UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING File No. 2015-CFPB-0029	)
In the matter of:	) ORAL ARGUMENT REQUESTED
INTEGRITY ADVANCE, LLC and JAMES R. CARNES	)

BRIEF IN SUPPORT OF THE MOTION OF INTEGRITY ADVANCE, LLC AND JAMES R. CARNES TO DISMISS THE NOTICE OF CHARGES

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INTRODUCTION

The Consumer Financial Protection Bureau ("CFPB" or "Bureau") has filed a Notice of Charges ("Notice") alleging that Respondents Integrity Advance, LLC and James R. Carnes (collectively, "Respondents") violated Section 1036 of the Consumer Financial Protection Act ("CFPA"), 12 U.S.C § 5536 (2012).[1] Specifically, section 1036(a) limits the Bureau's enforcement authority over "prohibited acts"—that is alleged violations of the consumer finance laws—to "covered persons or service providers." *Id.* § 5536(a). In addition, the Notice also alleges that Integrity Advance purportedly violated the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1631, 1638 (2012), and its implementing regulation, Regulation Z, 12 C.F.R. §§ 1026.17, 1026.18 (2015) and the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. § 1693k (2012), and its implementing regulation, Regulation E, 12 C.F.R. § 1005.10(e) (2015).

The Court should dismiss the Notice for four reasons. First, neither Integrity Advance nor Mr. Carnes was ever, nor is currently, a "covered person" within the meaning of the CFPA because: (1) Respondents ceased offering or providing any consumer financial product or service before the Bureau had a lawfully-confirmed Director; and (2) even after a Director was lawfully-confirmed, Respondents never engaged in any business within the Bureau's jurisdiction. Second, each of the Bureau's claims are barred by either the CFPA's three-year statute of limitations, as to Mr. Carnes, or by TILA's and EFTA's one-year statute of limitations. Third, the Bureau's Notice fails to state a claim under TILA and Regulation Z. Finally, the Bureau is prohibited by the doctrine of retroactivity from bringing any unfair, deceptive, or abusive acts or practices ("UDAAP") claims arising out of conduct that predates the Bureau's transfer date of July 21, 2011.

[1] The CFPA is found in Title X of the Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

BACKGROUND

Integrity Advance was a nonbank short-term, small-dollar lender. Between May 2008 and December 2012, Integrity Advance offered short-term, small-dollar loans to consumers, which ranged in value from $100–$1000. James R. Carnes is the CEO and president of Integrity Advance. The Company stopped offering loans to consumers three years ago.

The CFPA establishes the Bureau as an independent executive agency within the Federal Reserve System. 12 U.S.C. § 5491 (2012). The Bureau opened its doors on July 21, 2011. This date is referred to as the "transfer date," and also the "effective date," under the CFPA. As discussed below, July 21, 2011 is called the "transfer date" because it is the date on which certain pre-existing consumer financial protection laws transferred to the Bureau from other prudential regulators. *See* 12 U.S.C. § 5582; *Designated Transfer Date*, 75 Fed. Reg. 57252 (Sept. 20, 2010). July 21, 2011 is also the "effective date" because it is the earliest date on which certain enforcement and other statutory provisions under the CFPA could take effect, provided certain statutory strictures are met.

All of the Bureau's powers are concentrated within the hands of a single Director, who is to be appointed by the President, subject to the advice and consent of the Senate, to serve for a five-year term. On July 16, 2013, the Bureau's current and first-ever Director, Richard Cordray was confirmed by the United States Senate to serve a five-year term.

On January 4, 2012, the President had appointed Mr. Cordray to serve as Director of the Bureau during a Congressional recess. In July 2014, the Supreme Court held that the recess appointments of three members of the National Labor Relations Board ("NLRB"), purportedly appointed on the same day as Mr. Cordray, were unconstitutional because the Senate was not in

recess. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2556–57, 2577–78 (2014). By the identical facts and reasoning, Mr. Cordray's recess appointment was also unconstitutional.

Among other things, the Bureau is authorized to enforce the consumer financial laws, which include 18 enumerated laws, such as TILA and EFTA, as well as prohibitions against UDAAPs. To this end, the CFPA provides that the "Bureau may take an action authorized under Subtitle E [the Bureau's enforcement authority] to prevent a covered person . . . from committing or engaging in an unfair, deceptive or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service." 12 U.S.C. § 5531(a) (2012). A "covered person," in turn, is defined as "any person that engages in offering or providing a consumer financial product or service." *Id.* § 5481(6). In addition, the Bureau can bring enforcement actions against a "related person," which is defined as being, among other things, "any director or officer . . . charged with managerial responsibility for . . . [a] covered person." *Id.* § 5481(25)(C). The CFPA defines a "related person" as being a "covered person," within the meaning of the CFPA. *Id.* § 5481 (25)(B). The statute also defines those products or services that are "consumer financial products or services," and includes in that list "extending credit." *Id.* § 5481(15).

Respondents never engaged in the offering or provision of a consumer financial product or service during any time that the Bureau had enforcement authority as to them. Respondents also never engaged in any other conduct—at any time—as to which the Bureau could enforce one or more consumer financial protection laws. For this reason, the Court should dismiss the Notice.

LEGAL STANDARD[1]

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) should be granted if an agency cannot show that Congress has delegated authority over the defendant. *McCreary v. Potter*, 273 F. Supp. 2d 106 (D.D.C. 2003). "The exercise of jurisdiction by any governmental body in the United States is subject to limitations reflecting principles of international and constitutional law, as well as the strictures of the particular statute governing that body's conduct." *FTC v. Compagnie De Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1315 (D.C. Cir. 1980). The burden of establishing subject matter jurisdiction is on the party asserting it, here the CFPB. *See Port City Props. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1189 (10th Cir. 2008). In reviewing such a motion, "it is well established . . . that a court is not limited to the allegations in the complaint but may consider material outside of the complaint in an effort to determine whether the court has jurisdiction in the case." *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 195 (D.D.C. 2002); *see also Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003) (holding that in disposing of Fed. R. Civ. P. 12(b)(1) motion, "where necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts") (internal citation omitted); *Menifee v. U.S. Dept. of the Interior*, 931 F. Supp. 2d 149, 161 (D.D.C. 2013) (holding that court could consider evidence outside of pleadings because

[1] Rule 212 of the CFPB's Rules of Practice for Adjudication Proceedings state that "a respondent may file a motion to dismiss asserting that, even assuming the truth of the facts alleged in the notice of charges, it is entitled to dismissal as a matter of law." 12 C.F.R. § 1081.212. The Bureau's rules governing motions to dismiss, thus, provide a standard that is virtually identical to the applicable Federal Rules of Civil Procedure; however, the CFPB's rules of procedure have not been interpreted by any court. *See id.* Accordingly, for purposes of this motion, Respondents rely upon the well-developed case law interpreting Rule 12 of the Federal Rules of Civil Procedure.

evaluating whether employee satisfied exhaustion requirement under Federal Tort Claims Act ("FTCA") was a jurisdictional question).

