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.**	**ENFORCEMENT COUNSEL'S REPLY BRIEF**

ENFORCEMENT COUNSEL'S REPLY BRIEF

Enforcement Counsel made two arguments on appeal: that it is entitled to relief for Integrity Advance's pre-transfer date TILA violations; and that it is entitled to an order of restitution for Respondents' violations under the related CFPA claim (Count II). Respondents' opposition to Enforcement Counsel's opening appeal brief makes three primary assertions: 1) Congress intended the CFPA to be applied only prospectively; 2) applying the CFPA in any other manner would have impermissible retroactive effect; and 3) Enforcement Counsel's claims are time-barred. Each of these arguments is meritless. Respondents point to no language in the CFPA indicating Congressional intent to preclude the Bureau from obtaining remedies for conduct that was illegal before the CFPA itself took effect. Section 5565, which took effect on July 21, 2011, governs the Bureau's "jurisdiction to grant" relief, not Respondents' liability for relief.

The fact that the Bureau's authority to grant relief took effect on July 21, 2011 in no way implies that it may award relief only for conduct that occurred after that date.

Further, there is no retroactive effect here – Integrity Advance's actions were unlawful when committed, and the Federal government could have obtained at that time the same relief Enforcement Counsel seeks here. Finally, Respondents' statute of limitations arguments are both specious and outside the scope of Enforcement Counsel's appeal. There are no applicable statute of limitations provisions that would bar any of Enforcement Counsel's claims. As a result, the Director should issue a Final Decision awarding restitution both for Integrity Advance's pre-transfer date TILA violations and for the company's violation of the CFPA under Count II of the Notice of Charges.

I. A Relief Award for Pre-Transfer Date Violations Does Not Violate Retroactivity Doctrine

As addressed in Enforcement Counsel's opening appeal brief, the Supreme Court's decisions in *Landgraf v. USI Film* and its progeny instruct that determining whether a statute can be applied retrospectively requires a two-part analysis. 511 U.S. 244, 280 (1994); EC App. Br. [dk. 183] at 5-6. The first part of that analysis requires determining whether Congress "'expressly prescribed the statute's proper reach,' and in the absence of language as helpful as that we try to draw a comparably firm conclusion about the temporal reach specifically intended by applying 'our normal rules of construction.'" *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994), and *Lindh v. Murphy*, 521 U.S. 320, 326 (1997), (respectively) (internal citation omitted). "If that effort fails," the question then becomes "whether applying the statute to the person objecting would

have a retroactive consequence in the disfavored sense of 'affecting substantive rights, liabilities, or duties on the basis of conduct arising before its enactment.'" *Id.* (quoting *Landgraf*, 511 U.S. at 278) (alterations omitted).

a. Ordinary Rules of Construction Indicate that Congress Intended for the Bureau to have Authority to Award Pre-Transfer Date Relief

Enforcement Counsel is not aware of any 'express' indication in the CFPA concerning the statute's temporal reach – and Respondents have failed to point to one.[1] In the absence of explicit language, the Director should apply the normal rules of statutory construction and determine that the best reading of 12 U.S.C. § 5565 is that Congress intended for the Bureau to have authority to award relief for pre-transfer-date violations of enumerated laws like TILA, which were in effect long before the CFPA itself was enacted.

Section 5565, by its terms, speaks to the Bureau's (and courts') authority to award relief, not to regulated parties' liability for that relief. In particular, § 5565 provides that the Bureau (or a court) "shall have jurisdiction to grant any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law." 12 U.S.C. § 5565(a). Although § 5565(a) took effect on July 21, 2011 (12 U.S.C. § 5561 note), that only means that the Bureau's "jurisdiction *to grant* ... relief" took effect on that date. Nothing in this provision—or any other—suggests that this authority to grant relief is limited to granting relief only for violations that occurred on or after that date. Indeed,

