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**	**ORDER DENYING MOTION TO DISMISS** **Hon. Parlen L. McKenna**

ORDER DENYING MOTION TO DISMISS

On December 21, 2015, Respondents Integrity Advance and James R. Carnes (collectively, Respondents) filed a Motion to Dismiss in which they requested oral argument in addition to briefing. The Consumer Financial Protection Bureau (CFPB or the Bureau) filed its Opposition on January 15, 2016. Respondents filed a Reply on January 26, 2016. I granted Respondents' request for oral argument, and heard the parties' arguments on April 5, 2016 in Washington, D.C. After thoroughly considering these arguments and the applicable law, the Motion to Dismiss is DENIED.

I. LEGAL STANDARD

The CFPB's Rule of Practice for Adjudication Proceedings 212 (Rule 212) provides 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. As of this date, no federal court has interpreted the CFPB's rules of procedure, however, a Recommended Decision and a Decision of the

Director have been issued in one administrative enforcement proceeding. *See In the Matter of PHH Corp. et al*, File No. 20 14-CFPB-0002, Decision of the Director at 10 (June 4, 2015). To the extent that holdings in *PHH* are persuasive or binding on me, I will apply them here. I will also refer to applicable Federal Rules of Civil Procedure (FRCP) and case law interpreting them as necessary.

Although Rule 212(b) is similar to FRCP 12(b)(6), the standards are not precisely the same. However, they are sufficiently similar that rules and case law pertinent to FRCP 12(b)(6) may appropriately be considered when analyzing a Motion to Dismiss filed under Rule 212(b).

II. BACKGROUND

The parties, in a joint filing submitted on March 23, 2016, stipulated to the following facts:

1. The Consumer Financial Protection Bureau is an independent agency of the United States.
2. Integrity Advance, LLC (Integrity Advance) is a limited liability company organized under Delaware law.
3. Integrity Advance maintained an office at 300 Creek View Road, Newark, DE.
4. Integrity advance was wholly owned by an entity called Hayfield Investment Partners (Hayfield), which was also organized under Delaware law.
5. At some points in time, James R. Carnes (Carnes) owned 52% of Hayfield.
6. Carnes is a natural person residing in Kansas.
7. Carnes was the President and CEO of Integrity Advance.

8. From May 15, 2008 through December 2012, Integrity Advance offered short term loans to consumers residing in numerous states around the country.
9. Some number of consumers applied for loans with Integrity Advance by entering their personal information into a lead generator website.
10. Integrity Advance ceased offering loans in December 2012.
11. Integrity Advance offered loans to consumers in amounts ranging from $100 to $1,000.
12. Exhibit A represents an authentic copy of a loan application form and a loan agreement form used by Integrity Advance.
13. Integrity Advance was licensed by the Delaware Office of State Bank Commissioner (DOSBC).
14. Integrity Advance obtained and held a lender's license from the DOSBC.
15. Integrity Advance renewed its lender's license annually with the DOSBC.
16. The Bureau issued a Civil Investigative Demand (CID) to Respondents on January 7, 2013.
17. The Senate confirmed Richard Cordray as the Bureau's Director on July 16, 2013.
18. The Bureau filed the Notice of Charges against Integrity Advance and Carnes on November 18, 2015.
19. The Office of the Inspectors General of the Federal Reserve and the Department of the Treasury submitted a letter to Congress dated January 10, 2011 in response to questions by Representatives Bachus and Biggert.

The remaining facts alleged in the Notice of Charges, briefly summarized as follows, are taken as true for purposes of considering the Motion to Dismiss. As a small-dollar, short-term lender (colloquially known as a payday lender), Integrity Advance offered loans to consumers who completed an online application and also maintained a call center so consumers could speak to a company representative. Consumers were not aware of all the terms of the loan until they completed the application, and were also required to agree to an Automated Clearing House (ACH) authorization allowing Integrity Advance to make electronic deposits to and withdrawals from the consumer's bank account. Integrity Advance generally deposited loan funds within 24 hours of receiving the consumer's electronic signature on the completed application, unless the consumer contacted Integrity Advance to decline the loan.

Lenders such as Integrity Advance are required to comply with the Truth in Lending Act (TILA) and disclose costs and fees associated with their loans in compliance with that law. Integrity Advance's contract displayed a repayment cost and payment schedule that assumed a borrower would repay the loan in one lump sum. However, if a borrower wished to follow this repayment schedule and incur only the displayed cost of the loan, he or she was required to contact Integrity Advance to make arrangements accordingly. If the borrower did not contact Integrity Advance at least three days prior to the stated repayment date, the company would "auto-renew" the loan, debiting only the amount of the finance charge and any accrued fees from the borrower's bank account. The principle would then be due on the consumer's next pay date and an additional finance charge and fees would be charged. Integrity Advance referred to this practice as a "refinancing" or "rollover." After four rollovers, Integrity advance would continue to take a finance charge, plus $50 to apply to the principal of the loan, until it was repaid in full. This significantly increased the total cost of the loan to the consumer.

The Bureau alleges that Integrity Advance's customers did not understand that the full amount would not automatically be debited, and that they would end up paying significantly more than the amount set out in the initial disclosure. The disclosure did not set out the total amount a consumer would pay if the loan was extended to its maximum length, with four rollovers and subsequent $50 payments toward principal. The Bureau alleges that Integrity Advance's failure to accurately disclose the total costs and fees is a violation of TILA.

Lenders that use ACH transfers are required to comply with the Electronic Fund Transfer Act (EFTA). Integrity Advance required borrowers to receive loan proceeds through direct deposit, and to authorize the company to collect payments by electronic debit. The Bureau alleges Integrity Advance violated EFTA by placing a confusing section in the contract allowing Integrity Advance to create checks and withdraw funds from consumers' bank accounts even if the consumer subsequently withdrew consent to ACH transfers.

The Bureau's allegations against Carnes are premised on the same activity, since the Bureau contends he is a "related person" under the Consumer Finance Protection Act (CFPA or the ACT), 12 U.S.C. § 5481(25), and therefore a "covered person" for purposes of the CFPA, 12 U.S.C. § 5481(25)(B). Carnes was a director with managerial authority, and allegedly directly responsible for Integrity Advance's policies and procedures.

