 10, 2017). By way of comparison, that is more pages of records than the CFPB has produced in multiple years in response to four Congressional subpoenas addressing dozens of topics. Staff finds that the CFPB has manifestly failed to make any legally cognizable claim of burden as to Specification 20. *See, e.g.*, *Shelton*, 404 F.2d at 1301 (holding *ipse dixit* of counsel that "to comply Mr. Shelton would have to empty the contents of his office" failed to state a claim of burden); *Ferrer*, 199 F.Supp.3d at 143–44 (holding Ferrer's *ipse dixit* cannot sustain a claim of burden).

c. The CFPB's allegations of undue burden are conspicuous, however, because the CFPB is a civil law enforcement agency with the power of legal compulsion. *See* 12 CFR § 1080.6. As part of its Rules Relating to Investigations,

[39] The CFPB has also cited the fact that a search for the word "arbitration" against all CFPB "internal" emails produced over 1.37 million records for review. But it appears that this search is likely overbroad procedurally because it has not been de-duplicated, and a search across a great number of email accounts is likely to contain a large number of globally duplicative emails. It is also likely over broad substantively for the reasons discussed, *supra*, at 30. In light of this, this limited data point is off little use, and in any event is unremarkable in light of recent cases. As to the CFPB's complaints regarding it internal forensic capability, the CFPB has presented absolutely no evidence to suggest that an external e-discovery vendor would be unable to easily extract, process, and prepare, emails for review.

the CFPB can issue CIDs, which are similar to a subpoena in that they are a form of legal compulsion. *Id.* The CFPB's rules allow a recipient of a CID to petition the Director to modify or set aside the CID. *Id.* The rules require that these petitions "shall set forth all factual and legal objections to the civil investigative demand, including all appropriate arguments, affidavits, and other supporting documentation." *Id.* Director Cordray himself rules on these petitions. What is conspicuous about the CFPB's claims of burden is that in Director Cordray's rulings he holds the recipients of the CFPB's CIDs to the same or higher standards than the Committee applies here—a standard that requires a detailed explanation of burden.[40] Director Cordray routinely denies lengthy petitions alleging that CFPB CIDs are burdensome, and yet in response to the Specifications 20 he has provided only limited data.

As to raw volume, the CFPB's production of 2,362 pages of records (or even potential review of 10,000 discrete records) pales in comparison to what the CFPB regularly requires of its CID recipients. To take an example recently in the news, J.G. Wentworth voluntarily produced over 40,000 pages of records in response to a CID they believed the CFPB lacked jurisdiction to issue. *See* J.G. Wentworth, LLC's Opposition to the CFPB's Petition to Enforce Civil Investigative Demand and Response to Courts Order to Show Cause, *CFPB v. J.G. Wentworth, LLC*, 2:16-cv-02773 (CDJ) (E.D. Pa. Aug. 10, 2016) (ECF No. 13). The CFPB responded by serving yet another CID propounding fourteen record specifications, seven interrogatories, and two requests for written records. *Id.* These specifications sought production of *files* for over 100,000 transactions, and 47 different data elements for more than 50,000 transactions. *Id.* When J.G. Wentworth refused to comply stating that the CFPB had no jurisdiction, the CFPB promptly brought suit

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[40] *See e.g.*, Decision and Order on Petition by Harbour Portfolio LLC to Set Aside or Modify Civil Investigative Demand, *In re Harbour Portfolio Advisors, LLC*, 2016-MISC-Harbour Portfolio-0001 at 4 (CFPB Nov. 1, 2016) ("Harbour's claims of undue burden are similarly unavailing. . . . Harbour offers no specific information about the volume of data, the cost of production, or any possible technical limitations that may impair its ability to comply with the CID."); Decision and Order on Petition by National Asset Advisors LLC and National Asset Mortgage LLC to Set Aside or Modify Civil Investigative Demand, *In re National Asset Advisors LLC*, 1026-MISC-National Asset Advisors and National Asset Mortgage-001 at 4 (CFPB Nov. 1, 2016) ("Petitioners' claims of undue burden are similarly unavailing. Petitioners make only generalized assertions about the burden of the CIDs, stating that 'every document produced must be reviewed for responsiveness and privilege' and that they lack sufficient staff to comply with the timeframe of the CID. . . . Petitioners offer no specific information about the volume of data, the cost of publication, or any possible technical limitations that may impair their ability to comply with the CIDs."); Decision and Order on PHH Corporation's Petition Modify or Set Aside Civil Investigative Demand, *In re PHH Corporation*, 2012-MISC-PHH Corp-001 at 6 (CFPB Sept. 20, 2012) ("Here, though PHH repeatedly asserts that the CID is overbroad or unduly burdensome, it has offered little or no detail to make the kind of showing required to substantiate these claims. Instead, in order to meet its legal burden, the subject must undertake a good-faith effort to show 'the exact nature and extent of the hardship' imposed, and state specifically how compliance will harm its business. . . . PHH has not met its legal burden here to justify modifying or setting aside the CID, since its petition contains only generalized assertions and suggestions devoid of any tangible detail.").

to enforce the CID. Petition to Enforce, *CFPB v. J.G. Wentworth, LLC*, 2:16-cv-02773 (CDJ) (E.D. Pa. Aug. 10, 2016) (ECF No. 1). Then, according, to news accounts, when it became apparent the CFPB would lose the litigation, it withdrew the CID. Notice of CFPB's Withdrawal of the CID, *CFPB v. J.G. Wentworth, LLC*, 2:16-cv-02773 (CDJ) (E.D. Pa. Aug. 10, 2016) (ECF No. 33). In another investigation, CFPB required Company A and related persons and entities to *produce* 1,560,437 *records*.[41] In another case, the CFPB required Company B *alone* to produce 123,135 records compromising in excess of half a million pages, with another 32,373 records being logged in a privilege log. And in another investigation, Company C was required to produce over 53,000 records and Company D over 41,000 records.[42]

V. Conclusion.

For all of the foregoing reasons, Staff believes there is ample basis to proceed against Director Cordray for contempt of Congress due to his default on Specifications 19 and 20.

[41] SEALED. The name of this company and the subsequent companies have been anonymized to protect confidentiality.
[42] SEALED.