UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

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| ADMINISTRATIVE PROCEEDING<br>File No. 2015-CFPB-0029<br><br>In the matter of<br><br>INTEGRITY ADVANCE, LLC and<br>JAMES R. CARNES | **ORAL ARGUMENT REQUESTED** |

# RESPONDENTS' ANSWERING APPEAL BRIEF

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## ABBREVIATIONS USED IN THIS BRIEF

ALJ: Administrative Law Judge Parlen L. McKenna

CFPB or Bureau: Consumer Financial Protection Bureau

CFPA: Consumer Financial Protection Act of 2010

Director: CFPB Director Richard Cordray

Dkt. 1: Enforcement Counsel's Notice of Charges

Dkt. 33: Enforcement Counsel's Opposition to Respondents' Motion to Dismiss

Dkt. 87: Enforcement Counsel's Memo of Points and Authorities in Support of its Motion for Summary Disposition as to Liability

Dkt. 87-C: Exhibit B – Declaration of John Marlow (Public)

Dkt. 128. Enforcement Counsel's Notice of Withdrawal of Motion to Withdraw Count IV

Dkt. 176, ALJ's Recommended Decision

Dkt. 183: Enforcement Counsel's Opening Appeal Brief

Dkt. 184: Respondents' Opening Appeal Brief

EC: Enforcement Counsel

EFTA: Electronic Fund Transfer Act

FTC: Federal Trade Commission

FTCA: Federal Trade Commission Act

NORA: Notice and Opportunity to Respond and Advise

TILA: Truth in Lending Act

UDAAP: Unfair, Deceptive, or Abusive Acts or Practices

## INTRODUCTION

EC's appeal should be denied. Neither section 1055 of the CFPA nor other provisions of that statute applies retroactively. Despite EC's protestations, the Bureau cannot reach back to impose liability and seek remedies under the CFPA for conduct that occurred before the CFPA's effective date without violating long-settled Supreme Court precedent and bedrock principles of due process inherent in the retroactivity doctrine.

First, under *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the CFPA only applies prospectively. Congress clearly intended that the CFPA would apply only prospectively, as evidenced by the fact that is set a specific effective date. Moreover, applying section 1055 of the CFPA to conduct that pre-dates July 21, 2011, would impose legal obligations that did not previously exist, in violation of *Landgraf*.

Second, EC's arguments regarding retroactivity only highlight further the fact that the TILA, EFTA, and CFPA statutes of limitation time-bar EC's claims. Indeed, if EC is correct that the CFPA does not impose impermissible retroactive effects because the FTC could have imposed identical TILA liability against Respondents, albeit only in federal court, then by extension the statutes of limitation that indisputably apply in federal court would also have to apply in the Bureau's administrative forum, and EC's claims are time-barred. And, of course, EC's claims are time-barred, even though the CFPA has no retrospective effect.[1]

[1] The arguments in EC's Opening Appeal Brief are mooted by the other defects in EC's case. Specifically, the CFPB never had authority over Respondents. Dkt. 184 at 1-2. Thus, the Director need not address the merits of EC's argument that the CFPA may be applied retroactively to address conduct the occurred prior to the effective date of the CFPA and the existence of the Bureau.

## ARGUMENT

### I. The CFPA Does Not Apply Retroactively And Any Such Application Would Violate Respondents' Due Process Rights

#### A. Section 1055 Reach Conduct That Pre-Dates July 21, 2011

Due process principles preclude the Bureau from granting relief under the CFPA as to conduct that occurred before July 21, 2011 because (1) the CFPA, by virtue of its effective date, cannot apply retroactively; and (2) the CFPA's application to conduct that pre-dates July 21, 2011 would have an impermissible retroactive effect. *Landgraf*, 511 U.S. at 264. These retroactivity principles apply to 12 U.S.C. § 5565 of the CFPA ("Section 1055"), just as they apply to the other provisions of the statute, including 12 U.S.C. § 5531 ("Section 1031") and 12 U.S.C. § 5536 ("Section 1036"), which provide the Bureau's UDAAP authorities.

The CFPA is a prospective statute. Indeed, "retroactivity is not favored in the law," and "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Landgraf*, 511 U.S. at 264 (1994) (internal citations omitted). This is true because "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly" before they are found in violation. *Id.* at 265. In other words, statutes are presumptively prospective, and not retroactive in nature, unless there is an express finding to the contrary (there can be no such finding here).