III. THE MOTION TO DISMISS

In support of their Motion to Dismiss, Respondents argue that the Notice should be dismissed because: (1) the CFPB never had authority to regulate 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 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.

The Bureau counters by arguing they have always had the authority to regulate Respondents, both when the Secretary of the Treasury (the Secretary) was interim head of the Bureau and now that a Director was appointed. The Bureau also argues that, even assuming the Secretary could not have brought an enforcement action, the Notice of Charges here was not filed until after the Director had been confirmed by the Senate, when his appointment was unquestionably constitutional. The Bureau also contends no statute of limitations applies here because this is an administrative proceeding, not a civil action in a court of the United States (Article III Court). In response to the argument that the Bureau failed to state a claim under TILA and Regulation Z, the Bureau says the facts alleged in the Notice of Charges, taken as true at this stage in the proceedings, make out a colorable TILA claim. Finally, the Bureau conceded that it does not seek to bring UDAAP claims for any conduct occuring prior to July 21, 2011 and thus there is no issue of retroactivity.

IV. ANALYSIS

A. CFPB's Authority to Regulate Small-Dollar, Short-Term Lenders

The primary dispute between the parties centers around the question of the CFPB's ability to regulate Respondents based upon a determination of when jurisdiction attached. To determine whether the Bureau had jurisdiction over Respondents at the time they engaged in small-dollar, short-term lending, I must consider a number of issues. The threshold question is whether the Act does, indeed, provide that the Bureau's jurisdiction over nonbank entities requires both the designated transfer date to have passed *and* a Director to have been appointed to head the Bureau. In the alternative, the question is whether the Secretary, as interim head of the Bureau, had authority to bring an enforcement proceeding against a nonbank entity. For the reasons set out below, I find that the Bureau had jurisdiction over nonbank entities such as Respondents prior to the Director's Senate confirmation. I also find that the Act authorized the Secretary to bring administrative enforcement proceedings against various covered persons, including nonbank entities.

1. The Appointments Clause and Separation of Powers Issues

a. Timeline of Director Cordray's Appointment

Richard Cordray initially assumed the position of Director of the CFPB via a recess appointment on January 4, 2012. On the same day, President Obama appointed three new members of the National Labor Relations Board. The Supreme Court later held that the appointment of those NLRB members was unconstitutional; even though recess appointments are permitted under certain circumstances, the recess in question was "presumptively too short" to qualify. *N.L.R.B. v. Noel Canning*, 134 S.Ct. 2550, 2557 (2014). On July 16, 2013, the Senate voted to confirm Director Cordray to the position.

There is no reason to believe a federal court would reach a different conclusion than the Supreme Court's decision in *Noel Canning* if Director Cordray's recess appointment were challenged. Moreover, though the Bureau has not explicitly conceded this point, it has not argued that the Director's recess appointment was constitutional and has used July 16, 2013 as the date when Director Cordray assumed full authority over the CFPB. Thus, I consider the Secretary to have been interim head of the Bureau from its inception until July 15, 2013, with all powers and limitations provided for in the Act. The Director was entitled to exercise all authorities under the Act at all times thereafter.

b. The Bureau's Authorities Prior to the Director's Appointment

Respondents contend that the Act sets out a two-part test for CFPB jurisdiction over nonbank entities such as themselves: first, the designated transfer date must have passed, and second, a Director must have been appointed in accordance with the Appointments Clause of the Constitution, Art. II, cl. 2. Thus, Respondents argue that the CFPB had no jurisdiction over them until the Director was confirmed on July 16, 2013. Respondents say the authority to enforce federal laws is not delegated by Congress to an agency, it is delegated to an officer of the United States who acts on the agency's behalf. Since Integrity Advance had entirely ceased operations approximately a month before the Director was appointed, they believe they never engaged in conduct subject to the jurisdiction of the CFPB.

The Bureau argues Respondents conflate two separate issues: first, the existence of substantive prohibitions against certain conduct, and second, the CFPB's ability to file a civil action or bring an administrative proceeding seeking to punish an entity for engaging in such conduct. The Bureau argues Respondents became "covered persons" for purposes of the Act upon its enactment; Respondents were subject to TILA and EFTA long before the Bureau was even established; and the alleged unfair and deceptive acts became illegal as of the designated transfer date. The Bureau maintains the Secretary had authority to enforce these laws against Respondents, but says even if I find the Secretary did not have that authority, it does not change the fact that the conduct was a violation of substantive laws when it occurred. The fact that a Notice of Charges was filed later, after the Director's appointment, simply means that this enforcement proceeding was properly initiated by a principal officer of the United States who has unquestionable authority to bring it.

Respondents' argument relies heavily on two cases, *Buckely v. Valeo*, 424 U.S. 1 (1976), *superseded by statute on other grounds*, and *Edmonds v. U.S.*, 520 U.S. 651 (1997). They have argued these cases stand for the proposition that authority to enforce laws cannot exist in the absence of a principal officer of the United States vested with that authority.

Buckley involved a challenge to the separation of powers between Congress and the executive branch with respect to the composition of the Federal Election Commission. *See* 424 U.S. at 6. The Commission, which was charged with administering and enforcing the Federal Election Campaign Act (FECA), had broad investigatory, rulemaking, and enforcement powers. *Id.* at 110. It was comprised of two ex officio members, who were members of Congress, and six voting members, two of whom were appointed by the President and four of whom were appointed by Congress. *Id.* at 113. The Supreme Court found this composition unconstitutional, as Congress was impermissibly reserving to itself the power to appoint the people who would enforce its laws:

> We hold that these provisions of the Act, vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights, violate Art. II, § 2, cl. 2, of the Constitution.

> Such functions may be discharged only by persons who are "Officers of the United States" within the language of that section.

Id. at 140.

However, the Court went on to hold that the Commission's inability to exercise certain powers until Congress had the opportunity to reconstitute the Commission's composition "should not affect the validity of the Commission's administrative actions and determinations to this date . . . The past acts of the Commission are therefore accorded de facto validity . . ." 424 U.S. at 142-43. The Court also stayed its judgment for 30 days "insofar as it affects the authority of the Commission to exercise the duties and powers granted it under the Act." *Id.* at 143.