[1] Contrary to Respondents' suggestion, Enforcement Counsel never argued in its opening brief that Respondents bore some "burden" on the retroactivity question – it merely made the point that Respondents have not located any explicit Congressional direction on this issue. *See* EC App. Br. [dk. 183] at 5-6. As a question of law, it is unclear what "burden" Respondents are referencing.

such a reading would be absurd. Where, as here, the conduct was already unlawful and already could have subjected the violating party to the remedies specified in § 5565, there would be no reason (and Respondents have pointed to none) for Congress to preclude the Bureau from obtaining relief for those violations. In creating the Bureau, Congress plainly did not intend to grant regulated entities a get-out-of-jail-free card for their pre-transfer-date conduct. Moreover, if Respondents were correct that the Bureau cannot obtain relief for pre-transfer-date violations of pre-existing statutes, that would mean that Congress intended for the Bureau to have essentially no enforcement role for years. Under Respondents' view, the Bureau would have to wait until an entity violated the (pre-existing) law after July 21, 2011, and only then take action. And, when it did take action, it could only address the post-transfer-date violations, even if the exact same violations had been occurring before that date. Respondents offer no plausible theory for why Congress would have intended any of these results.

Respondents argue that the presence of an effective date for § 5565 somehow creates a presumption that relief should only be available for prospective violations, but even assuming that Respondents are correct, that presumption would not apply where there is another clear justification for Congress's inclusion of such a date. *See Lytes v. DC Water & Sewer Auth.*, 572 F.3d 936, 941 (D.C. Cir. 2009) ("[A]lthough the Congress's decision to delay the effective date of a statute generally indicates it intends prospective only effect, when an alternative and time-neutral explanation of the delay appears on the face of the statute, a court indeed must proceed to the second step [of the *Landgraf* analysis] . . . ."). Here there is a clear and compelling justification for the inclusion of an effective date – the CFPA, among many other things, required the creation of a whole new government agency and required the transfer of numerous

authorities from other parts of the federal government to that new agency. It would have been illogical for Congress to assume that this could happen instantaneously, given that the Bureau did not have a single employee to exercise those powers on the day the CFPA was signed into law.

This analysis is confirmed by the statute itself and the Congressional Record. Section 1062 of the CFPA outlines the process for several government agencies to transfer various authorities to the Bureau. *See* 12 U.S.C. § 5582. It requires that those functions be transferred on a date set by the Secretary of the Treasury, between six months and a year after the passage of the CFPA. 12 U.S.C. § 5582(c)(1). On September 20, 2010, the Secretary of the Treasury mandated that the designated transfer date would be July 21, 2011. The Secretary's statement reads as follows:

> Congress contemplated that the lead time for the ''orderly implementation'' of the CFPB's functions could range between 6 to 18 months after the date of enactment. To fulfill the statutory goal of an ''orderly and organized startup'' of the new agency, the CFPB should be provided a reasonable period of time to develop its operations and organization prior to the transfer of functions and employees from other agencies. A transfer date of July 21, 2011, 12 months after the date of enactment, will provide the CFPB an appropriate period of time to hire and assign employees to support its new functions, as well as to plan and make important decisions necessary to build a strong foundation for the new agency.

75 Fed. Reg. 57252, 57252 (Sept. 20, 2010). Hence, it is clear that the delayed effective date did not communicate Congressional intent as to the Bureau's ability to award relief for pre-transfer-date violations, but instead was designed to allow an orderly implementation of the Bureau and its powers. For this reason, Respondents' suggestion

that the effective date provision would be rendered meaningless if it does not govern retroactivity is clearly mistaken.[2]

b. Awarding Relief Under 12 U.S.C. § 5565 for Pre-Transfer Date TILA Violations Does Not Have Retroactive Effect

The second part of the *Landgraf* test asks whether the statute at issue "would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. Here, there is no retroactive effect to the imposition of Truth in Lending Act liability because that statute was in effect during the entirety of Integrity Advance's operations, and Integrity Advance always could have been liable for the exact same remedies that Enforcement Counsel seeks here. The Bureau has not taken a new statute and "imposed new duties with respect to" old conduct. Rather, it brought a proceeding based on an old statute to which Integrity Advance was always subject.