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) should be granted if the complaint does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A plaintiff must be "entitled to relief" and is obliged to provide more than merely formulaic and conclusory grounds showing his entitlement to relief. *Id.* at 555. A complaint does not "suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 557). "Threadbare recitals" of nothing more than the elements of a claim "supported by mere conclusory statements," are insufficient to state a claim under Rule 12(b)(6). *Id.* (citing *Twombly*, 550 U.S. at 555).

The Notice should be dismissed because: (1) the CFPB never had authority to regulate the Respondents; (2) each of the Bureau's claims are barred by either the CFPA's three-year statute of limitations or by TILA's and EFTA's one-year statute of limitations; and (3) the Notice fails to state a claim under TILA and Regulation Z; and (4) even if the CFPB *did* have authority over the Respondents and its claims were adequately and timely pleaded, the doctrine of retroactivity prohibits the CFPB from bringing any UDAAP claims arising from conduct that occurred before July 21, 2011.

ARGUMENT

I. THE BUREAU HAS NEVER HAD ENFORCEMENT AUTHORITY AS TO INTEGRITY ADVANCE OR MR. CARNES

A. The CFPB Did Not Obtain Legal Authority To Regulate Non-Banks Until There Was a Lawfully-Appointed Bureau Director, Which Occurred After Integrity Advance Ceased Offering Consumer Financial Products Or Services

The Bureau did not have jurisdiction to exercise consumer financial protection laws over nonbanks, including Respondents, until a Director was lawfully-appointed. Section 1066(a) of the CFPA provides that the Bureau could *only* exercise its *transferred* authority—that is the authority that transferred to the agency from the federal banking (or prudential) regulators—before there was a lawfully-appointed Director. 12 U.S.C. § 5586 (a). And, as discussed below, there was not a lawfully-appointed director of the Bureau until July 16, 2013. Section 1066(a) states:

> The Secretary [of the Treasury][2] is authorized to perform the functions of the Bureau *under this subtitle* until the Director of the Bureau is confirmed by the Senate in accordance with section 1011.

Id. § 5586(a) (emphasis added).[3] Section 1011 of the CFPA, in turn, provides that "there is established the position of the Director, who shall serve as the head of the Bureau," and that the

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[2] The CFPA contemplates the Secretary of Treasury or a designee of the Secretary carrying out the transfer authority functions of the Bureau before there is a lawfully-appointed Director of the Bureau.

[3] The authorities conferred in section 1066(a) can only apply to the specific transfer authorities described in subtitle F; to read otherwise would render the phrase "under this subtitle" meaningless. *See, e.g.*, *New Process Steel*, 130 S. Ct. 2635, 2640 (2010) (stating that, fundamentally, an interpretation of a statute must "[h]armonize and give meaningful effect to all of the provisions . . ."); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (declining to adopt a "construction of the statute, [that] would render [a term] insignificant") (internal quotation marks omitted); *Market Co. v. Hoffman*, 101 U.S. 112, 115–16 (1879) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be . . . insignificant" (internal quotation marks omitted)).

Director shall "be appointed by the Director with the advice and consent of the Senate." *Id.* § 5491(b)(1)(2). Section 1066 is located within *Subtitle F—Transfer of Functions and Personnel; Transitional Provisions* of the CFPA, and indeed references only the transferred authorities noted in that subtitle. The provisions of Subtitle F provide, among other things, that on July 21, 2011, the Bureau received transferred authority from the five federal banking (prudential) regulators to enforce the federal consumer financial protection laws as to large banks. The transferred authorities referenced in Subtitle F specifically *do not include* the authority to enforce consumer financial protection laws as to nonbanks, such as Respondents.

Prior to the lawful appointment of the Director, the CFPB had only limited regulatory and enforcement authority. The nature of this limited authority is further explained in a January 10, 2011 letter jointly submitted by the Department of Treasury Inspector General and Federal Reserve Board ("Federal Reserve") Inspector General in response to a Congressional inquiry about the operations of the Bureau, as contemplated by the CFPA. This letter is the only instance when any federal government entity has publicly interpreted the Bureau's authority under Section 1066(a), especially in the absence of a lawfully-appointed Director. The letter explains that in the absence of a lawfully-appointed Director, the Bureau, in pertinent part, only had the authority to:

> [P]rescribe rules, issue orders, and produce guidance related to the federal consumer financial laws that were, prior to the designated transfer date [July 21, 2011] within the authority of the Board, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, and the National Credit Union Administration [the federal banking regulators].[4]

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[4] Letter, Joint Response by the Inspectors General of the Department of the Treasury and Board of Governors of the Federal Reserve System: Request for Information Regarding the Bureau of Consumer Financial Protection, 5 (Jan. 10, 2011) [hereinafter OIG Letter], *available at* https://www.treasury.gov/about/organizational-structure/ig/Documents/OIG-CA%2011004%20Committee%20of%20Financial%20Services%20Response%20CFPB.pdf

Thus, before there was a lawfully-appointed Bureau Director, the agency did not have the authority to pursue enforcement actions against entities that were not previously within the jurisdiction of a federal banking regulator.[5] *See* OIG Letter at 7 & n.4 ("According to the text of the Dodd-Frank Act, the Secretary's authority under section 1066(a) does not extend to [the Bureau's] newly-established authorities."). It is undisputed that Respondents were never within the jurisdiction of a federal banking regulator.

Moreover, at the Bureau's inception, by necessity and design, no other official could have assumed the CFPB's new consumer financial protection authority. *See* 12 U.S.C. § 5491(b)(1); OIG Letter at 7. The Director of the CFPB exercises significant executive authority,[6] and is not directed or supervised by any other appointed executive official; he thus acts as a principal Officer of the United States. *See Edmond v. United States*, 520 U.S. 651, 663 (1997) (noting that principal officers are those whose work is not directed or supervised at some level by other appointed officers). In the absence of a lawfully-appointed director, the CFPB would otherwise have had no "Officer[s] of the United States" appointed in accordance with the Constitution and CFPA Section 1011 to exercise the "significant authorities" provided to a federal regulator for the first time by the CFPA. Thus, in the absence of any lawfully-appointed Director, there was

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[5] These new regulatory authorities were not explicitly provided by law to federal regulators prior to the Dodd-Frank Act's enactment, in contrast with the "transferred authorities" that moved to the CFPB existing consumer financial protection powers from other federal regulators. The Bureau's transferred authorities include the power to issue rules to implement federal consumer financial protection laws. The transferred authorities also include supervisory, enforcement, and rulemaking powers over banks, thrifts, and credit unions holding more than $10 billion in deposits (larger depositories). 12 U.S.C. §§ 5581–5587 (2012).