Edmonds involved the Coast Guard Court of Criminal Appeals, which was composed of both civilians and commissioned officers. The petitioners argued, in relevant part, that judges of military Courts of Criminal Appeals were principal officers of the United States subject to the requirements of the Appointments Clause, not inferior officers. The Court recognized that the Appointments Clause gives the President the exclusive power to select principal officers, thus "prevent[ing] encroachment upon the Executive and Judicial Branches." 520 U.S. at 659. However, the requirement for Senate confirmation "serves to both curb Executive abuses of the appointment power . . . and 'to promote a judicious choice of [persons] for filling the offices of the union.'" *Id.* (internal citations omitted). In contrast, inferior officers, as a matter of administrative convenience, may be appointed either by the President, Courts of Law, or Heads of Departments.

The Court continued with a thorough analysis of the difference between principal and inferior officers. Both types of officers may exercise of significant authority on behalf of the United States; the main distinguishing factor is that an inferior officer has a superior. 520 U.S. at 662. Inferior officers' "work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.* at 663.

There are clear differences between *Buckley* and this case. First, the power to enforce FECA was vested in a Commission composed of six voting members and two ex officio members, while the power to enforce the CFPA is vested in a single Director. The issue in *Buckley* was whether the Congressionally-appointed Commissioners were validly appointed; the Court considered it in the context of the separation of powers between Congress and the executive branch. Here, the temporary head of the Bureau was the Secretary of the Treasury, who is also a Presidentially-appointed principal officer of the United States. The issue, then, is not whether Congress impermissibly reserved enforcement powers over its own laws to itself, as in *Buckley*, but whether an agency charged with enforcing certain laws has jurisdiction over those laws even if the principal office at that agency is vacant. There also exists the sub-issue of whether the specific powers delegated to the Secretary as interim head of the CFPB are limited by statute, if not constitutionally. I will address this in due course, however, the threshold issue must be resolved first.

I find that *Edmonds* is largely inapposite here. There is no dispute that the Director of the CFPB is a principal officer of the United States, subject to the Appointments Clause. There is also no dispute that the Secretary of the Treasury is also a principal officer of the United States. *Edmonds* neither addresses the issue of whether one principal officer can stand in as head of another agency while that office is vacant, nor addresses what powers are granted or limited during that time.

Respondents' assertion that an agency has no jurisdiction over persons who may break the law while the principal office is vacant is troubling. Respondents attempt to distinguish between the appointment of an initial agency head and the appointment of successors, stating "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. § 5491(c)(2). However, Respondents also assert that there are "instances when there is no director and, thus, no officer able to carry out the full authorities of the CFPA." Resp. Brief at 8-9.

Taken to its logical conclusion, Respondents argument means that if an agency head were to resign immediately and not remain in office while awaiting confirmation of a replacement, or were to pass away while in office, people could break the laws administered by that agency with impunity until a new officer was appointed because the conduct would no longer be substantively illegal. Moreover, once a new agency head was appointed, he or she would not be able to bring enforcement actions against those persons due to the gap in jurisdiction. This result is illogical, unworkable, and contrary to Congressional intent in passing laws regulating financial transactions. Indeed, these laws were passed by Congress, signed into law by the President, and came into effect on either the date of enactment—July 21, 2010—or on the designated transfer date—July 21, 2011. In particular, the Act provided that "[t]his subtitle [subtitle B (§§ 1021–1029A), enacting this part] shall become effective on the designated transfer date, except that sections

1022, 1024, and 1025(e) [12 U.S.C. 5512, 5514, and 5515(e)] shall become effective on the date of enactment of this Act [July 21, 2010]."

Section 5514 is entitled "Supervision of nondepository covered persons" and sets out the scope of coverage, supervisory authority, enforcement authority, rulemaking and examination authority the Bureau is granted over such persons. Congress was well aware, in drafting and passing the Act, that this section would take effect before a Director could be nominated or confirmed. To allow nondepository covered persons to elude a law specifically directed at them due to the circumstances of the Director's confirmation would contravene Congressional intent.

I also note that in *Buckley*, the Supreme Court stayed its judgment to allow the Commission to continue "to exercise the duties and powers granted to it under the Act" while Congress considered how to constitutionally recompose the Commission. 424 U.S. at 142-43. If Respondents' reading of *Buckley* was accurate, the Court's decision would be internally inconsistent, since the Commission could not have continued to exercise its duties and powers if the law was not applicable until a constitutionally-appointed Commission was formed.

Moreover, the Director in this case was eventually confirmed by the Senate, thus any constitutional defect in his initial appointment was remedied. The salient question is whether the remedy was effective. *Fed. Election Comm'n v. Legi-Tech, Inc.*, 75 F.3d 704, 708 (D.C. Cir. 1996). If the remedy adequately addresses any prejudice to Respondents from the constitutional violation, then "dismissal is neither necessary nor appropriate." *Id.* As of July 21, 2011, nonbank covered persons such as Respondents were obligated to abide by consumer financial protection laws. The Bureau was fully authorized to enforce those laws against Respondents at the time it brought this proceeding. Any prejudice to Respondents stemming from the Director's initial unconstitutional appointment is purely speculative, thus dismissal would not be appropriate.

2. Federal Oversight of Nonbank Entities

Respondents contend that "[i]t is undisputed that Respondents were never within the jurisdiction of a federal banking regulator." Resp. Brief at 8. This, while not necessarily untruthful, is nevertheless misleading: Integrity Advance was not within the jurisdiction of a *federal banking* regulator, but was both regulated by the Delaware state banking regulator and subject to federal oversight by the Federal Trade Commission (FTC). Prior to the establishment of the CFPB, the FTC oversaw non-depository institutions such as mortgage companies, debt collection companies, and payday lenders. While the FTC was not granted supervision or examination authority, it was—and still is—able to bring enforcement actions against these institutions. *See* 15 U.S.C. § 1602(f) (2010); 15 U.S.C. § 1638 (2010). The ability to supervise and conduct examinations of payday lenders is a new power granted to CFPB in the Act, as is the authority to pursue UDAAP claims. However, the ability to enforce existing laws against payday lenders is not new.