The imposition of liability on Respondents here would not "increase [Integrity Advance's] liability for past conduct" since the Federal Trade Commission had the authority to bring TILA causes of action and receive the same monetary relief that

[2] Respondents suggest that Enforcement Counsel "dismissed" its pre-transfer date UDAAP claims because it believed that the CFPA could not be applied retrospectively and is now trying to "cherry pick" which provisions of the CFPA are retroactive. Resp. Opp. Br. [dkt. 188] at 2-3. This argument is disingenuous at best. Enforcement Counsel never asserted that any of its UDAAP claims applied to pre-transfer date conduct. In response to Respondents' motion to dismiss, Enforcement Counsel clarified this point but also made clear that it "disagreed" with Respondents' retroactivity arguments. EC Opp. to MTD [dkt. 033] at 14. Moreover, Respondents' retroactivity arguments in their motion to dismiss only pertained to UDAAP claims and not Enforcement Counsel's TILA claim. Resp. MTD [dkt. 028] at 24-29. Hence, there is no inconsistency between Enforcement Counsel's current arguments and its prior statement that retroactivity arguments as to the UDAAP claims are moot.

Enforcement Counsel seeks here. EC App. Br. [dk. 183] at 7. Respondents' attempt to counter by pointing out the differences in the CFPA statute as compared to the Federal Trade Commission Act (FTCA), but cannot actually contest Enforcement Counsel's position. They concede that "courts have interpreted section 13(b)'s injunctive relief provision to allow a district court to grant equitable relief as well." Resp. Opp. Br. [dkt. 188] at 7.[3] Respondents had no choice given the numerous cases holding that the FTC is able to receive restitution in its enforcement actions. *See* EC App. Br. [dk. 183] at 7 n.3. Furthermore, pointing out that the CFPA and FTCA are not drafted identically does not show that this matter imposed new and unanticipated obligations on Integrity Advance. Even if Respondents are correct that the FTC would have needed to show the likelihood of an ongoing violation in order to obtain injunctive relief[4], that does not erase the fact that the FTC could have brought the exact same TILA claim, and obtained the exact same relief, as the Bureau.

For this reason, Respondents' complaint that retroactivity is disfavored is inapplicable here. *See* Resp. Opp. Br. [dkt. 188] at 2. When *Landgraf* held that statutes will "not be construed to have retroactive effect unless their language requires this result," the court was concerned about defendants being subjected to new rules and regulations that did not exist when the acts in question were committed. 511 U.S. at 264. Where there is no retroactive effect, as in this matter, the presumption is inapplicable. *See id*. at 269-70 ("A statute does not operate 'retrospectively' merely because it is

[3] Although Respondents assert courts have permitted equitable relief "provided there is a reason to believe a party is violation [sic] or about to violate the FTCA", Resp. Opp. Br. [dkt. 188] at 7, they have not cited to any such cases holding that an ongoing violation is a prerequisite to restitution.

applied in a case arising from conduct antedating the statute's enactment....Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment.").[5]

Respondents argue that the fact that the FTC must pursue claims for restitution in federal district court is somehow relevant. But the case law is clear that differences in forum have no import in a retroactivity analysis. A statute that addresses a change from district court to an administrative forum "speak[s] to the power of the court rather than to the rights or obligations of the parties," *Landgraf*, 511 U.S. at 274 (quoting *Republic Nat. Bank of Miami v. United States*, 506 U.S. 80, 100 (1992)), and thus "take[s] away no substantive right but simply changes the tribunal that is to hear the case." *Id.* (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). Such "[c]hanges in procedural rules" do not "rais[e] concerns about retroactivity." *Landgraf*, 511 U.S. at 275.[6]

II. The Bureau's Claims Are Not Time-Barred

Respondents spend a large portion of their opposition brief arguing, yet again, that Enforcement Counsel's claims here are barred by various statute of limitations provisions. Given that Enforcement Counsel did not make any statute of limitations arguments in its opening appeal brief, Respondents' entire line of argument is improper. 12 C.F.R. § 1081.403 ("Briefs shall be confined to the particular matters at issue*); see*

[5] *See also Landgraf*, 511 U.S. at 273 ("Even absent specific legislative authorization, application of new statutes passed after the events in the suit is unquestionably proper in many situations.").