[6] Further to this point, the Director may only be removed by the President for "inefficiency, neglect of duty or malfeasance in office." 12 U.S.C. § 5491(c)(3) (2012). Additionally, the Director has authority to appoint and hire the employees necessary to carry out the duties of the Bureau, *id.* § 5493(a), and "to delegate to any duly authorized employee, representative, or agent any power vested in the Bureau by law," *id.* § 5492(a).

no other Officer who could exercise the agency's newly-created, non-transferred authorities, which include the authority to pursue enforcement actions over a nonbank, such as Integrity Advance and its principal, Mr. Carnes.[7]

B. Under The Supreme Court's Reasoning In *Noel Canning*, The Director Was Not Lawfully-Appointed Until July 16, 2013

The President appointed Richard Cordray Director of the CFPB on January 4, 2012, pursuant to the Chief Executive's authority under the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3. The Senate, however, was not in recess at the time.[8] Consistent with the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, the President nominated Richard Cordray as Director on January 24, 2013. The Senate confirmed Director Cordray on July 16, 2013. 159 Cong. Rec. S5704-05 (daily ed. July 16, 2013). As of that day, but not before, the CFPB was authorized to exercise the new powers to regulate nonbanks delegated by Congress in the Dodd-Frank Act.

Mr. Cordray's January 4, 2012 appointment under the Recess Appointments Clause was undertaken on the same day and in precisely the same manner as the President's unilateral (and unconstitutional) appointment of three members to the NLRB. *See NLRB v. Noel Canning*, 134 S. Ct. at 2556–57, 2573–78. However, in *Noel Canning*, the Supreme Court unanimously

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[7] Indeed, it is significant that this matter implicates the appointment and confirmation of the Bureau's first-ever director, because the CFPA further distinguishes between those instances when there is no director and, thus, no officer able to carry out the full authorities of the CFPA and all other instances involving the appointment and confirmation of a new director. To this end, the CFPA expressly contemplates a scenario in which an outgoing Director's term would be held-over until an incoming Director could be confirmed by the Senate. *See* 12 U.S.C. § 1011(c)(2) ("An individual may serve as Director after the expiration of the term for which appointed, until a successor has been appointed and qualified.")

[8] After adjourning on December 17, 2011, the Senate agreed to hold a series of "pro forma" sessions to occur periodically until January 23, 2012. 157 Cong. Rec. S883–S8784 (daily ed. Dec. 17, 2011).

invalidated the NLRB recess appointments as unconstitutional. *Id.* at 2578. The Court held that, because "a recess of more than 3 days but less than 10 days is presumptively too short," the "President lacked the power to make the recess appointments" to the NLRB at issue. *Id.* at 2557. Accordingly, by direct application of the holding in *Noel Canning* to Mr. Cordray's appointment on January 4, 2012, the President "lacked the power" to recess appoint a Director of the CFPB, since the recess appointment occurred within the same recess and under the same authority as the NLRB appointments at issue in *Noel Canning*. 134 S. Ct. at 2557 (stating that "[t]hree days is too short a time to bring a recess within the scope of the Clause"); *see also* David H. Carpenter & Todd Garvey, *Practical Implications of* Noel Canning *on the NLRB and CFPB*, Cong. Res. Serv., 7-5700, 1 (Apr. 1, 2013) (noting that the D.C. Circuit's decision in *Noel Canning* [subsequently upheld by the Supreme Court] casts "serious doubt" on the authority of the CFPB).

Noel Canning, coupled with the limitations of the authority delegated to the CFPB imposed by Section 1066(a), mean that before July 16, 2013 the Bureau could not have brought an enforcement action against Integrity Advance and Mr. Carnes because Respondents are nonbanks and were outside the scope of any transferred authority. Further, by July 16, 2013, when Mr. Cordray was lawfully- appointed and confirmed, neither Integrity Advance nor Mr. Carnes was offering or providing a consumer financial product or service or otherwise engaged in any business activities over which the Bureau has jurisdiction. *See* Notice ¶ 12.

C. The CFPB's Lack Of Authority As To Respondents Cannot Be Cured

After Director Cordray was confirmed by the Senate on July 16, 2013 and before the Supreme Court's ruling in *Noel Canning*, the Bureau published in the Federal Register a Notice of Ratification from Director Cordray on August 27, 2013. *Notice of Ratification*, 78 Fed. Reg. 53734 (Aug. 30, 2013). The Notice of Ratification explained that between January 4, 2012 and

July 17, 2013 (when Mr. Cordray was sworn-in), the Director had been "serving as a recess appointee," and that he believes that the "actions [he] took" during that recess appointee period "were legally authorized and entirely proper." *Id.* But in order "[t]o avoid any possible uncertainty, however," the Director "affirm[ed] and ratif[ied] any all actions" that he "took during that period." *Id.*[9]

The Notice of Ratification, however, did not—because it cannot—create authority that never existed in the first place. The Notice of Ratification is wholly ineffective in giving the CFPB regulatory and enforcement authority over Integrity Advance and Mr. Carnes because it cannot ratify actions that rely on jurisdiction that the Bureau never had. *See Cook v. Tullis*, 85 U.S. 332, 338 (1873) ("[I]t is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made."). The Bureau's authority over nonbank "covered persons" could not be assumed under the Dodd-Frank Act until the Bureau had a lawfully-appointed Director. The Director's ratification of his actions does not remedy the jurisdictional deficiencies as to this particular case that were created by the timing of his appointment. Indeed, it is axiomatic that a Notice of Ratification cannot be effective if when an agency lacks authority to take the action subsequently being ratified and it also lacks the authority at ratification. For example, when a newly-appointed Office of Thrift Supervision ("OTS") Director "had no power to appoint a conservator . . . on February 15, 1990, he lacked the power on June 1, 1990, to ratify the earlier appointment." *Franklin Sav. Ass'n v. Dir. of the Office of Thrift Supervision*, 740 F. Supp. 1535, 1539 (D. Kan. 1990).

[9] Furthermore, the sweeping, one-sentence ratification does not provide the "detached and considered judgment" required for the ratification of agency action. *See Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 213 (D.C. Cir. 1998) (noting that, in ratifying previous enforcement action, the OTS Director "acted in the normal course of agency adjudication," "[r]ather than simply writing a letter or a memorandum adopting the Notice of Charges as his own . . . .").