Respondents and the Bureau also differ as to whether it matters that the Act defines "covered persons" in the present tense. I find this argument superfluous to the issues at hand. For a period of time when Respondents engaged in payday lending, they were covered persons under the Act; the fact that they have since ceased operations does not affect their liability for allegedly illegal acts committed during that period of time.

Respondents say it is "bewildering" that the Bureau quoted language regarding "covered persons" from 12 U.S.C. § 5563(b), which applies to cease-and-desist proceedings, rather than § 5563(a), which applies to administrative proceedings. Resp. Reply at 4-5 n. 5. However, it bears mentioning that § 5563(a) authorizes the Bureau "to conduct hearings and adjudication proceedings with respect to *any* person" (emphasis added). Thus, Respondents' argument about whether they were, in fact, "covered persons" appears equally inapposite.

3. Part F of the CFPA Authorized the Secretary to Bring Administrative Proceedings to Enforce All Consumer Financial Protection Laws

Congress authorized the Secretary of the Treasury "to perform the functions of the Bureau under this subtitle until the Director of the Bureau is confirmed by the Senate . . ." 12 U.S.C. § 5586(a). This language is found in Subtitle F, entitled "Transfer of Functions and Personnel; Transitional Provisions." Respondents contend that this means the Secretary could perform only functions transferred from another agency, and that any new functions of the Bureau could not be performed until a Director was confirmed by the Senate. After analyzing the statute as a whole, I find the Secretary's authority to perform CFPB functions was indeed limited, but not to the extent Respondents would have me believe.

As Respondents themselves pointed out, for purposes of Part F, "consumer financial protection functions" is defined as:

> (A) all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law, including performing appropriate functions to promulgate and review such rules, orders, and guidelines; and
> (B) the examination authority described in subsection (c)(1), with respect to a person described in section 5515(a) of this title.

15 U.S.C. § 5581(a)(1); Tr. at 24. The Administrative Procedures Act (APA) defines an "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing."[1] 5 U.S.C. § 551(6). Adjudication is the "agency process for the formulation of an order." 5 U.S.C. § 551(7). Neither the CFPA nor the Dodd-Frank Act contain any other definition of an order or an adjudication, so it is appropriate to give those terms their ordinary administrative law definitions. See 12 U.S.C. §§ 5301, 5481. The CFPA's implementing regulations do define a "final order" as "an order issued by the Bureau with or without the consent of the respondent, which has become final, without regard to the pendency of any petition for reconsideration or review." 12 C.F.R. § 1081.103. Under the regulations, an adjudication proceeding is "conducted pursuant to section1053 of the Dodd-Frank Act and intended to lead to the formulation of a final order" other than a temporary cease-and-desist order. *Id.*

By the plain language of the statute, the Secretary was authorized to carry out the functions of the Bureau under Part F. 12 U.S.C. § 5586(a). The authority to issue orders is in no way limited in Part F, which grants *all* authority to . . . issue orders . . . pursuant to *any* Federal consumer financial law." 12 U.S.C. 5581(a)(1)(A) (emphasis added). Therefore, it must follow that he was authorized to bring hearings or adjudication proceedings pursuant to 12 U.S.C. § 5563, since such proceedings are clearly an

[1] The APA is codified as 5 U.S.C. § 551 *et seq*. The Bureau is "an Executive agency, as defined in section 105 of title 5. Except as otherwise provided expressly by law, all Federal laws dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Bureau." 12 U.S.C. § 5491(a).

"appropriate function" for promulgating orders.[2] That the precise requirements governing hearings or adjudication proceedings is contained elsewhere in the statute does not mean Congress intended to stymie the Secretary's authority to conduct them; on the contrary, if Congress did not intend the Secretary to have this authority, it simply would not have granted him the ability to issue orders in Part F.

Next, the issue of whether the Secretary's authority was limited to consumer financial protection laws transferred from other agencies under Part F, or extended to the Bureau's newly-established authorities must be addressed. Respondents rely on the 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 (Jan. 10, 2011) (OIG Letter) to argue that the Secretary could only act on transferred authorities. In the OIG Letter, the Inspectors General concluded that, prior to a Director's confirmation, the Secretary was not permitted to "prohibit unfair, deceptive, or abusive acts or practices under subtitle C in connection with consumer financial products and services" or to supervise nondepository institutions under section 1024. *Id.* at Page 7. Although the OIG Letter is informative, it is not binding herein.

Title 15 U.S.C. § 5581(a)(1)(A) grants the Director, or the Secretary prior to a Director's appointment, "*all* authority to prescribe rules or issue orders or guidelines pursuant to *any* Federal consumer financial law." The IG letter mischaracterizes this

[2] The Ninth Circuit recently held that the Bureau had authority to bring a civil action pursuant to 12 U.S.C. § 5564 in an Article III court prior to the Director's confirmation, stating that "no court, including the Supreme Court, has ever suggested that Article II problems nullify Article III jurisdiction. Absent clear instruction from the Supreme Court, we will not hold so here." *C.F.P.B. v. Gordon*, No. 13-56484 (9th Cir., Apr. 14, 2015). Here, the Bureau chose to pursue its claims against Respondents in an administrative forum, thus no Article III issues are implicated. However, if the Bureau had the authority to bring Article III civil proceedings while the Secretary was its interim head, it reasonably follows that it also had authority to bring administrative proceedings.

authority, stating that the Secretary could only "prescribe rules, issue orders, and produce guidance related to the federal consumer financial laws that were, prior to the designated transfer date, 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 letter also says, with respect to the consumer financial protection laws under the authority of the FTC, that the Secretary could "prescribe rules, issue guidelines, and conduct a study or issue a report (with certain limitations)."

The plain language of the statute contradicts Respondents' position, and that of the Inspectors General. Under 15 U.S.C. § 5586(a), the Secretary's interim authority was to perform the functions of the Bureau under Part F, and the definition of these functions for purposes of Part F includes the power to issue orders pursuant to any consumer financial law under the Bureau's purview. It is unclear to me why the Inspectors General incorporated limiting language not contained in the statute, but after a thorough analysis, I find that the powers and limitations of the Secretary were not correctly summarized in the OIG Letter and should not be accorded any weight.