[6] Respondents' references to transferred authority are nonsensical. *See* Resp. Opp. Br. [dkt. 188] at 8. Enforcement Counsel has never argued that the FTC's authority was transferred to the Bureau or "relie[d] on the FTCA's authorities in order to prove a TILA violation." *Id*. As addressed herein, Enforcement Counsel pointed to the FTC's authority in order to show that imposing TILA liability here would not have retroactive effect.

generally, *Nat'l Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1161 (D.C. Cir. 2013) (refusing to entertain arguments made by an intervenor that were outside the scope of the petitioner's appeal). The Director should ignore this portion of Respondents' answering brief.

Even if the Director considers Respondents' argument, he should find that it is substantively baseless. As Enforcement Counsel argued in its opposition brief, the TILA, EFTA, and CFPA claims in this matter are not time-barred. There is no statute of limitations provision applicable to this administrative proceeding as each of the provisions Respondents have sought to apply - by their own terms - only concern actions in Federal district court. *See* EC Opp. Br. [dkt. 186] at 13-19.

Respondents attempt to conflate the retroactivity and statute of limitations analyses – suggesting, without any case law support, that Enforcement Counsel's reference to FTC authority somehow means that the claims here are time-barred. Respondents' argument is, quite simply, a non-sequitur. The fact that granting restitution for Integrity Advance's TILA violations has no impermissible retroactive effect because the FTC could have received the same relief has nothing to do with whether Enforcement Counsel can bring these claims in an administrative proceeding or what statute of limitations, if any, applies. The statute of limitations and retroactivity questions are entirely separate. Moreover, the underlying assumption of Respondents' argument—that the FTC would be time-barred if it brought these TILA and EFTA claims in federal district court—is incorrect because the statutory provisions authorizing federal government enforcement of TILA and EFTA do not contain a statute of limitations, for the FTC *or* for the Bureau. *See* EC Opp. Br. [dkt. 186] at 16-17; *see generally*, *Vallies v. Sky Bank*, 591 F.3d 152, 156 (3d Cir. 2009) (stating that the Federal

Trade Commission enforces TILA through the §1607 administrative enforcement provision); *Barber v. Kimbrell's, Inc.*, 577 F.2d 216, 222 (4th Cir. 1978).

Respondents' statute of limitations arguments as to Enforcement Counsel's CFPA claims are similarly misguided.[7] Respondents argue that the Bureau should have discovered Respondents' violations as soon as it was founded because there were complaints about Integrity Advance in a database maintained by the Federal Trade Commission. Resp. Opp. Br. [dkt. 188] at 13. Respondents fail to cite a single case in support of their proposition that knowledge of violations can be imputed to the government the instant a consumer complaint is submitted to an agency. It is patently absurd to suggest that the Bureau "discovered" Respondents' violations as of the transfer date—before the Bureau had served a CID, reviewed any documents, or even contemplated an investigation into Respondents. Indeed, Respondents' position would require the Bureau to pre-judge its cases and file suit without conducting any investigation. Additionally, Respondents' argument necessarily means that the Bureau "discovered" many of Respondents' violations before they even happened, as all of the counts here involve conduct that continued through 2012.