Ratification occurs when a principal approves prior actions of its purported agent. It is essential that the ratifying party have the authority both to *commit* the ratified act at the time the act was performed, as well as authority to *ratify* that act at the time ratification was made. Restatement (Second) of Agency § 82; *see also W. Nat'l Bank of N.Y. v. Armstrong*, 152 U.S. 346, 352 (1894) ("[A] ratification, to be efficacious, must be made by a party who had power to do the act in the first place.").

In particular, the authority of a federal agency to ratify actions that were taken when it lacked appropriate statutory authority are strictly limited. As stated, a ratifying party must have the legal authority to perform the act "at the time the ratification was made." *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994). In *NRA*, the FEC filed a petition for writ of certiorari to the Supreme Court without the approval of the Solicitor General, as was required by law. *Id.* at 98. After the statute of limitations to file the petition expired, the Solicitor provided approval for the FEC's petition. *Id.* The Supreme Court was left to "determine whether this 'after-the-fact' authorization relates back to the date of the FEC's unauthorized filing so as to make it timely." *Id.* The Court explained that "[t]he question is at least presumptively governed by . . . the doctrine of ratification." *Id.* Since the Solicitor lacked general authority by operation of the statute of limitations to file the petition on the day that he gave his approval, the Court held that he *could not retroactively ratify* the FEC's filing. *Id.* at 98–99.

Here, on August 27, 2013, the day when the Bureau issued the Director's Notice of Ratification, the Bureau lacked legal authority over Respondents. Specifically, the Bureau lacked any authority under the CFPA, including but not only UDAAP authority as to Integrity Advance and Mr. Carnes, because in August 2013, Respondents were not engaging in the offering or provision of a consumer financial product or service, and were not covered persons

—a requirement of any CFPA claim. *See* 12 U.S.C. §§ 5531, 5536. Thus, the Bureau had no jurisdiction over Respondents in December 2012 when the Company stopped making loans *because* there was not yet a lawfully-appointed Director. Similarly, the Bureau had no authority over Integrity Advance between January 2012 and July 2013 during the Director's recess appointment period, which was rendered unlawful by *Noel Canning*. Finally, the Bureau had no authority over Respondents at the time the Notice of Ratification was issued.

To be clear, this case differs from other instances when courts have upheld notices of ratification that cured Appointments Clause defects. In those cases, the subsequent ratification cured Appointments Clause defects because at the time of the ratification the agency *was lawfully authorized* to take the action at issue. For example, in *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996), the court upheld the FEC's subsequent review and ratification of a case, because *at the time of ratification*, the agency had a lawfully appointed quorum of commissioners, which served to cure the Appointment Clause defect. Similarly, in *Doolin Security Savings Bank v. Office of Thrift Supervision*, the court held that a lawfully appointed director of OTS "effectively ratified the Notice of Charges signed by [the unlawfully appointed director] *at a time when he could have initiated the charges himself* . . ." 139 F.3d at 214 (emphasis added). In *Andrade v. Regnery*, the D.C. Circuit upheld the ratification of a reduction in force ("RIF") order carried out by the Deputy Director of the Office of Juvenile Justice and Delinquency Prevention ("OJJDP"). 824 F.2d 1253, 1255 (D.C. Cir. 1987). The court acknowledged that the deputy director had not been validly appointed during the planning stages of the RIF. *See id.* at 1255. However, the court affirmed that the original order implementing the RIF was given by a duly appointed Assistant Attorney General and the OJJDP deputy director was validly appointed at the time the RIF was executed. *Id.* at 1256. Thus, the D.C.

Circuit affirmed the trial court's holding that "any defect in the implementation of the RIF as to appellants had been cured by [the deputy director's] act of ratification." *Id.*

In both *Legi-Tech* and *Doolin*, the reviewing court held that the lawfully appointed agency heads could have begun each of those administrative enforcement processes anew, because the FEC commissioners and OTS director ratifying previous agency actions had *current authority* over the respondents. In those cases—neither of which constituted instances in which the general authority of the agency was in question—ratification provided a valid cure for Appointments Clause defects. *See Legi-Tech*, 75 F.3d at 709; *Doolin*, 139 F.3d. at 213. Conversely, here, the Constitutionally-defective appointment of the CFPB's Director is a threshold issue of authority that may not be cured through after-the-fact ratification by the agency. This is true because under Section 1066 of the CFPA and *Noel-Canning*, the Bureau did not have authority over Respondents before the Director's lawful appointment, *and* at any time after the Director was confirmed by the Senate, as Respondents were not "covered persons." The Bureau, of course, does not dispute any of this, as averred in its Notice. *See* Notice ¶ 12.

D. The Court Should Dismiss The Notice Because Respondents Never Engaged In Conduct Within The Bureau's Jurisdiction

The Bureau has never had regulatory or enforcement authority over Respondents. As discussed above, when Integrity Advance made loans to consumers, the Bureau did not have jurisdiction as to nonbanks. The Company stopped making loans in December 2012, which the Bureau does not dispute. *See* Notice ¶ 12. By July 16, 2013, when the Bureau had a Director who was lawfully in place and could pursue its authorities, Respondents were not engaged in business activities that were within the Bureau's jurisdiction.

Moreover, the language of the CFPA is clear that the Bureau may only enforce its UDAAP authority or otherwise bring a claim arising from an alleged violation of the CFPA

against a "covered person," as that term is defined in the statute. A "covered person," in turn, is defined in the present tense. This present tense language "strongly suggests that it [the definition] does not extend to past actions." *Sherley v. Sebelius*, 644 F.3d 388, 394–95 (D.C. Cir. 2011). The Supreme Court has stated that, under the Dictionary Act, 1 U.S.C. § 1 (2012),[10] "the present tense generally does not include the past." *Carr v. United States*, 130 S. Ct. 2229, 2236 (2010). Indeed, "Congress could have phrased its requirement in language that looked to the past . . . but it did not choose this readily available option." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987) (holding that a statute's "undeviating use of the present tense strongly suggests" that "the harm sought to be addressed . . . lies in the present or the future, not in the past"); s*ee also Reuther v. Trustees of Trucking Emp. of Passaic & Bergen Cnty. Welfare Fund*, 575 F.2d 1074, 1077 (3d Cir. 1978) (noting that if Congress intended something other than a prospective application of the statutes in question, "it could have stated '[i]n the case of a contribution that is, was, or has been made by an employer.'"). Nothing in the plain language of the CFPA or its legislative history suggests that the Bureau's authority over "any person that engages in offering a consumer financial product or service" should be read to mean that a "covered person" includes a person or entity that *ever* provided a consumer financial product or service.

