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,	**BUREAU'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS**
Respondents.	

BUREAU'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

Table of Contents

Table of Authorities

Cases

Statutes

I. Introduction

For more than four years Respondents ran an online payday loan operation that misled consumers. When originating loans, Integrity Advance provided consumers with figures ostensibly stating what the loan would cost: the total expense after Integrity Advance withdrew all payments as scheduled, the finance charge, and the annual percentage rate (APR). Indeed, this information was prominently displayed and emphasized in Integrity Advance's contracts. Integrity Advance calculated the amounts it disclosed by assuming that the loans would be repaid in full in a single payment. However, under the default terms of the contract, the loans would *not* be paid off in a single payment. Nestled in the confusing fine print of the contract were a series of terms that caused the loans to roll over automatically. Instead of withdrawing the full amount owed, as the disclosures suggested, Integrity Advance would—at least for the first five payments—withdraw only the amount of the finance charge without applying any amount to principal. As a result, unless the consumer took affirmative action to change the default terms of the contract, the total cost of the loan was much higher than the amount on the disclosure.

Respondents attempt to evade liability for this unlawful conduct by raising a series of meritless arguments in their motion to dismiss. Respondents' primary argument is based on the premise that the Bureau has no jurisdiction to pursue violations of law that occurred prior to Senate confirmation of the Bureau's Director. There is no basis for this assertion in law or logic. When the Bureau initiated this proceeding by filing the Notice of Charges, the Bureau had a confirmed Director and was vested with the full powers granted to it by Congress—facts which even Respondents admit. On that date, the Bureau had the authority to pursue non-banks, like Respondents, for violations of the

Truth in Lending Act (TILA), the Electronic Fund Transfer Act (EFTA), and the Dodd Frank Consumer Financial Protection Act (CFPA) itself. There is simply no authority for the proposition that the Bureau can only enforce violations of law that occurred after the confirmation of the Director, particularly given that the CFPA's substantive prohibitions indisputably took effect on July 21, 2011 (and TILA and EFTA long before that), a time when Respondents admit that they were still conducting business.

Respondents' other arguments are equally meritless. The statutes of limitations relied upon by Respondents expressly apply only to "actions" that are brought in courts, not administrative proceedings like this one. *See PHH Corp., et al.*, 2014-CFPB-0002, Decision of the Director at 10 (June 4, 2015) (relying on *BP America Production Co. v. Burton*, 549 U.S. 84, 91 (2006)). Indeed, in *PHH*, the Director flatly stated that 12 U.S.C. § 5564(g)(1), one of the provisions on which Respondents rely, does not apply to Bureau administrative proceedings. *Id*.

Finally, not only is Respondents' argument that the Notice of Charges fails to state a TILA claim without merit, the language of Integrity Advance's contract and Respondents' admissions in their Answer demonstrate that—as a matter of law—Integrity Advance violated TILA. Integrity Advance's contracts disclosed annual percentage rates, finance charges, and payment totals on the assumption that the loans would be fully repaid in one payment. Answer ¶ 26. However, Integrity Advance admits that "unless a consumer contacted Integrity Advance *to change the terms of the loan* . . . Integrity Advance renewed the consumer's loan." Answer ¶ 29 (emphasis added). These automatic renewals led to additional undisclosed finance charges and higher APRs and total repayment sums. Thus, as Respondents essentially admit, the default operation of the loan rendered Integrity Advance's disclosures inaccurate unless customers took steps to "change the terms of the loan[s]" after signing.

For all the reasons discussed herein, the Bureau respectfully requests that Respondents' motion be denied in full.

II. Standard of Review

To prevail on a motion to dismiss for failure to state a claim, Respondents must show that they are entitled to judgment as a matter of law. *See* 12 C.F.R. § 1081.212(b). For purposes of the motion, all allegations in the Notice of Charges must be accepted as true. *Id*.[1]

In their motion, Respondents seek to apply the Supreme Court standards found in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombley*, 550 U.S. 544 (2007), to assert that the Bureau failed to adequately plead causes of action. Resp. Br. at 5, 22. While the detailed Notice in this matter would easily survive review under those standards, it is settled law that administrative proceedings are not governed by the same standards as those pertaining to Federal district court cases. *See Flying Food Grp. Inc. v. NLRB*, 471 F.3d 178, 183 (D.C. Cir. 2006) ("As we have long held, '[p]leadings in administrative proceedings are not judged by the standards applied to an indictment at common law.'") (quoting *Aloha Airlines, Inc. v. Civil Aeronautics Bd.*, 598 F.2d 250, 262 (D.C.Cir.1979)). An administrative agency merely has to show that Respondents "understood the issue" and were "afforded full opportunity" to defend their conduct. *Aloha*, 598 F.2d at 262 (quoting *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 350

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[1] *Accord, e.g.*, *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993) (construing the Federal Rules of Civil Procedure).