Respondents' citation to a document showing that the Bureau searched and found complaints about Integrity Advance in March of 2012 does not change this analysis. To call a search for complaints "discovery of the violation to which an action relates" is illogical. An online consumer complaint does not establish a violation. If that

[7] Respondents rely on the statute of limitations found in § 5564(g), which does not apply to administrative proceedings. *See* EC Opp. Br. [dkt. 186] at 14-15. Respondents ignore the inapplicability of this provision, and allege that "EC has failed to establish the timeliness of any of its claims," (Resp. Opp. Br. [dkt. 188] at 12) ignoring the fact that statute of limitations is an affirmative defense on which they bear the burden of proof. *See* EC Opp. Br. [dkt. 186] at 18.

were the case, Enforcement Counsel could merely attach a consumer complaint to a Notice of Charges or Complaint and would be entitled to a judgment on the pleadings. Further, the claims in this matter directly flowed from Respondents' loan agreement, and Enforcement Counsel did not see the language of that agreement until late 2013. *See* EC Opp. Br. [dkt. 186] at 19.

Finally, Respondents' claim that Enforcement Counsel's interpretation of the "date of discovery" contradicts Supreme Court precedent significantly misconstrues *Gabelli v. SEC*, 133 S. Ct. 1216 (2013). Resp. Opp. Br. [dkt. 186] at 12. In *Gabelli*, the Supreme Court "declined to graft a discovery rule" onto 28 U.S.C. § 2462 without any "textual, historical, or equitable" reasons for doing so. *Gabelli*, 133 S. Ct. at 1224. By contrast, section 5564(g)(1) (even if it were applicable here) expressly provides that the Bureau may bring actions three years from the "date of discovery of the violation to which an action relates." 12 U.S.C. § 5564(g)(1).[8] Nor does the three-year date of discovery statute of limitations conflict with the five-year limitation on penalties in 28 U.S.C. § 2462. As is discussed in detail below, section 2462 does not prohibit any of the relief sought by Enforcement Counsel in this matter.

III. Section 2462 Does Not Limit the Bureau's Relief

Generally speaking, Congress has limited the government's ability to seek a "civil fine, penalty, or forfeiture" against a defendant after five years from accrual of the government's claim. 28 U.S.C. § 2462. Respondents argue that this prevents Enforcement Counsel from seeking restitution for violations that occurred prior to

[8] Respondents' citation to *Harris v. Koenig* (722 F. Supp. 2d 44 (D.D.C. 2010)) is inapposite. Resp. Opp. Br. [dkt. 188] at 13. *Harris* involves the applicability of the fraudulent concealment doctrine to a private ERISA claim. It has no bearing on when a government enforcement agency discovers a violation of the laws it enforces.

November 18, 2010. Their position is mistaken. Respondents first argue that disgorgement qualifies as "forfeiture" under § 2462. Resp. Opp. Br. [dkt. 188] at 14. But the one case cited by Respondents for this point is an outlier; most circuits to have considered the issue, including the D.C. Circuit, have maintained that disgorgement should not ordinarily be considered forfeiture. *See Zacharias v. S.E.C.*, 569 F.3d 458, 473 (D.C. Cir. 2009) (disgorgement orders are not penalties "so long as the disgorged amount is causally related to the wrongdoing."); *Riordan v. S.E.C.*, 627 F.3d 1230, 1234-35 (D.C. Cir. 2010); *United States v. Telluride Co.*, 146 F.3d 1241, 1247 (10th Cir. 1998); *S.E.C. v. Tambone*, 550 F.3d 106, 148 (1st Cir. 2008), *reh'g en banc granted, op. withdrawn*, 573 F.3d 54 (1st Cir. 2009), *op. reinstated in part on reh'g*, 597 F.3d 436 (1st Cir. 2010); *S.E.C. v. Rind*, 991 F.2d 1486 (9th Cir. 1993).

Second, Respondents assert that "[r]estitution, such as EC seeks here, also constitutes forfeiture," but cite no case law supporting this contention. Resp. Opp. Br. [dkt. 188] at 14. Indeed, courts have been clear that the opposite is true – the restitution awarded by the Recommended Decision is not a penalty subject to § 2462. *See Johnson v. S.E.C.*, 87 F.3d 484, 491 (D.C. Cir. 1996) ("Where the effect of the SEC's action is to restore the *status quo ante*, such as through a proceeding for restitution or disgorgement of ill-gotten profits, § 2462 will not apply."); *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 423 (1915) ("The words 'penalty or forfeiture' in this section refer to something imposed in a punitive way for an infraction of a public law, and do not include a liability imposed solely for the purpose of redressing a private injury, even though the wrongful act be a public offense, and punishable as such."); *United States v. Telluride Co.*, 146 F.3d 1241, 1246 (10th Cir. 1998) ("Our focus in defining a penalty for § 2462 is whether the sanction seeks compensation unrelated to, or in excess, of the