Following the Bureau's logic in this enforcement action would mean the CFPB could bring a lawsuit against a lender that made consumer loans in 2006 and stopped making them in 2009. The only discernable – while immaterial – difference is that Integrity Advance's lending activities occurred closer to the date of the Bureau's inception. But, to be clear, this case is distinct from an instance when the Bureau might bring suit against a company that offered a

[10] 1 U.S.C. § 1 provides that "[w]ords used in the present tense include the future as well as the present . . . ."

consumer financial product or service when the Bureau had jurisdiction over the company—even though the company stopped engaging in that conduct before the CFPB filed an enforcement action. In such an example, the company would have fallen within the CFPB's jurisdiction by offering consumer financial products or services *during a time in which the Bureau had authority over such activity*. Respondents are not arguing that a company must be currently engaged in the offering or provision of a consumer financial product or service to be called a "covered person," under the CFPA; rather, in order for the Bureau to bring a cause of action under the CFPA, an entity must have engaged in the offering or provision of a consumer financial product or service *at some point in time when the Bureau had authority as to that conduct.* Respondents never did. For this reason, the Court should dismiss the Notice.[11]

II. THE BUREAU'S CLAIMS ARE TIME-BARRED AND SHOULD BE DISMISSED

A. The CFPA's Three Year Statute of Limitations Time-Bars The Bureau's Claims Against Mr. Carnes

Even if the Bureau had enforcement jurisdiction as to Mr. Carnes in the first instance—and it is does not—Counts III, IV, and VII, as to Mr. Carnes should be dismissed. The CFPB's UDAAP claims against Mr. Carnes are "indisputably time-barred." *See Small v. Chao*, 398 F. 3d 894, 898 (7th Cir. 2005) (statutes of limitations claims are appropriate for motions to dismiss). The Bureau's claims arise from conduct that happened no later than December 2012. *See* Notice ¶ 12. But the Bureau did not file its Notice until November 18, 2015, nearly three years later.

[11] In sum, the Dodd-Frank Act provides a dual test for effectiveness vis-à-vis the Bureau's enhanced consumer protection authorities—the newly-created authorities of the Bureau are only effective after July 21, 2011 (the express effective date under the statute) *and* the lawful appointment of a Director. To allow the Director to overcome the statutorily-required effective date, including through ratification, and pursue claims against entities and activities that never fell within the Bureau's authority would impermissibly extend the agency's authorities.

The CFPA provides that any claim arising under the Bureau's UDAAP authority must be brought within "3 years after the date of discovery of the violation to which an action relates." 12 U.S.C. § 5564(g)(1). Indeed, in the Bureau's first administrative proceeding, the administrative law judge held that the "CFPA states that the CFPB must follow the statute of limitations of the statute it is enforcing, 'as applicable.'" *3D Resorts-Bluegrass, LLC*, 2013-CFPB-0002, 3 (Jul. 12, 2013) (Order on Aff. Def.) (analyzing the statutes of limitation applied in a CFPB adjudication proceeding*)*. Here, the applicable statute of limitations is a three-year statute of limitations that starts running from the "date of discovery," as to claims arising under the Bureau's UDAAP authority.

In comparable instances, courts have held that the "date of discovery" rule in the non-fraud context "refer[s] not only to actual discovery, but also to the hypothetical discovery of facts a reasonably diligent plaintiff would know." *Merck & Co. v. Reynolds*, 559 U.S. 633, 645 (2010)). Case law is clear that the date of discovery means the date when an agency was likely to have known through reasonable due diligence. *Gabelli v. SEC*, 133 S. Ct. 1216, 1221 (2013). Agencies are expressly held to the "know or should have known" standard when ascertaining a "date of discovery" in the statute of limitations context. It follows that the date on which the Bureau knew or should have known of the alleged violations set out in the Notice is not the date when the Bureau completed its investigation. *See id*. For example, in False Claims Act cases, which even sound in fraud, courts hold law enforcement and relator plaintiffs to a "knew or should have known" "discovery-due-diligence" standard. This means that "the running of the statute of limitations does not begin at the point the plaintiff has sufficient information to prevail at trial, or even when a plaintiff is aware that the conduct at issue is actionable under the law." *U.S. ex rel. Miller v. Bill Harbert Int'l Const.*, 505 F. Supp. 2d 1, 7 (D.D.C. 2007) (citations

omitted). Rather, courts have consistently found that a limitations period begins to run at the point in time that the government official charged with bringing the civil action 'discovers, or by reasonable diligence could have discovered, the basis of the lawsuit." *Id*. Applied here, the limitations period started to run when the Bureau "possesse[d] sufficient critical facts" to put it on notice that, allegedly, "a wrong ha[d] been committed" and further investigation was needed. *Id*.

Further to this point, the Supreme Court has noted that "[a]gencies often have hundreds of employees, dozens of offices, and several levels of leadership" and thus have resources to discover alleged violations through investigations earlier than private individuals. *Gabelli*, 133 S. Ct. at 1223. For example, in *Gabelli* the Court elaborated on the Securities and Exchange Commission ("SEC"), which much like the Bureau, has a "central mission" of investigating unlawful conduct arising under laws that the agency is charged with enforcing. *Id*. at 1222. And the Bureau, like numerous law enforcement agencies, such as the SEC, "has many legal tools at hand to aid in that pursuit." *Id.*

It therefore follows that here, too, the "date of discovery" means the date on which the Bureau knew or should have known of an alleged violation, given the agency's extensive investigative authority and substantial resources. Accordingly, even assuming, arguendo, the Bureau has enforcement authority as to Mr. Carnes—which it does not—the Bureau's three-year statute of limitations started running at one of three possible dates; any of which render Counts III, IV and VII as to Mr. Carnes, time-barred. First, if the Bureau asserts that it had jurisdiction as to Respondents on July 21, 2011, the transfer date, then the three-year statute of limitations started running on that date, as the Bureau had reason to know about Integrity Advance's lending activities. Indeed, the Notice pleads that the Company relied on a website for its lending

operations and that these operations were underway by July 2011. *See* Notice ¶¶ 4, 12. Thus, the Bureau knew or should have known of any alleged unlawful conduct as of July 21, 2011 and would have had to have brought a UDAAP claim as to Mr. Carnes on or before July 21, 2014; it did not.

Second, if the Bureau asserts that it had jurisdiction as to Respondents on January 4, 2012, when Mr. Cordray was appointed during a Congressional recess, which was subsequently rendered unlawful then the Bureau's three-year statute of limitations as to Mr. Carnes would have started running on that date. The Bureau would have had to file its UDAAP claims as to Mr. Carnes on or before January 4, 2015; it did not.