4. Conclusion

The parties do not dispute that Respondents offered payday loans between the designated transfer date, July 21, 2011, and December 2012. Respondents have argued that the Bureau never had authority over them because they ceased operations prior to the constitutional appointment of the Bureau's first Director. I disagree. Respondents' alleged violations of TILA and EFTA, if proved, had long been illegal. Charges arising from those acts could have been brought by FTC prior to the designated transfer date, and by either FTC or the Bureau once the designated transfer date had passed. The UDAAP violations, if proved, were illegal as of the designated transfer date. This is true regardless of whether the Secretary was authorized to enforce the substantive provisions of the law; the Supreme Court recognized in *Buckely v. Valeo* that a law does not cease to exist simply because the office charged with enforcing that law on behalf of an agency is vacant. 424 U.S. at 142.

Even assuming *arguendo* that Respondents' position had merit, the CFPA granted the Secretary the authority to issue orders regarding any consumer financial protection laws, and orders are promulgated through administrative adjudication. The Bureau, under the authority of the Secretary and later the Director, was authorized to bring an administrative enforcement proceeding to enforce TILA, EFTA, and UDAAP claims as of July 21, 2011, the designated transfer date. Respondents were therefore "covered persons" against whom the Bureau could bring enforcement proceedings as of that date, and allegedly engaged in illegal conduct under the Bureau's jurisdiction for several months thereafter.

B. Statute of Limitations

The second argument Respondents make in support of the Motion to Dismiss is that the Bureau's UDAAP claims against Mr. Carnes were not brought before the three-year statute of limitations found in 12 U.S.C. §5564(g)(1) expired. Similarly, they assert the TILA and EFTA claims against Integrity Advance are also time-barred by the one-year statute of limitations found in 15 U.S.C. §1640(e) and 15 U.S.C. §1693m(g). Respondents argue that, because the Bureau can seek the same remedies in an administrative proceeding as it can in District Court, a statute of limitations must be applied to both. Otherwise, it would lead to an "incongruous result" that would be contrary to public policy.

In response, the Bureau says Respondents fail to distinguish between administrative proceedings like this one and civil actions brought in a court of the United States. The Bureau filed this administrative proceeding pursuant to Sections 1053 and 1055 of the Consumer Financial Protection Act, 12 U.S.C. §§ 5563, 5565. *See* Notice of Charges ¶¶1-2. Unlike 12 U.S.C. § 5564, entitled "Litigation Authority," there is no statute of limitations in 12 U.S.C. § 5563, which governs "Hearings and Adjudication Proceedings." The Bureau contends that, even if Respondents believe the enforcement structure is unfair, it is nevertheless what Congress intended and provided for in the Act. Tr. at 60.

1. There are No Statutes of Limitations in UDAAP, TILA, or EFTA claims Brought by the Bureau in an Administrative Proceeding

The Director addressed a similar statute of limitations issue in *PHH Corp., et al.*, 2014-CFPB-0002, Decision of the Director at 10 (June 4, 2015).[3] There, the Director engaged in a lengthy discussion of the difference between an administrative proceeding and a civil action in an Article III court. The Bureau had brought an administrative proceeding against PHH Corp. for violations of the Real Estate Settlement Procedures Act (RESPA). Authority for enforcing RESPA was transferred entirely from the Department of Housing and Urban Development (HUD) to the Bureau on the designated transfer date. HUD was only authorized to file enforcement actions in district courts, and RESPA contains a three-year statute of limitations.

[3] This decision is presently on appeal before the United States Court of Appeals for the D.C. Circuit. However, the decision remains the official interpretation of the Bureau and is binding in these proceedings unless and until it is overruled by the Court of Appeals or the United States Supreme Court.

Respondents offered two reasons why I should not consider the Director's Decision in *PHH Corp.* here. First, they say it is not binding precedent because there is, as yet, no case law establishing that a CFPB administrative law judge is bound by Directors' Decisions. Tr. at 39. This argument is contrary to the Act and its implementing regulations, as well as established principles of administrative law. Under the Act, hearings or adjudication proceedings are conducted in accordance with the APA, 5 U.S.C. Chapter 5. 12 U.S.C. § 5563. Under the APA, the presiding officer may make either an initial decision or a recommended decision. 5 U.S.C. § 556(c)(10). The CFPB has chosen to require its administrative law judges to issue recommended decisions. 12 C.F.R. § 1081.400. Unlike initial decisions, recommended decisions do not become final agency action automatically if no appeal or review is made within a specified time frame. *See* 5 U.S.C. § 557(b). In CFPB proceedings, parties may either submit an appeal to the Director, or, if no appeal is made, "the Director shall, within 40 days after the date of service of the recommended decision, either issue a final decision and order adopting the recommended decision, or order further briefing regarding any portion of the recommended decision." 12 C.F.R. § 1081.402(b).

Under the structure of the CFPB, any decision issued pursuant to an administrative hearing is reviewed by the Director, regardless of whether the parties choose to appeal. The Director then issues the Final Decision and Final Order. Respondents' argument that administrative law judges are not bound by the Director's holdings due to lack of case law on that point is clearly specious.

Next, Respondents contend that the Director's holding in *PHH Corp.* was limited to RESPA enforcement, and does not apply to CFPA, TILA, and EFTA claims. I do not agree. The Director wrote,

> [T]he CFPA gives the Bureau a choice: it may enforce laws administratively or in court. The section of the CFPA that authorizes the Bureau to enforce laws through administrative proceedings does not contain a statute of limitations. *See* 12 U.S.C. § 5563. A different section of the CFPA gives the Bureau the option to bring "civil action[s]" in court for violations of a consumer financial law. *See* 12 U.S.C. § 5564. That section contains a three-year statute of limitations for violations of the CFPA, and provides that, in "any action arising solely under an enumerated consumer law," such as RESPA, the Bureau may sue "in accordance with the requirements of that provision of law, as applicable." 12 U.S.C. § 5564(g).