Here, all provisions of the CFPA comprising subtitles C and E, for example, are solely prospective. And the ALJ's Recommended Decision accords with what EC has previously acknowledged in this case: the CFPA is not retroactive. For this reason, EC voluntarily dismissed its UDAAP claims under Counts III, IV, and VII as to conduct that predates July 21,

2011. Dkt. 33 at 14.[2] Moreover, when it voluntarily dismissed these claims, EC acknowledged that as a result of that dismissal, "Respondents retroactivity arguments [in their Motion to Dismiss] need not be addressed." *Id.* Thus, EC's argument on appeal that section 1055 of the CFPA applies retroactively for purposes of Count I is glaringly inconsistent. EC cannot cherry-pick whether and when the CFPA applies retroactively.

Nevertheless, EC argues incorrectly that the Bureau's administrative forum should award relief under section 1055 for alleged TILA violations tied to conduct that occurred before the statute's July 21, 2011 effective date. In support of this contention, EC asserts that: (a) the Bureau's authority is "in no way limited to awarding relief only for violations that happened on or after July 21, 2011," and (b) the FTC could have brought a TILA claim before July 21, 2011 and therefore the CFPB's TILA claim does not impose any new obligations on Respondents. *See* Dkt. 183 at 4, 7. EC's arguments are wrong.

**1. EC Misstates Core Retroactivity Principles**

As an initial matter, EC misstates fundamental tenets of the retroactivity analysis. EC states incorrectly that Respondents must "identify any statutory language evincing Congressional intent to only apply the remedies portion of the CFPA prospectively"; this, of course, improperly inverts the burden under retroactivity doctrine. *Id.* at 5. Contrary to EC's formulation, unless there is clear Congressional intent that a statute applies *retrospectively*, the initial presumption is that the law will apply *only prospectively*. *Landgraf*, 511 U.S. at 264. Thus, EC's contention that Respondents have not identified statutory language mandating only prospective application misses the mark and ignores the fact that there is nothing in the CFPA evincing Congressional

[2] EC subsequently withdrew Count IV in its entirety. Dkt. 128.

intent for retrospective application.[3] Moreover, as discussed below, EC ignores well-settled law that the inclusion of an effective date in fact represents Congressional intent for *only prospective* application of the law. EC further misrepresents the retroactivity analysis; the salient issue is not *when* the Bureau can issue an order granting equitable monetary relief, as EC suggests. Dkt. 184 at 4. There is no dispute that the agency's administrative forum could only issue an order on or after July 21, 2011.

**2. The CFPA's Effective Date Applies To Section 1055 And Renders This Provision, Like The Rest Of Subtitle E, Only Prospective**

Under *Landgraf*, "prospectivity remains the appropriate default rule." *Landgraf*, 511 U.S. at 272. In evaluating the first prong of *Landgraf*, numerous courts, including the U.S. Supreme Court, routinely hold that an announcement of an effective date in a statute is a clear indication that Congress intends for the statute to apply *only prospectively*. When "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); s*ee 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

[3] In addition, the cases EC cites to support its errant construction of the retroactivity doctrine pre-date *Landgraf* or are otherwise inapposite to EC's argument. *See Bradley v. Sch. Bd. Of City of Richmond*, 416 U.S. 696 (1974) (pre-dating *Landgraf*); *Moore v. Agency for Int'l Dev.*, 994 F.2d 874 (D.C. Cir. 1993) (same); *Ibrahim v. D.C.*, 208 F.3d 1032 (D.C. Cir. 2000) (holding that a "three-strikes" statutory provision requiring indigent prisoners to pay a filing fee after filing a third frivolous lawsuit reflected clear Congressional intent to apply retrospectively under prong one of *Landgraf* because the statute by its very wording and purpose was designed to apply retrospectively); *Quantum Entm't Ltd. v. U.S.*, 714 F.3d 1338 (D.C. Cir. 2013) (finding impermissible retroactive effects where application of a revised provision within the same statute would transform an agreement from void to valid and thus would "increase liability for past conduct" and "impose new duties with respect to transactions already completed.").

application); *Gay v. Sullivan*, 966 F.2d 1124, 1128 (7th Cir. 1992) (holding that a "provision for a future effective date" is "strong evidence of a congressional rejection of retroactivity").

Indeed, numerous courts that have analyzed other provisions of the Dodd-Frank Act have concluded that those provisions are not intended to apply retroactively. *See, e.g.*, *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.").