Finally, if the Bureau contends that its date of discovery derives only from when it initiated its investigation, then the Bureau's date of discovery is at least a few months before it served Integrity Advance with a Civil Investigation Demand ("CID") on January 7, 2013. Indeed, by the time the Bureau knew to serve a CID on Integrity Advance, the agency knew or should have known of alleged unlawful conduct. This means that the Bureau would have had to have brought its UDAAP claims sometime in the late summer or early fall of 2015, that is three years from a liberal applied date of discovery; the Bureau, of course, filed its Notice outside this three-year window. The UDAAP claims as to Mr. Carnes are time-barred and should be dismissed for this reason, as well.

B. The Bureau's TILA And EFTA Claims As To Integrity Advance Are Also Time-Barred

Even if the Court finds that the Bureau has jurisdiction to pursue this enforcement action, it should dismiss Counts I, II, V, and VI of the Notice, as the Bureau's TILA claim (Count I), EFTA claim (Count V) and derivative CFPA claims (Counts II and VI) are time-barred. *See* Notice ¶¶ 58–61, 84–87. The law is clear that the statute of limitations for bringing any TILA

claim is one year, as the statute provides that "any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e). The EFTA contains identical language limiting the statute of limitations for filing such a claim to one year, as well. *See* 15 U.S.C. § 1693m(g). And it also is clear that "[i]n a[n] action arising . . . under an enumerated consumer law [such as TILA or EFTA], the Bureau may commence, defend, or intervene in the action in accordance with the requirements of that provision of law." 12 U.S.C. § 5564(g)(2)(B); *see 3D Resorts-Blugrass*, File No. 2013-CFPB-0002, at 3 ("The CFPA states that the CFPB must follow the statute of limitations of the statute it is enforcing.").

Indeed, to date, there is only one case that has addressed this precise issue—that is the application of TILA's one-year statute of limitations—to a Bureau enforcement case. In *CFPB v. ITT Educ. Servs., Inc*., No. 1:14-cv-00292-SEB-TAB, 2015 WL 1013508, *33 (Mar. 6, 2015), the court held that the language in TILA mandating a one-year statute of limitations applies to the Bureau's cases brought in court.[12] The court dismissed the Bureau's TILA claims on grounds that they were time-barred. Here, too, the Court should dismiss the Bureau's TILA claims and also its EFTA claims on the same grounds.

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[12] The *ITT* court distinguishes between instances when a TILA claim is brought in federal district court and when that claim is brought in a federal banking agency's administrative forum. Specifically, the *ITT* court's distinctions cite guidance from the Federal Reserve and the OCC on why TILA enables those agencies to bring TILA claims in an agency enforcement action past the one-year statute of limitations. Those agencies' administrative enforcement actions, of course, are markedly different from the Bureau's action here and from the Bureau's authorities to litigate more generally. For example, neither the OCC nor the Federal Reserve can proceed in federal district court. The Bureau, in contrast, has the discretion to bring a case in either district court or this forum, and the agency can seek the same remedies in either forum, as well. If the Bureau can select its forum, obtain the same remedies in either forum, then the causes of action that it may pursue—including any limits on those causes of action—must be the same as a matter of fairness.

The *ITT* court noted the significance of the one-year statute of limitations, explaining that "civil penalty" actions have grave implications, and that statutes of limitations serve a critical purpose of ensuring that parties not "face limitless liability." *See id.* (quoting *Consol. Bank, N.A., Hialeah, Fla. v. Office of Comptroller of Currency*, 118 F.3d 1461, 1467 (11th Cir. 1997)). Moreover, nothing in the Dodd-Frank Act or legislative history shows that Congress intended to override the statutes of limitations in the 18 enumerated statutes, including the TILA and EFTA that the Bureau may enforce.

The Notice pleads that Integrity Advance ceased offering loans in December 2012. *See* Notice ¶ 12. Thus, the CFPB was required to have brought its claims under TILA and EFTA by December 2013. The statutes of limitations under TILA and EFTA provide one year from the date of the transaction at issue to bring a claim. The Bureau did not, and its TILA and EFTA claims are time-barred; the Court should dismiss Counts I, II, V and VI for this reason, as well.

C. The CFPB's Claims Are Also Not Preserved Under A Continuing Violation Theory

Supreme Court jurisprudence precludes an argument that the alleged violations of the CFPA, TILA, and EFTA constitute "continuing violations." *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *overturned on other grounds by* Pub. L. 111-2, 123 Stat 5 (Jan. 29, 2009) ("[c]ontinuing effects . . . d[o] not make out a present violation."). The alleged violations would have necessarily occurred at or before the extension of credit, and therefore the continued payment of a loan extended by Integrity Advance is simply a continued effect of any initial violation, which "cannot breathe life into prior . . . [conduct]." *Id.* at 628.

Courts have expressly rejected the continuing violation theory with regard to EFTA. *See Repay v. Bank of Am., N.A.*, No. 12 CV 10228, 2013 WL 6224641, at *4 (N.D. Ill. Nov. 27, 2013) ("[o]nce the series of transfers is initiated by the first transfer, the violation occurs . . . .").

Courts have similarly rejected application of any continuing-violations doctrine to the TILA statute of limitations. *King v. State of Cal.*, 784 F.2d 910, 913–14 (9th Cir. 1986) (rejecting the continuing-violations theory as "expos[ing] the lender to a prolonged and unforeseeable liability that Congress did not intend"); *Butler v. Fairbanks Capital*, No. Civ.A. 04-0367(RMU), 2005 WL 5108537 at *29, (D.D.C. Jan. 3, 2005) (refusing to apply a continuing-violation theory to TILA claims). Thus, the Court should dismiss Counts I, II, V and VI because they are time-barred.

III. COUNTS I AND II SHOULD BE DISMISSED BECAUSE THE NOTICE FAILS TO STATE A CLAIM UNDER TILA AND REGULATION Z

The Notice's factual allegations must produce an inference of liability strong enough to move the Bureau's claims "across the line from conceivable to plausible." *Iqbal*, 556 U.S. at 683. The Notice, however, does not plead sufficient facts to infer "more than the mere possibility of misconduct." *Id.* at 679. The Court should dismiss Counts I and II, which allege TILA violations.