damages caused by the defendant."); *United States v. Doman*, 255 F.2d 865, 868 (3d Cir. 1958) (concluding that § 2462 did not apply because provision at issue "does not provide for a penalty but is remedial in nature.").

IV. The Director Should Award Relief Under Count II

In its opening appeal brief, Enforcement Counsel explained that while it was not seeking a duplicative recovery for Respondents' violations found under Count II, it was still proper for the Director to make a concurrent damages award. EC App. Br. [dk. 183] at 8-9. Respondents do not contest this in their answering brief. *See* Resp. Opp. Br. [dkt. 188] at 15 n.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."). Instead they make another statute of limitations argument that is outside the scope of Enforcement Counsel's brief. Nonetheless, Respondents' argument is baseless. As seen above, no statute of limitations bars Enforcement Counsel's TILA claim.

Moreover, even if the Director were to find that Enforcement Counsel's TILA claim was time-barred, it would not impact the related CFPA claim. Count II is predicated on the fact that a violation of an enumerated statute, like TILA, is also a separate violation of the CFPA. *See* 12 U.S.C. §§ 5481(12)(O), 5536(a)(1)(A). Therefore, Count II is brought under the CFPA and not under TILA, and assuming *arguendo* there were a statute of limitations that barred a TILA claim, it would not bar Count II. If Enforcement Counsel had brought Count II as part of an action in federal court, the three-year date of discovery statute of limitations in § 5564(g)(1) would apply, as the claim would be in an "action ... brought under this title" within the meaning of that provision, but section 5564(g)(1) does not apply to CFPA claims brought in an

administrative proceeding. *See* EC App. Br. [dk. 183] at 17-18. Further, as argued above, any suggestion that the Bureau discovered Integrity Advance's TILA violations prior to November 18, 2012 is baseless.

V. Conclusion

For the foregoing reasons, Enforcement Counsel renews its request that the Director issue a final decision: 1) awarding full restitution of $131,433,343.47 for Count I; and 2) awarding restitution of $38,164,153.31 for Count II.

Respectfully submitted,

Attorneys for Plaintiff
Consumer Financial Protection Bureau

ANTHONY ALEXIS
Enforcement Director

DEBORAH MORRIS
Deputy Enforcement Director

CRAIG COWIE
Assistant Litigation Deputy

s/Alusheyi J. Wheeler
Alusheyi J. Wheeler
1700 G Street NW
Washington, DC 20552
Phone: (202) 435-7786
Facsimile: (202) 435-7722
Email: alusheyi.wheeler@cfpb.gov

Enforcement Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of December 2016, I caused a copy of the foregoing Enforcement Counsel's Reply Brief to be filed by electronic transmission (e-mail) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), the U.S. Coast Guard Hearing Docket Clerk (aljdocketcenter@uscg.mil), Administrative Law Judge Parlen L. McKenna (cindy.j.melendres@uscg.mil), Heather L. MacClintock (Heather.L. MacClintock@uscg.mil), and served by email on the Respondents' counsel at the following addresses:

Allyson B. Baker, Esq.
ABBaker@venable.com

Danielle R. Foley, Esq.
DRFoley@venable.com

Peter S. Frechette, Esq.
PSFrechette@venable.com

Hillary S. Profita, Esq.
HSProfita@venable.com

Joanna P. Boyd, Esq.
JPBoyd@venable.com

Christine E. White, Esq.
CEWhite@venable.com

Andrew T. Hernacki, Esq.
ATHernacki@venable.com

/s/ Alusheyi J. Wheeler_____
Alusheyi J. Wheeler