Thus, EC's contention that "the statute is silent on whether § 5565 applies retrospectively or only prospectively," Dkt. 183 at 5, is flatly wrong. The effective date – which EC acknowledges – applies to the entirety of Subsection E, including the CFPB's authority to take action and the scope of any relief ordered under section 1055. Through the effective date, Congress "expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280. And "[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." *Id.* at 257

Here, the retroactivity analysis ends at the first step of *Landgraf*. The ALJ was not required – much less permitted – to proceed to the second step of the inquiry and examine whether application of the section 1055 in this manner would have an impermissibly retroactive effect. Nevertheless, the second step of *Landgraf* would mandate the same result: a remedy under section 1055 cannot apply to conduct that pre-dates July 21, 2011.

### 3. Section 1055 Of The CFPA Cannot Apply To Pre-July 21, 2011 Conduct; This Would Have Impermissible Retroactive Effects

EC's arguments about the reach of section 1055 would also render that provision impermissibly retroactive and a violation of Respondents' due process rights, as it is axiomatic that "individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *See Landgraf*, 511 U.S. at 265. Alleged TILA violations stemming from pre-July 21, 2011 cannot give rise to equitable monetary relief under section 1055. This is true because the CFPA represents a *brand new source of liability*. *Landgraf*, 511 U.S. at 280 Specifically, if the ALJ had applied section 1055's remedial scheme to conduct that pre-dates the CFPA's effective date, this would impermissibly "increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 245. Applying section 1055's remedies to conduct that allegedly violated TILA and occurred before July 21, 2011 would "attach new legal consequences to events completed before" the CFPA's enactment. Indeed, EC does not actually dispute this fact. Rather, it argues instead that *the FTC* could have sought equitable monetary relief for TILA violations under section 13(b) of the FTCA before July 21, 2011. *See* Dkt. 183 at 6-7. This argument fails.

First, the differences in language between sections 13(b) of the FTCA and 1055 of the CFPA underscore the reasons why applying section 1055 retrospectively would involve application of a "new provision [that] attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269-270. The FTC "was [not and is not] empowered to obtain equitable relief" for TILA violations under the same parameters as section 1055. *See* Dkt. 176 at 64. Section 1055, of course, provides that the Bureau "in an action brought under Federal consumer financial law, shall have jurisdiction to grant any appropriate legal or equitable relief." 12 U.S.C. § 5565(a)(1). By contrast, section 13(b) of the FTCA

allows the FTC to obtain injunctive relief when "the [FTC] has reason to believe" that a party *is violating* or *is about to violate* the FTCA. 15 U.S.C. § 53(b); *see also, e.g.*, Order, *FTC v. Amazon.com, Inc.*, Case No. 2:14-cv-01038-JCC, Dkt. 253-1 at 10 (W. D. Wash. June 13, 2016) (citing *United States v. W.T. Grant*, 345 U.S. 629, 633 (1953)). Further to this point, courts have interpreted section 13(b)'s injunctive relief provision to allow a district court to grant equitable relief, as well, provided there is a reason to believe a party is violation or about to violate the FTCA. This threshold requirement is in sharp contrast to section 1055, which requires only a showing that there has been an underlying violation of consumer financial law. For example, here, IA ceased making any consumer loans nearly three years before the Notice was filed. Dkt. 176 at 14. This would hardly meet section 13(b)'s threshold standard for bringing a claim, namely that there is a likelihood of an ongoing legal violation. (And it is not enough to speculate that six years ago, the FTC might have – hypothetically – brought such a claim and sought such relief; this is not how the doctrine of retroactivity works.)

In addition, section 13(b), unlike section 1055, has no express language providing for equitable monetary relief; rather, courts have interpreted section 13(b), in certain instances, to enable a district court to award equitable monetary relief. Section 1055 has language that expressly provides that a court or the Bureau may award equitable monetary relief "with respect to a violation of Federal consumer financial law." 12 U.S.C. 5565(a)(1). Thus, there is a lower threshold for determining when the Bureau might award equitable monetary relief under section 1055 than the standards for seeking the same relief under section 13(b) of the FTCA in district court.