The Notice fails to state a claim under TILA because Integrity Advance's disclosure of a payment table with a single payment reflects the single-payment legal obligation between Integrity Advance and consumers; thus, it complies with TILA's strict disclosure requirements. *See* 12 C.F.R. §§ 1026.17; 1026.18. Rather than allege facts that these requirements were not met, the Notice attempts to create a new TILA disclosure standard by which a "true repayment schedule"—one which accounts for a consumer's likely extension of the contract after consummation—is required to be disclosed instead. But TILA and its implementing regulation, Regulation Z, have no such requirement. In fact, the Bureau fundamentally misconstrues TILA's disclosure rules and ignores the long-standing TILA principle that post-consummation changes

to a loan do not render a disclosure at the time that the loan was made inaccurate. *Id.* § 1026.17(e).

TILA requires creditors to disclose specific information, as prescribed by Regulation Z, including a loan's annual percentage rate ("APR"), the finance charge, the amount financed, and a payment schedule. *See* 15 U.S.C.§§ 1631 and 1638. Regulation Z requires these disclosures to be "clear and conspicuous," that is, that they be legible and in a reasonably understandable form, 12 C.F.R. § 1026.17(a)(1); Comment 17(a)(1)-1, and that they reflect the terms of the *legal obligation between the parties*." *Id.* § 1026.17(c)(1) (emphasis added). Read together, these provisions mandate that a required disclosure like a payment schedule reflect the terms of the underlying credit contract and be communicated in a manner that the consumer may read and understand.

Indeed, the disclosures highlighted by the CFPB, track the model form that Regulation Z sets forward. The disclosure uses the appropriate format, labels, and terminology as the regulation prescribes. This Regulation Z model form, in turn, provides a safe harbor, meaning that when a company presents a TILA disclosure that tracks this model form, it is presumptively compliant with the TILA "clear and conspicuous" requirement. *See* 12 C.F.R. Part 1026, app. H (H.2). There is no question that the contract between Integrity Advance and consumers at the time of loan consummation was for a single payment loan which could be extended, at the consumer's option, beyond the maturity date. The TILA disclosures were provided on the model form and disclosed a payment schedule reflecting that agreement. This is what TILA and Regulation Z require.

The Bureau, nevertheless, attempts to allege a TILA (and Regulation Z) violation on the theory that Respondents should have assumed consumers would renew their loans after

consummation and should have made a "true payment schedule" based on this assumption.[13] This attempts to read into Regulation Z a requirement to predict post-consummation events and incorporate them into a payment schedule that not only does not exist, but is directly contradicted by Section 1026.17(e) of Regulation Z. This section of Regulation Z makes clear that post-disclosure events (such as the election to renew a loan contract after consummation) do not render the initial disclosure inaccurate.

Here, any change to the loan terms necessarily resulted from a payment decision made after the loan was consummated. If consumers did not indicate that they would repay the loan under the initial terms, or if consumers elected to request a renewal, the consumer's repayment obligation changed in accordance with the terms of the contract. TILA and Regulation Z do not require, and the CFPB has not pleaded, that new after-the-fact disclosures should have been made. *See, e.g., Jasper Cnty. Sav. Bank v. Gilbert*, 328 N.W.2d 287, 290 (Iowa 1982) (concluding that TILA "does not require the lender to disclose that the dollar amount of the costs of credit will increase if the consumer makes late payments."). The Bureau fails to state a TILA claim and the Court should dismiss Counts I and II for this reason.

IV. THE COURT SHOULD NARROW SUBSTANTIALLY THE SCOPE OF COUNTS III, IV, AND VII WHICH ALLEGE UDAAP VIOLATIONS ARISING FROM CONDUCT THAT PREDATES JULY 21, 2011

Even if the Court finds that the Bureau had enforcement authority over Respondents, the agency has no UDAAP authority as to conduct that predates July 21, 2011. The Bureau's Notice alleges UDAAP violations that arise from Integrity Advance's offering or provision of loans between May 15, 2008 and December 2012. *See* Notice ¶ 12. In fact, the Bureau's Notice of

[13] To support this claim, the CFPB alleges that consumers believed "[c]omplaints submitted by consumers indicate that the consumers thought the company would debit only the total amount disclosed in the TILA disclosure . . . ." *Id.* ¶ 32. The fact of a consumer complaint, however, is irrelevant to the legal question before the Court: whether the Bureau can plead that Integrity Advance's TILA disclosures failed to meet that statute's technical disclosure requirements.

Charges alleges UDAAP violations that arise solely from and specifically because of the provision or offering of a loan. *See* Notice ¶¶ 62–70, 71–77, 88–94 (alleging deceptive and unfair conduct arising from the extension of a loan). The Notice alleges no UDAAP violations that arise from conduct that post-dates December 2012 when Integrity Advance stopped offering loans. *See id.* In other words, 38 of the 56 months when Integrity Advance made loans to consumers pre-date the time that the Bureau had the authority to bring a UDAAP claim. Accordingly, the Court should narrow the scope of Counts III, IV and VII and any relief the Bureau seeks under these claims.

The law is clear "that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place." *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 946 (1997) (internal quotations and citations omitted). This "retroactivity principle finds expression in several provisions of our Constitution," including the Due Process Clause, which "also protects the interests in fair notice and repose that may be compromised by retroactive legislation." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994).

For this reason, there is a "time-honored presumption" against retroactivity "unless Congress has clearly manifested its intent to the contrary." *Hughes Aircraft*, 520 U.S. at 946. Indeed, here, Congress has manifested its intent that the CFPA's UDAAP authority reach only conduct that happened on or after July 21, 2011. As noted above, both subtitle C, which contains the CFPB's UDAAP authorities, and subtitle E, which contains the CFPB's Enforcement Authorities, including the Bureau's authority to seek any remedies, each include sections providing that "[t]his subtitle shall take effect on the designated transfer date" which was July 21, 2011. 12 U.S.C. §§ 5531, 5561. The Supreme Court has explained that "[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any

application to conduct that occurred at an earlier date." *Landgraf,* at 257. When, as here, "Congress has delayed the effective date of a substantive statute that could in principle be applied to conduct completed before its enactment, [courts] presume the statute applies only prospectively." *Lytes v. DC Water & Sewer Auth.*, 572 F.3d 936, 941 (D.C. Cir. 2009); *see also Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 838–39 (1990) (recognizing that a six-month delay in the effective date of the federal prejudgment interest statute suggested prospective-only application); *Gay v. Sullivan*, 966 F.2d 1124, 1128 (7th Cir. 1992) (holding that "provision for a future effective date" is "strong evidence of a congressional rejection of retroactivity").