PHH Corp., et al., 2014-CFPB-0002, Decision of the Director at 10 (June 4, 2015). Certainly the Director concentrated on the statute of limitations in RESPA because that was the law PHH was found to have violated, but his reasoning was not limited to RESPA; it is broadly applicable to the Bureau's enforcement activities under § 5563.

The three-year statute of limitations to which the Director refers above is exactly the limitation provision of §5564(g)(1) that Respondents argue is applicable to the alleged CFPA violations in the present proceeding. The Director stated in *PHH* that the use of the word "action" in §5564(g)(2)(b) meant that the statute of limitations did not apply to administrative proceedings brought by the Bureau under §5563. *Id.* at 10-11. The difference is that here the CFPA statute of limitations for Bureau actions comes from §5564(g)(1), while the RESPA statute of limitations is applied to Bureau actions through subsection (g)(2). However, subsection (g)(1) uses the same "action" language as subsection (g)(2).

Even more significantly, Respondents in the present proceeding wish to apply the TILA and EFTA statutes of limitations through §5564(g)(2)(b)—the very same provision through which the Respondents in *PHH.* sought to apply RESPA's statute of limitations. Therefore, I can see no reason why the analysis for the CFPA, TILA, and EFTA claims should not be the same as the RESPA analysis in *PHH.*

Respondents also challenge the Bureau's interpretation of the word "action." The Director has stated that "an administrative proceeding is not a 'civil action,' and this matter is brought pursuant to a different section of the CFPA (12 U.S.C. § 5563, not 12 U.S.C. § 5564). Indeed, the Bureau's authority to bring 'civil actions' clearly indicates that the 'forum' for such actions is a court of law. *See* 12 U.S.C. § 5564(f)." Director's Decision at 11.

Respondents argue that one of the canons of statutory interpretation is that "when you have a word in a statute you have to consistently use that word the same way throughout the statute." Tr. at 42; *see also* Reply Brief at 6. According to Respondents, if you construe all instances of the word "action" throughout the statute to mean "civil litigation in District Court," the Bureau cannot bring UDAAP claims in an administrative forum. This is because § 1031 of the Dodd-Frank Act permits the Bureau to "take any action authorized under Subtitle E to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice." 12 U.S.C. § 5531(a).

Respondents' argument fails to distinguish between "action" used as in its usual and "action" used as a legal term of art. The word "action" is not precisely defined by the CFPA or the Dodd-Frank Act generally. *See* 12 U.S.C. §§ 5301, 5561. Thus, to determine the meaning of a statute "[we] must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). The first rule of statutory construction is to look to the ordinary meaning of the language. *Moskal v. United States, 498* U.S. 103, 108 (1990).

"Action" has a number of common definitions. One is "the process of doing something; conduct or behavior." ACTION, Black's Law Dictionary (10th ed. 2014). A synonym of action is "deed." http://www.merriam-webster.com/dictionary/action. In its usual legal sense, "action" is defined as "A civil or criminal judicial proceeding." ACTION, Black's Law Dictionary (10th ed. 2014). The Black's entry for "action" only mentions administrative law in two contexts: "action to review judgment," which is "a request for judicial review of a nonjudicial body's decision, such as an administrative ruling on a workers'-compensation claim," and an "informal action," which is "an executive-branch action that does not fall under rulemaking or formal adjudication procedures in the Administrative Procedure Act." *Id.* Thus, I conclude that the ordinary legal definition of action does not include administrative proceedings such as this one.

Clearly, context matters when determining the meaning of a word. To "take action" is not the same as to "file an action." The former means to perform an act or deed, while the latter means to bring suit in a court of law. To interpret the language of § 1031 "the Bureau may take any action authorized under Subtitle E" to mean "the Bureau may file any suit in a court of law authorized under Subtitle E" is illogical; Subtitle E refers to many procedures that the Bureau may undertake that are not "actions" by the legal definition of the word.[4]

Respondents' argument that words should be given consistent meaning throughout a statute is correct, with the caveat that the word must also be used in the same (or a substantially similar) context. In the CFPA, the word "action" is used numerous ways, not all of which have the same meaning. *See* § 5492(c)(5) ("The Bureau shall not be liable under any provision of law for any action or inaction of the Board of Governors . . ."); § 5496(c)(6) (Bureau must provide periodic reports on "the actions taken regarding rules, orders, and supervisory actions with respect to covered persons which are not credit unions or depository institutions"); § 5534(a)(3) (Bureau shall notify consumers who have submitted complaints or inquiries about "any follow-up actions or planned follow-up actions by the regulator . . .").

I do note that the statute does use the phrase "administrative action" instead of "administrative proceeding" on three occasions. *See* § 5497(d)(1) ("If the Bureau obtains a civil penalty against any person in any judicial or administrative action under Federal consumer financial laws, the Bureau shall deposit into the Civil Penalty Fund, the amount of the penalty collected."); § 5538(b)(6) (states cannot institute parallel civil actions when "a civil action or an administrative action has been instituted by or on behalf of the Bureau of Consumer Financial Protection or the Commission" for violations of mortgage

[4] Similarly, if the word "order" was universally interpreted using the APA definition discussed above, it would result in a nonsensical interpretation of numerous provisions of the Act. For example, 12 U.S.C. § 5491 which currently reads, "[t]he Director may establish regional offices of the Bureau… in *order* to carry out the responsibilities assigned to the Bureau under the Federal consumer financial laws" would become, "[t]he Director may establish regional offices of the Bureau… in '*the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing*' to carry out the responsibilities assigned to the Bureau under the Federal consumer financial laws" (emphasis added). *See* 12 U.S.C. § 5491(e) and 5 U.S.C. § 551(6). This clearly leads to an absurd result that was not Congress' intent.

lending laws); § 5565(c) (entitled "Civil money penalty in court and administrative actions").