Second, the FTC can only obtain equitable monetary relief in federal district court. This is because section 13(b) "does not expressly confer any general power [on the Commission], of

the kind possessed by a court of equity, to compel restitution . . . ." *Heater v. FTC*, 503 F.2d 321, 326-27 (9th Cir. 1974). It follows that "[o]f course, no damages can be awarded, or mandatory orders entered [in the administrative forum]." *Id.* In stark contrast, section 1055 expressly enables the Bureau to award equitable monetary relief. For this reason, as well, the standard that enables the Bureau to award equitable monetary relief under section 1055 is easier for EC to meet than the statutory regime under section 13(b) that enables a court to award to equitable monetary relief. For example, the Bureau's administrative forum, including and especially in this matter, does not adhere to the Federal Rules of Evidence. The lack of evidentiary rules in the administrative forum made it markedly easier for EC to bring a prima facie case and to try to prove, albeit unsuccessfully, a restitution case under section 1055 than if EC had proceeded in district court like the FTC must do under section 13(b). Indeed, section 1055's remedial provisions are precisely the type of new legal obligations that can only apply prospectively, in accordance with fundamental tenets of due process.

EC's argument also ignores the difference between *transferred authority* (where the Bureau "stepped into the shoes" of other agencies, such as with the prudential regulators and *newly-created authority* that did not exist prior to the CFPA. EC attempts to argue around this dichotomy. It relies on the FTCA's authorities in order to prove that a TILA violation could have been remedied with equitable monetary relief prior to July 21, 2011, even though the FTCA does not constitute a transferred authority. EC's tortured analysis underscores Respondents' very point: the FTCA and CFPA are different statutes with different causes of actions and legal obligations arising under them. EC already acknowledged this when it voluntarily dismissed its deception and unfairness claims as to conduct that pre-dates July 21, 2011 in order to avoid Respondents' retroactivity arguments.

### B. EC's Interpretation Of Section 1055 Would Render Meaningless The Effective Date For Subtitle E

"A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (stating that courts should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed"). Section 1058 is clear that subtitle E "shall become effective on the designated transfer date," which is July 21, 2011. EC's arguments that section 1055 is not presumptively prospective fail to give full effect to section 1058. The effective date language in section 1058 unambiguously applies to all of the provisions in subtitle E, including but not only section 1055. This renders all of subtitle E *per se* prospective and not retrospective in scope.

## II. EC's Claims Are Also Time-Barred

EC's TILA and EFTA claims, and UDAAP claims as to Mr. Carnes are time-barred, which is true regardless of whether section 1055 can apply retrospectively (and it cannot). Moreover, if EC wants to invoke similarities to the FTC to avoid the doctrine against retroactivity, then EC must also accept the consequences of that argument. Specifically, under EC's own logic, the TILA and EFTA claims are time-barred. EC's entire retroactivity argument hinges on the argument (which is incorrect) that because section 13(b) of the FTCA afforded the FTC the opportunity to seek equitable monetary relief for TILA violations for conduct occurring before July 21, 2011, the Bureau can similarly award equitable monetary relief under section 1055 for alleged TILA violations occurring before the effective date. As we note above, this argument is unavailing.

But EC's arguments to this end also highlight core contradictions underlying its entire case. For example, section 13(b) only provides equitable monetary relief in federal district court; the FTC cannot obtain this same relief in its administrative forum. If EC insists that this forum difference is inconsequential, then it follows that *other* forum differences (such as the application of limiting provisions) are inconsequential – and thus the same strictures imposed on TILA and EFTA claims in federal district court also apply to this case. In other words, the Bureau cannot have it both ways. If section 1055 has retrospective effect in this administrative forum because the FTC could obtain certain remedies in federal district court prior to July 21, 2011, then it follows that the statutes of limitations that apply to TILA, EFTA, and UDAAP claims brought in district court also apply in the Bureau's administrative forum. Indeed, the D.C. Circuit, as it held recently in *PHH*, would agree that statutes of limitations for claims brought in district court similarly apply to claims brought in the Bureau's administrative forum. "Section 5563 ties the CFPB's administrative adjudications to the statutes of limitations of the various federal consumer protection laws it is charged with enforcing."[4] Similarly, "[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 also PHH*, 839 F.3d at 51 n.28 ("[F]or actions the CFPB brings in court under any of the 18 pre-existing consumer protection statutes, the CFPB may only 'commence, defend, or intervene in the action in accordance with the requirements of that provision of law, as

[4] The court in *PHH* further explained: "But Congress limited the enforcement power granted in Section 5563. The CFPB may enforce those federal laws "*unless* such Federal law specifically limits the Bureau from conducting a hearing or adjudication proceeding." *PHH*, 839 F.3d at 51.

applicable.'")[5]; *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."). Notably, in *PHH*, the Bureau did not challenge the D.C. Circuit's panel decision regarding that court's statutes of limitations holding when the Bureau requested rehearing *en banc* by the D.C. Circuit. *See* Resp't CFPB Pet. for Reh'rg En Banc, *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016) (No. 16-46917) (requesting rehearing on other issues but not the issue of the applicability of statutes of limitations to the Bureau's administrative forum).