But even if the CFPA did not have an effective date that explicitly showed that the CFPA and its UDAAP authority only reach prospective conduct, it would still be the case that the statute could not apply to conduct that predates July 21, 2011. This is because the statute "attaches new legal consequences to events completed before its enactment," and it would be unfair to "impos[e] new burdens on persons after the fact." *Landgraf*, 511 U.S. at 269–70. This principle applies both in the civil and criminal contexts. *Id.* at 272. The Bureau's UDAAP authority—codified in sections 1031 (UDAAP authority) and 1036 (pursuing unlawful conduct)—and the remedies that the Bureau can obtain from any UDAAP violations, as enumerated in section 1055, as well as the Bureau's authority to proceed here in the first instance under section 1053 all comprise a "statute, which . . . creates a new obligation, imposes a new duty, [and] attaches a new disability, in respect to transactions or considerations already past." *Id.* at 269.

Under *Landgraf*, there is only a small category of laws that could ever apply to conduct retrospectively, and the CFPA is clearly not among them. Specifically, this small category of

laws "regulate secondary rather than primary conduct." *Id.* at 275. For example, courts have held that a statute that applies a new jurisdictional rule, such as changing the venue for application of an already-existing statute, or rules of procedure that apply to pre-enactment date conduct are not impermissibly retroactive, as they concern only secondary conduct, unlike the CFPA, which regulates an actor's primary conduct. *Id.* at 274-75; *see also Hughes Aircraft*, 520 U.S. at 951.

The Supreme Court, in fact, has defined secondary conduct very narrowly, so as to preclude nearly all laws from applying retrospectively. For example, in *Hughes Aircraft*, the Supreme Court held that a 1986 amendment to the False Claims Act, which permitted a private relator to pursue FCA claims and also eliminated a defense to an FCA claim, could not be applied to allegations arising from conduct that occurred in 1982 and 1984. The *Hughes* Court explained that this amendment to an-already existing statute "creates jurisdiction where none previously existed; it thus speaks . . . to the substantive rights of parties as well." *Hughes Aircraft*, 520 U.S. at 951. The Court explained that, even though the statute already existed, the mere addition of a private right of action, resulted in the FCA "amendment essentially creat[ing] a new cause of action." *Id*. at 949. Following the Supreme Court's logic, the CFPA necessarily applies only to prospective conduct; the statute's authorities, including its UDAAP and enforcement authorities, are entirely new legal provisions that are part of a new statute conferring authorities on a newly-created agency. The Court cannot apply this authority to conduct that predates July 21, 2011.

In fact, to date, in nearly every (if not every) instance when the Bureau has alleged a UDAAP violation in a litigated proceeding, the agency has only pleaded UDAAP violations that

arise from conduct that occurred on or after July 21, 2011.[14] Moreover, courts have universally held that other substantive provisions of the Dodd-Frank Act are not retroactive. *See McCauley v. Home Loan Inv. Bank*, 710 F.3d 551, 554 n. 2 (4th Cir. 2013); *Meyer v. One West Bank, F.S.B*, 91 F. Supp. 3d 1177, 1181 (C.D. Cal. 2015); *Jones v. Southpeak Interactive Corp.,* No. 12cv443, 2013 WL 1155566, at *9 (E.D. Va. Mar. 19, 2013); *Blackwell v. Bank of Am. Corp.,* No. 11-2475-JMC-KFM, 2012 WL 1229673, at *4 (D.S.C. Mar. 22, 2012); *Henderson v. Masco Framing Corp.,* No. 11-cv-00088-LRH, 2011 WL 3022535, at *4 (D. Nev. July 22, 2011) ("[T]his court finds that the Dodd-Frank Act's SOX provisions are not retroactive.").

For example, in *Koch v. SEC*, 793 F.3d 147, 157-58 (D.C. Cir. 2015), the court held that the Securities and Exchange Commission could not impose a class of sanctions that were created by the Dodd-Frank Act. *See Koch*, 793 F.3d at 157–58 (addressing application of section 925(a) in Title VIII of the Dodd-Frank Act, also called the Investor Protection and Securities Reform Act of 2010). In that case the narrow issue before the court was whether the SEC could impose a new type of sanction to address conduct arising from a violation of the law that pre-dated the Dodd-Frank Act. And, even there, the court held that imposing a new sanction as to pre-Dodd-Frank Act conduct would "create new legal consequences for past conduct" in contravention of *Landgraf*. *Id.* at 158.

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[14] *See, e.g.*, Complaint at 32, *CFPB v. Corinthian Colleges, Inc.*, No. 1:14-cv-07194 (N.D. Ill.) (Sept. 16, 2014); Pl's Resp., at 38, *CFPB v. Hanna*, No. 1:14-cv-02211-AT (N.D. Ga.) (Oct. 3, 2014) (responding to a motion to dismiss by disclaiming any effort to apply the UDAAP provision to conduct occurring prior to July 21, 2011); Complaint at 2, *CFPB v. Sec. Nat'l Auto. Acceptance Co.*, LLC, No. 15-cv-401 (S.D. Ohio, June 17, 2015) (limiting allegations of UDAAP conduct to July 21, 2011 and later); Complaint at 12, *CFPB v. Freedom Stores, Inc.*, No. 2:14cv643 ANA/TEM (E.D. Va., Dec. 18, 2014) (confining dates of UDAAP allegations to between July 21, 2011 and December 31, 2011, despite the defendant operating as early as January 1, 2010); Complaint at 3, *CFPB v. Student Financial Aid Servs.*, No. 2:15-at-00821 (E.D. Cal., Jul. 23, 2015) (limiting allegations of UDAAP conduct to "relevant" period "[f]rom at least July 21, 2011 to the present").

The Bureau impermissibly seeks to apply its newly-created UDAAP authority to conduct, almost all of which occurred before July 21, 2011. The Court should substantially narrow any remedy that the Bureau would be allowed to pursue as to Counts III, IV, and VII, which allege violations of the Bureau's UDAAP authority.

CONCLUSION

The Court should dismiss the Notice. The Bureau has never had enforcement jurisdiction as to Respondents. The Notice also alleges causes of action that are time-barred. Its TILA causes of action fail to state a claim on which relief can be offered. And the Bureau's Notice alleges UDAAP violations, which arise from alleged conduct that almost entirely predates July 21, 2011.

For all of the foregoing reasons, the Court should dismiss the Notice in its entirety and award Respondents all costs.

Dated: December 21, 2015

By: /s/ Allyson B. Baker

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CERTIFICATION OF SERVICE

I hereby certify that on the 21th day of December, 2015, I caused a copy of the foregoing Notice of Appearance and Declaration to be filed by electronic transmission (e-mail) with the U.S. Coast Guard Hearing Docket Clerk (aljdocketcenter@uscg.mil) and Administrative Law Judge Parlen L. McKenna (cindy.j.melendres@uscg.mil), and served by electronic mail on the following parties who have consented to electronic service:

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