UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING File No. 2015-CFPB-0029 In the matter of: INTEGRITY ADVANCE, LLC and JAMES R. CARNES	)	**RESPONDENTS' RESPONSE TO BUREAU'S NOTICE OF SUPPLEMENTAL AUTHORITY**

RESPONDENTS' RESPONSE TO BUREAU'S NOTICE OF SUPPLEMENTAL AUTHORITY

Respondents Integrity Advance, LLC and James R. Carnes submit this response to the Bureau's April 15, 2016 Notice of Supplemental Authority. The Bureau cites *CFPB v. Gordon* mainly for the erroneous proposition that "'[t]he CFPB had the authority to bring the action at the time Gordon [the defendant] was charged'—July 2012 . . . ." The salient issue in *Gordon*, however, concerns Article III standing, which is not an issue in the instant matter. Specifically, the appellant and amicus in *Gordon* essentially argue that in the absence of a constitutionally-appointed Director, the Bureau could not act as an executive agency. The *Gordon* Court, in turn, largely addresses only this precise question. Indeed, even that court's Article II holding stems from a truncated analysis that relies on little more than the court's more fulsome, but necessarily distinct, Article III analysis.

Respondents' Motion to Dismiss makes authority arguments that *Gordon* does not address. Respondents assert correctly that under sections 1011 and 1066 of the Consumer Financial Protection Act ("CFPA"), the Bureau did not have authority as to nonbanks until the CFPB's first Director was constitutionally appointed. Respondents do not dispute that the

Bureau could operate as an executive agency in the absence of a constitutionally-appointed Director. To the contrary, as section 1066 expressly contemplates a bifurcated authority, part of which took effect on July 21, 2011. Authority as to banks transferred to the Bureau on July 21, 2011, regardless of whether there was a constitutionally-appointed Director on that date, and the Bureau could only assume "newly created" non-transfer authority, concerning nonbanks, on July 21, 2011 and *only once* there was a constitutionally-appointed Director. The briefing in *Gordon*, and, consequently, the majority's holding in that case, never address this crucial bifurcated authority issue.[1] This bifurcated authority, however, necessarily informs any Article II Appointments Clause analysis for all of the reasons previously noted by Respondents in their briefs and oral argument. The Bureau's reliance on *Gordon* here misses the mark.

Furthermore, the majority in *Gordon* also relies on *NRA Political Victory Fund v. FEC* for its holding that Director Cordray's August 30, 2013 ratification "cures any initial Article II deficiencies." Maj. op. at 18. In fact, the Court finds that "[t]he parties agree that while Cordray's initial January 2012 recess appointment was invalid, his July 2013 confirmation was valid." Maj. op. at 8. The *Gordon* court implicitly relies on *NRA Political Victory Fund* (and the line of ratification cases generally) to hold that notwithstanding the Appointments Clause defect, the Director's subsequent Notice of Ratification cured this defect as to Gordon, because the Bureau could have brought its enforcement action in July 2013 when the Director was constitutionally appointed.

[1] Moreover, the majority's opinion does not address the OIG Report cited by the Appellant or the OIG Letter cited by Respondents in the case at hand.

Here, too, is a critical difference.[2] Respondents (voluntarily) stopped offering or providing any consumer financial products or services before July 2013 when Director Cordray was confirmed by the Senate. The Bureau could not have similarly pursued a CFPA action as to Respondents in July 2013, and thus, there is no possibility that the Director's August 2013 Notice of Ratification could have cured the Appointments Clause defects at issue in the instant case.

Respondents present a much more discreet and detailed argument than that on which the Ninth Circuit based its opinion. To briefly summarize Respondents' argument:

- The Appointments Clause and Supreme Court precedent show that Executive authority can only be delegated to an Officer of the United States;
- The Appointments Clause provides important protections to the process of creating Officers of the United States;
- This Constitutional framework is inherent to the CFPA (*see* § 1011);
- The CFPA, in Subtitle F and Section 1066, bifurcates authority between non-transfer (newly-created) authority (applicable to nonbanks) and transfer authority;
- Newly created authority could only be exercised by the lawfully-appointed Director;
- Since the first Director of the CFPB was not confirmed until July 16, 2013, the Bureau did not assume its newly created enforcement authority as to nonbanks until that time;
- The Bureau's authority to pursue a CFPA claim as to nonbanks may not be retroactively applied (including through ratification) to entities that were no longer covered persons (that is they offered or provided a consumer financial product or service), on or after July 16, 2013; and
- Respondents no longer offered or provided a consumer financial product or service on July 16, 2013. Thus, the Bureau could not pursue a CFPA claim against Respondents.

In addressing the Appointments Clause issue in isolation, the *Gordon* majority fails to address vital arguments that are voiced by Judge Ikuta's powerful dissent. As Respondents have argued, the Appointments Clause is relevant because of the bifurcation of the Bureau's authority, as contemplated by section 1066 of the CFPA, and the inherent Appointments

[2] Implicit in the majority's opinion is that the CFPB could have brought a case against Gordon after Director Cordray was confirmed by the Senate. Maj. op. at 19.

Clause and delegation deficiencies in the Bureau's application of authority as to nonbanks, including Respondents, prior to the lawful appointment of its first Director. Dis. op. at 33 ("Who was exercising the executive power of the United States needed to bring this civil enforcement action?").

CONCLUSION

Since the Ninth Circuit did not consider or address the fundamental issues that inform Respondents' Motion to Dismiss the CFPA claims, the *Gordon* majority's holding is of limited utility to the Court.[3]

Respectfully submitted,

Dated: April 18, 2016

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[3] Of course, Respondents will provide any additional brief as is deemed warranted by the Court.

CERTIFICATION OF SERVICE

I hereby certify that on the 18th day of April 2016, I caused a copy of the foregoing Answer to be filed by electronic transmission (e-mail) with the U.S. Coast Guard Hearing Docket Clerk (aljdocketcenter@uscg.mil), Heather L. MacClintock (Heather.L.MacClintock@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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