However, reviewing the Act in its entirety, these references are anomalies; with the exception of the instances noted above, these terms are not used interchangeably. They should not be given more weight than the bulk of the statute, which clearly distinguishes between judicial actions and administrative proceedings. The Supreme Court has considered a similar issue:

> In an effort to show that the term "action" is commonly used to refer to administrative, as well as judicial proceedings, petitioners have cited numerous statutes and regulations that, petitioners claim, document this usage. These examples, however, actually undermine petitioners' argument, since none of them uses the term "action" standing alone to refer to administrative proceedings. Rather, each example includes a modifier of some sort, referring to an "administrative action," a "civil or administrative action," or "administrative enforcement actions."

BP Am. Prod. Co. v. Burton, 549 U.S. 84, 92-93 (2006). This led the Court to conclude that the statutory use of those terms, in fact, "buttresse[d] the point that the term 'action,' standing alone, ordinarily refers to a judicial proceeding. *Id.* at 93.

The CFPB's enforcement powers are split into two separate sections: § 5563—entitled "Hearings and Adjudication Proceedings"—which never uses the word "action" and does not contain a statute of limitations, and § 5564—entitled "Litigation Authority"—which does use the word "action" and does contain a statute of limitations. [5] Other sections of the Act also make clear distinctions between the terms "action" and "administrative proceeding," including § 5565(a), entitled "Administrative proceedings *or* court actions" (emphasis added).

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[5] It is important to note that §5564(d)(2)(a) does apply to "any action, suit, or proceeding to which the Bureau is a party," and thus is not limited to civil actions. However, given this construction, the drafters surely would have used the same "action, suit, or proceeding" wording rather than simply "action" in § 5564(g)(1) if they had intended the three year statute of limitations to apply to administrative proceedings.

The Bureau's position that a statute of limitations should not be inferred to administrative proceedings when it is not explicitly stated in the statute is further bolstered by Supreme Court precedent: "Unless a federal statute directly sets a time limit, there is no period of limitations for administrative enforcement actions." *Alden Mgmt. Servs., Inc. v. Chao*, 532 F.3d 578, 582 (7th Cir. 2008) (citing *BP America Production Co. v. Burton*, 549 U.S. 84 (2006); *Intercounty Construction Corp. v. Walter*, 422 U.S. 1 (1975)). In addition, statutes of limitations against the government are to be construed narrowly. *See Guaranty Trust Co. v. U.S.*, 304 U.S. 126, 132 (1938). The statute of limitations in the CFPB is not ambiguous, but even if it was, any doubt would be settled in the government's favor: "when the sovereign elects to subject itself to a statute of limitations, the sovereign is given the benefit of the doubt if the scope of the statute is ambiguous." *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 96 (2006).

Furthermore, Congress both created the ability to bring UDAAP claims and amended TILA and EFTA as part of the Dodd-Frank consumer protection reforms. The Bureau's ability to enforce TILA is found in 15 U.S.C. § 1607 and its ability to enforce EFTA is found in 15 U.S.C. § 1693(o). Both provisions specifically mention the Bureau and do not contain statutes of limitations. The statutes of limitations for TILA and EFTA are in 15 U.S.C. §1640(e) and 15 U.S.C. §1693m(g), respectively, and both provide, "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." Moreover, those sections govern civil actions brought in court by private litigants (or, under TILA, state attorneys general), not by an administrative agency such as the Bureau. If Congress intended the Bureau to be subject to a statute of limitations when bringing enforcement proceedings in an administrative forum, it clearly could have included that limitation.

Finally, with respect to TILA, both case law and documented agency interpretation directly support the Bureau's position that the statute of limitations is inapplicable to administrative proceedings. "Enforcement actions brought under 15 U.S.C. § 1607 are not subject to the one-year statute of limitations imposed by Section 1640." *C.F.P.B. v. ITT Educ. Servs., Inc.*, 2015 WL 1013508, *33 (S.D. Ind. Mar. 6, 2015).[6] The court relied, in part, on the Federal Reserve's manual interpreting Regulation Z, which states that "regulatory administrative enforcement actions . . . are not subject to [TILA's] one-year statute of limitations." Fed. Reserve Board Consumer Compliance Handbook, Regulation Z at 57 (Nov. 2013).[7]

Respondents say *ITT* is distinguishable from this case because it examines powers of the Office of the Comptroller of the Currency and the Federal Reserve Bank, neither of which are permitted to file suits in District Court. Tr. at 68-69. They say the "distinction that's made in the ITT case is made for the discreet [sic] purpose of, distinguishing those two agencies from the district court proceeding in that matter." *Id.* However, my reading of *ITT* shows that the District Court used the OCC and Federal Reserve guidance as positive sources to inform its decision, not to distinguish the powers of those agencies from the powers of the Bureau. See *ITT Educ. Servs., Inc.*, 2015 WL 1013508 at *32-33.

[6] This case is currently under appeal to the U.S. Court of Appeals for the 7th Circuit.

[7] At the time, Congress had designated the Federal Reserve Board and its staff as the primary source for interpretation and application of TILA. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980). Therefore, "[u]nless demonstrably irrational," Federal Reserve Board staff opinions construing TILA are "dispositive." *Id.* at 565. The court also relied on the statement of the Comptroller of the Currency that "[t]he Comptroller's administrative authority to enforce compliance with the Truth in Lending Act and Regulation Z ... [is] based on Section 108 of the Act [15 U.S.C. § 1607] and 12 U.S.C. § 1818(b) [the Federal Institutions Supervisory Act]. The authority of these sections is separate from and independent of the civil liability provisions of ... the Truth in Lending Act." OCC Interpretive Letter, Fed. Banking L. Rep. 85,040 (Oct. 6, 1977).

The Bureau's argument that no statute of limitations applies in these administrative proceedings—even if the same suit would be time-barred in a federal court—is convincing. Moreover, I am bound to apply the Director's interpretation, which was clearly set out in *PHH*. Ultimate authority for issuing a Decision and Order in this case rests with the Director. I decline to adopt a position contrary to his.