This means that the TILA and EFTA claims in this case are limited to a one-year statute of limitations, as the federal district court in *CFPB v. ITT Educ. Servs.*, Inc., No. 1:14-cv-00292-SEB-TAB, 2015 WL 1013508, *33 (S.D. Ind. Mar. 6, 2015) made clear. *ITT* is the only case to render a decision on the question of whether TILA's one-year statute of limitations for private rights of action also applies to actions brought by the Bureau. That court declined "to read an exception for agency plaintiffs into the one-year statute of limitations imposed by TILA's civil liability provision."[6] The TILA and EFTA statutes of limitations begin to run "from the date of the occurrence the violation." 15 U.S.C. § 1640(e); *id.* § 1693m(g); *see ITT Educ. Servs.*, 2015 WL 1013508, *33. The alleged violations "occur" when the loan is consummated, since the claimed TILA and EFTA requirements at issue here would have been violated (if ever) as soon as the loan was made. *See In re Smith*, 737 F.2d 1549, 1552 (11th Cir. 1984); *Postow v. OBA Fed. Savings & Loan Ass'n*, 627 F.2d 1370, 1380 (D.C. Cir. 1980). Thus, EC's TILA and EFTA

[5] Indeed, the court described the notion that "the CFPB need not comply with any statutes of limitations when enforcing the Real Estate Settlement Procedures Act administratively" as "absurd" and questioned such a "nonsensical dichotomy between CFPB court actions and CFPB administrative actions." *Id.*

[6] EFTA has identical statutory language to the language in TILA that addresses the statute of limitations issue litigated in *ITT*.

claims are time-barred, as the last possible violations would have occurred in December 2012 when IA originated its final loan; this is nearly three years before EC filed its Notice of Charges ("Notice"). *See* Dkt. 176 at 14.

Moreover, the holding in *PHH* concerns all claims, including those arising under the Bureau's UDAAP authority. The CFPA expressly provides that causes of action arising specifically under this statute have a three-year statute of limitations that runs "from date of discovery." EC has failed to establish the timeliness of any of its claims, including its UDAAP claims (Counts III and VII), which start running from the "date of discovery." This three-year statute of limitations renders the deception claim against Mr. Carnes, along with Counts II and VI, incorporating TILA and EFTA claims into CFPA claims, time-barred.

EC's apparent interpretation of "date of discovery" is at odds with Supreme Court precedent. In fact, EC's interpretation of the "date of discovery" would have the statute start running at a date determined entirely at the Bureau's discretion, such as through the serving of a CID or submission of a NORA notice. A NORA notice, of course, is intended to provide the subject of the investigation with "notice of the nature of the subject's potential violations," CFPB Bulletin 2011-04 (Enforcement) (updated Jan. 18, 2012). This description alone shows that by the time that a NORA is issued, Enforcement counsel's knowledge of potential violations far exceeds any "should have known" standard that would determine a "date of discovery" start-date. Indeed, a discretionary start-date, as EC proposes, "would be utterly repugnant to the genius of our laws" because actions for penalties could "be brought at any distance of time." *Gabelli v. SEC*, 133 S. Ct. 1216 (2013). Such a regime would undermine the very purpose of a statute of limitations.

EC's claims, however, are clearly untimely, since information needed to evaluate Respondents' alleged conduct was publically available as soon as the Bureau was created. For example, EC's Notice pleads that IA relied on a website for its lending operations, which was available to EC. *See* Dkt. 1 ¶¶ 4, 12. Moreover, consumer complaints, on which EC has purported to rely, *see* Dkt. 87 at 12-13, 19; Dkt. 87-C (referencing consumer complaints), date back to at least 2009. These complaints were available to EC publically, through the BBB, as well as through the CFPB's connections with other state and federal law enforcement agencies, including the FTC. *See* FTC and CFPB Interagency Cooperation Agreement (Jan. 2012), attached hereto as **Attachment A**. Indeed, on March 29, 2012, an EC attorney searched for "Integrity Advance" within the FTC's Consumer Sentinel complaint database and returned a number of complaints. **Attachment B** (CFPB042438). From this database, EC, "[i]n the exercise of reasonable diligence, discovered or should have discovered the [alleged] breach or violation." *Harris v. Koenig*, 722 F. Supp. 2d 44, 55 (D.D.C. 2010).

