

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 )  
\_\_\_\_\_ )

**NOTICE OF SUPPLEMENTAL  
AUTHORITY**

**NOTICE OF SUPPLEMENTAL AUTHORITY**

Respondents submit this notice to advise the Director of relevant supplemental authority.

On December 27, 2016, the U.S. Court of Appeals for the Tenth Circuit issued its decision in *Bandimere v. SEC*, No. 15-9586 (attached as Exhibit A), an appeal arising from a Securities and Exchange Commission (“SEC”) administrative enforcement action. The petitioner in that case argued that the SEC Administrative Law Judge (“ALJ”) who presided over the hearing was an inferior officer under Article II of the Constitution, but had not been constitutionally appointed. The Tenth Circuit agreed and set aside the SEC’s opinion. This decision erodes Enforcement Counsel’s position that CFPB ALJs are not inferior officers and need not comply with the Appointments Clause.

The Tenth Circuit concluded that the SEC ALJ who presided over the administrative enforcement action against the petitioner was an inferior officer. Citing the Supreme Court’s decision in *Freytag v. Commissioner of Internal Revenue*, the Tenth Circuit stated that SEC ALJs “[o]ccupy offices established by law; . . . have duties, salaries, and means of appointment

specified by statute; and . . . exercise significant discretion while performing “important functions” that are “more than ministerial tasks,” as well as various “adjudicative functions.” Op. at 21-22 (quoting *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991)).

The Tenth Circuit also explained that the SEC ALJ’s authority to issue an “initial decision” does not mean that the ALJ does not also exercise “significant authority.” The ALJs’ “[i]nitial decisions can and do become final without plenary agency review.” *Id.* at 21 n.25.

Accordingly, because the SEC ALJ was not constitutionally appointed, he held his office in violation of the Appointments Clause. *Id.* at 2.

The Tenth Circuit further held that this constitutional violation is a structural one, *id.* at 6, that “relieves [the petitioner] of all liability,” *id.* at 5. The “structural safeguard” of the Appointments Clause “warrants reversal regardless of whether prejudice can be shown.” *Id.* at 22-23 n.31 (quoting *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 123 (D.C. Cir. 2015)). Accordingly, the court granted the petition and set aside the SEC’s opinion.

Here, too, for all of the same reasons enunciated in *Bandimere*, the ALJ’s opinion should be set aside, along with this entire proceeding. *E.g., Resp’ts’ Opening Appeal Br.*, Dkt. 184, at 2. The CFPB tasks its ALJs (or “hearing officers”) with all of the same obligations and responsibilities as those that the SEC’s ALJs have. Specifically, the CFPB’s ALJs, including the ALJ in this matter, “[t]ake testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders.” *See* Op. at 22 n.30 (quoting *Freytag*, 501 U.S. at 881-82); 12 C.F.R. § 1081.104 (listing the specific powers of the hearing officer, in addition to any authority under the APA). And like with the SEC’s rules for adjudications, “recommended decisions,” of the CFPB ALJs may be adopted without the Director’s review. 12 C.F.R. § 1081.400(c)(1) (“Unless a party timely files and perfects a notice of appeal of the recommended decision, the Director may

adopt the recommended decision as the final decision and order of the Bureau without further opportunity for briefing or argument.”). Indeed, the Bureau’s rules *require* that the ALJ’s recommended decision become the agency’s final decision within 40 days, if no party appeals. *Id.* § 1081.402(b).

The ALJ who presided over this matter constitutes an “inferior officer” who must be appointed by the President, the “Courts of Law,” or the “Heads of Departments.” U.S. Const. Art. II, § 2, cl. 2. The ALJ in this matter was not so appointed.<sup>1</sup> Accordingly, like in *Bandimere*, the ALJ’s Recommended Decision and this entire proceeding, should be set aside.

Respectfully submitted,

Dated: January 9, 2017

By: /s/ Allyson B. Baker  
Allyson B. Baker, Esq.  
Danielle R. Foley, Esq.  
Peter S. Frechette, Esq.  
Andrew T. Hernacki, Esq.  
Hillary S. Profita, Esq.  
VENABLE LLP  
575 7th St., N.W.  
Washington, D.C. 20004  
(202) 344-4000

*Attorneys for Respondents*  
*Integrity Advance, LLC and James R. Carnes*

---

<sup>1</sup> Enforcement Counsel has not argued (and cannot argue) that the hearing officer, if properly deemed an “inferior officer,” was appointed pursuant to the Constitution. *See* EC Answering Br., Dkt. 186 at 28.

**CERTIFICATION OF SERVICE**

I hereby certify that on the 9th day of January, 2017, I caused a copy of the foregoing Notice of Supplemental Authority to be filed by electronic transmission (e-mail) with the CFPB's Office of Administrative Adjudication ([CFPB\\_Electronic\\_Filings@cfpb.gov](mailto: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](mailto:aljdocketcenter@uscg.mil)), Heather L. MacClintock ([Heather.L.MacClintock@uscg.mil](mailto:Heather.L.MacClintock@uscg.mil)), and Administrative Law Judge Parlen L. McKenna ([cindy.j.melendres@uscg.mil](mailto:cindy.j.melendres@uscg.mil)), and served by electronic mail on the following parties who have consented to electronic service:

Kristin Bateman, Esq.  
[Kristin.Bateman@cfpb.gov](mailto:Kristin.Bateman@cfpb.gov)

Deborah Morris, Esq.  
[Deborah.Morris@cfpb.gov](mailto:Deborah.Morris@cfpb.gov)

Craig A. Cowie, Esq.  
[Craig.Cowie@cfpb.gov](mailto:Craig.Cowie@cfpb.gov)

Alusheyi J. Wheeler, Esq.  
[Alusheyi.Wheeler@cfpb.gov](mailto:Alusheyi.Wheeler@cfpb.gov)

/s/ Peter S. Frechette  
Peter S. Frechette, Esq.