C. The Notice of Charges Adequately States a Claim On Which Relief Could Be Granted

The Bureau has alleged that Respondent Integrity Advance violated several different consumer protection statutes. However, Respondents urge me to dismiss Counts I and II because the Notice of Charges has failed to state a claim under TILA and Regulation Z. According to Respondents, the disclosures and associated payment table "reflect[ed] the single-payment legal obligation between Integrity Advance and consumers; thus, it compli[ed] with TILA's strict disclosure requirements." Brief at 22. Respondents say the Bureau has attempted to create a new legal standard by requiring that disclosures and payment schedules reflecting the optional renewal periods be given to consumers instead. *Id.*

The Bureau argued that the legal obligation between the parties was not limited to a single payment because, by the terms of the contract, the loans rolled over automatically without any further action by consumers, while consumers wishing to pay off loans in a single payment were required to take action to do so.

The Bureau's regulations set out the seven requirements for a Notice of Charges. It must contain (1) The legal authority for the proceeding and for the Bureau's jurisdiction over the proceeding; (2) A statement of the matters of fact and law showing that the Bureau is entitled to relief; (3) A proposed order or prayer for an order granting the requested relief; (4) The time and place of the hearing as required by law or regulation; (5) The time within which to file an answer as required by law or regulation; (6) That the answer shall be filed and served in accordance with subpart A of this part; and (7) The docket number for the adjudication proceeding. 12 C.F.R. § 1081.200. Here, Respondents contend the Bureau's statement of fact and law under the second prong is insufficient. There is, as yet, no case law interpreting this regulation, so it is appropriate to look to the Federal Rules of Civil Procedure for guidance.

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Interpreting this Rule, the Supreme Court has held that although a complaint does not need to contain "detailed factual allegations." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). However, the facts alleged must be sufficient to "state a claim to relief that is plausible on its face," meaning a court could reasonably infer that the defendant has committed the alleged misconduct. *Id.* at 556, 570.

Engaging in a later analysis of F.R.C.P. 12(b)(6) and *Twombly*, the Court stated,

> Two working principles underlie *Twombly*. First, the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements. Second, determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense.

Ashcroft v. Iqbal, 556 U.S. 662, 663-64 (2009) (internal citations omitted). When considering a motion to dismiss, the first step is to identify allegations that are mere conclusions and therefore should not be assumed true. *Id.* at 664. As to "well-pleaded factual allegations" entitled to an assumption of truth, the determination should be "whether they plausibly give rise to an entitlement to relief." *Id.*

I find the Notice of Charges sets forth sufficient facts that, if proven true, the Bureau would be entitled to relief under TILA. The Bureau has alleged that, while Integrity Advance disclosed the interest rate, charges, and fees for its loans as though consumers were obligated to make a single payment but had the option to renew or roll over to an extended payment period, the loans were in reality multi-month installment loans with a prepayment option. The Bureau contends that, because Integrity Advance set up the loans and associated schedule of payments by assuming borrowers would exercise the maximum number of rollovers permitted in the contract, as well as the "auto-workout" provision for repayment after the final rollover, it was required to disclose the full cost of the loan over a period of months, not the cost if the borrower took action to direct a single payment at the end of the initial loan term.

The true nature of the loans provided by Integrity Advance is a genuine issue of material fact. It is not appropriate to consider it here, at the motion to dismiss stage, but rather after a hearing has been held to adduce all the relevant facts and allow the parties to make arguments concerning the applicable law. However, assuming the Bureau correctly asserted Respondents were entering into installment loans while disclosing them to consumers as single-payment loans, such actions are plausibly a violation of TILA. Respondents argued that the Notice of Charges does not contain a statement of the precise legal obligation between the parties. However, I find allegations 17 through 38 (setting out "The Application Process" and "The Contract"), taken together with allegations 49 through 57 ("The Truth in Lending Act") are adequate to give Respondents a clear understanding of the conduct the Bureau believes was illegal, and to allow them to prepare their defense. The Bureau has not provided "threadbare recital" of its claim, nor are its allegations merely conclusory. *See Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678.

D. The Issue of Retroactivity Has Been Resolved by Stipulation

The Bureau stipulated it is not seeking to enforce consumer financial protection laws to any of Respondents' conduct that occurred prior to the designated transfer date of July 21, 2011. Although Respondents contend that there are remaining issues of retroactivity stemming from the Secretary's lack of authority prior to the Director's appointment, these are resolved by my above findings regarding the Bureau's authority to enforce consumer financial protection laws against nonbank entities after July 21, 2011. At all relevant times, the Bureau had authority over Respondents and therefore no retroactivity issues exist.

IT IS SO ORDERED.

Hon. Parlen L. McKenna
Administrative Law Judge
United States Coast Guard

Done and dated on this 22nd day of April 2016 at
Alameda, California.

CERTIFICATE OF SERVICE

I hereby certify that I have served the forgoing *Order Denying Motion to Dismiss* (2015-CFPB-0029) upon the following parties and entities in this proceeding as indicated in the matter described below:

(Via Fax and email: D05-PF-ALJBALT-ALJDocket)
United States Coast Guard
40 South Gay Street, Suite 412
Baltimore, Maryland 21202-4022
Bus: (410) 962-5100 Fax: (410) 962-1746

Via Electronic Mail to CFPB Counsel(s) and CFPB electronic filings@cfpb.gov:
Alusheyi J. Wheeler, Esq.
1700 G Street, NW
Washington, DC 20552
Bus: (202) 435-7786
Fax: (202) 435-7722
Email: alusheyi.wheeler@cfpb.gov

Deborah Morris, Esq.
Email: deborah.morris@cfpb.gov
Craig A. Cowie, Esq.
Email: craig.cowie@cfpb.gov
Wendy J. Weinberg, Esq.
Email: wendy.weinberg@cfpb.gov
Vivian W. Chum, Esq.
Email: vivian.chum@cfpb.gov

Via Electronic Mail to Respondents' Counsel as follows:
Allyson B. Baker, Esq.
Hillary S. Profita, Esq.
Peter S. Frechette, Esq.
Venable LLP
575 7th Street, NW
Washington, C.D., 20004
Bus: (202) 344-4708
Email: abbaker@venable.com
Email: hsprofita@venable.com
Email: psfrechette@venable.com
Email: jpboyd@venable.com

Done and dated this 22nd day of April, 2016
Alameda, California

Cindy J. Melendres

Cindy J. Melendres, Paralegal Specialist
to the Hon. Parlen L. McKenna