EC's retroactivity arguments serve only to highlight the applicability of a statute of limitations to the claims at issue. Under EC's own argument, its claims must *either* be impermissibly retroactive or time-barred (or, as Respondents argue, both). Unless the Bureau applies the appropriate one-year statute of limitations and dismisses Counts I, II, V and VI as time-barred, the Bureau must uphold the ALJ's conclusions that section 1055 cannot be applied retroactively.

## III. Section 2462's Statute Of Limitations Also Limits The Bureau's Ability to Grant Relief

Assuming that Counts I and V are valid (they are not) and also not time-barred (they are), the Bureau cannot order restitution as to any conduct that pre-dates July 21, 2011, given the doctrine of retroactivity, and in any event, these restitution claims cannot attach to conduct that

precedes the Notice by more than five years. 28 U.S.C. § 2462 limits any relief that the Bureau may award. Specifically, the Bureau cannot award relief that touches conduct that occurred before November 18, 2010 or five years before the Notice of Claims was filed. This is because the Bureau may not award "any civil fine, penalty, or forfeiture" against Respondents outside the five-year statute of limitations mandated under this statute.

"[Section] 2462's statute of limitations applies to disgorgement." *SEC v. Graham*, 823 F.3d 1357, 1363 (11th Cir. 2016). The D.C. Circuit reasoned that "disgorgement is imposed as redress for wrongdoing and can be considered a subset of forfeiture. Because forfeiture includes disgorgement, § 2462 applies to disgorgement." *Id.* Restitution, such as EC seeks here, also constitutes "forfeiture" under § 2462 and, by an analysis identical to that applied by the D.C. Circuit in *Graham*, falls within the scope of the limiting statute. Accordingly, EC's claim for restitution – under any count of the Notice – "shall not be entertained unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462. And, phrase "the date when the claim first accrued" in § 2462 means "the date of the underlying violation." *United States v. Core Labs., Inc.*, 759 F.2d 480, 482 (5th Cir. 1985).

Here, for example, EC's TILA claims accrued when the disclosures at issue were made and the loans were consummated. It follows, as courts have explained in analogous situations, that "recovery [is] limited to violations occurring within the five years prior to the date of the complaint . . . because the five-year statute of limitations for civil penalty actions, 28 U.S.C. [§] 2462 (1970), [was] applicable." *See FTC v. Lukens Steel Co.*, 454 F. Supp. 1182, 1185 n.2 (D.D.C. 1978). Accordingly, under section 2462, the Bureau may not order any restitution for any loans that IA made to customers prior to November 18, 2010, which is five years before the filing of the Notice.

## IV. If Count I (TILA) Is Time-Barred, Then Count II Should Be Dismissed As Well

Count II, which is based entirely on violations of TILA (Count I), should be dismissed, along with EC's TILA claim (Count I), which is time-barred.[7] The D.C. Circuit's opinion in *PHH* affirms that statutes of limitations apply in the Bureau's administrative forum, just as they do in federal court. *See* Dkt. 184 at 6-7; *PHH*, 839 F.3d at 53-54. Thus, while Count II is limited to post-transfer date TILA violations (*i.e.* conduct between July 21, 2011 and December 2012), the conduct underlying the TILA violations nonetheless occurred three years before EC filed its Notice in November 2015. *See* Dkt. 176 at 14, ¶ 14 (finding that "Integrity Advance ceased offering loans in December 2012."). Thus, TILA's one-year statute of limitations bars *all* of the conduct underlying Counts I and II.

## CONCLUSION

For all of the foregoing reasons, the Director should deny Enforcement Counsel's appeal and find in favor of Respondents.

Respectfully submitted,

Dated: December 5, 2016

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[7] On appeal, EC seemingly clarifies that it is not seeking double recovery under Count II. This appears to nullify the ALJ's reasoning supporting his conclusion that EC is not entitled to restitution under Count II. *See* Dkt. 176 at 66. Nonetheless, Respondents maintain that EC is not entitled to double recovery, and, as discussed below, Count II should be dismissed.

**CERTIFICATION OF SERVICE**

I hereby certify that on the 5th day of December, 2016, I caused a copy of the foregoing Respondents' Answering Appeal Brief to be filed by electronic transmission (e-mail) with the CFPB's Office of Administrative Adjudication (CFPB_Electronic_Filings@cfpb.gov). A copy of this brief is provided by electronic mail to 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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