(1938)). Moreover, the Bureau's Rules of Practice for Adjudication Proceedings clearly outline the requirements of a Notice of Charges. *See* 12 C.F.R. § 1081.200.[2] There is no question that the Bureau has met these standards.[3]

III. The Bureau Has Authority to Bring This Enforcement Proceeding Against Integrity Advance and Carnes

The Bureau's authority to bring this enforcement proceeding against Integrity Advance and James R. Carnes (Carnes) is straightforward. On November 18, 2015, when the Bureau filed the Notice of Charges against Respondents, the Bureau undeniably had authority to enforce the law against nonbanks, including through administrative enforcement proceedings like the one here. *See* 12 U.S.C. § 5563 (establishing administrative enforcement authority). Indeed, Respondents themselves concede that by July 16, 2013, when the Senate confirmed Director Cordray as the Bureau's Director, the Bureau gained authority "to exercise the new powers to regulate nonbanks,"

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[2] "(b) *Contents of a notice of charges*. The notice of charges must set forth: (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(b).

[3] In deciding a motion to dismiss, the Administrative Law Judge overseeing the PHH matter did find that 12 C.F.R. § 1081.212 (allowing motions to dismiss in Bureau administrative proceedings) was similar enough to Federal Rule of Civil Procedure 12(b)(6) such that cases pertinent to the Federal Rule could be generally pertinent to the administrative process. However, the judge explicitly declined to rule on the application of *Twombley* and *Iqbal* as the Bureau's Notice of Charges had met those standards. *See PHH Corp., et al.*, 2014-CFPB-0002, Order Denying Motion to Dismiss at 7 n.1 (March 13, 2014).

including "the authority to pursue enforcement actions" against them.[4] Resp. Br. at 9. That should end the matter.

Respondents nonetheless attempt to muddy the waters with arguments about the Bureau Director's earlier recess appointment, the authorities the Bureau had during that recess appointment, and the Bureau's ratification of all actions taken during the recess appointment. Resp. Br. at 6-14. Those arguments are all wholly irrelevant. Respondents argue that "before there was a lawfully appointed Bureau Director, the agency did not have the authority to pursue enforcement actions against" nonbanks like Integrity Advance. Resp. Br. at 8; *see also id.* at 6-10. But even if that were true (which the Bureau does not concede), it would not matter here because the Bureau did not bring this proceeding prior to the confirmation of a Director. Rather, it filed the Notice of Charges in November 2015—at a time when even Respondents concede that the Director was properly appointed and the Bureau was vested with its full authorities to take action against nonbanks under the CFPA. *See* Resp. Br. at 9, 10. Whether the Bureau could have brought this proceeding earlier, during the Director's prior recess appointment, is simply beside the point.

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[4] The Bureau disagrees with Respondents' contention that the agency's authority over nonbanks took effect only once the Director received Senate confirmation. The statute specifies that the Bureau's authority to bring administrative enforcement proceedings, including against nonbanks, would take effect on "the designated transfer date," which was set as July 21, 2011. *See* Consumer Financial Protection Act (CFPA) § 1058, *codified at* 12 U.S.C. § 5561 note (setting "designated transfer date" as effective date for subtitle E); CFPA § 1062, *codified at* 12 U.S.C. § 5582(a) (directing Treasury Secretary to designate a "transfer date"); 75 Fed. Reg. 57252, 57252 (Sept. 20, 2010) (establishing July 21, 2011 as "designated transfer date"). But this dispute is irrelevant in this case because the parties agree that the Bureau's full enforcement authority had taken effect by the time the agency filed the Notice of Charges in this case.

Respondents' arguments about the Notice of Ratification are likewise a red herring. With the Notice of Ratification, the Bureau "affirm[ed] and ratif[ied] any and all actions" that the Director took on behalf of the Bureau during the period of his recess appointment. 78 Fed. Reg. 53734, 53734 (Aug. 30, 2013). But the relevant action in this case—the filing of the Notice of Charges in November 2015—did not take place during that period and therefore is not covered by the ratification. Respondents' arguments that the ratification was not effective (*see* Resp. Br. at 10-14) are therefore entirely off-point.

At bottom, then, Respondents' argument comes down to this: even when vested with its full authorities, the Bureau cannot enforce the law against anyone who stopped offering consumer financial products and services, and thus stopped the activity qualifying them as a "covered person," before the Director was confirmed. *See* Resp. Br. at 1, 10, 12, 14. Although not clearly stated, this argument seems to rest on the proposition that Respondents, as nonbanks, were not (in their view) subject to the Bureau's enforcement authority at the time they acted as "covered persons" and thus cannot be held liable by the Bureau *now* for the unlawful actions they committed before. That is nonsensical. Respondents are correct that the CFPA's prohibition on unfair, deceptive, and abusive acts and practices (UDAAPs) applies only to "covered persons" and "service providers." Resp. Br. at 14-15; *see also* 12 U.S.C. §§ 5531(a), 5536(a). And a "covered person" is "any person that engages in offering or providing a consumer financial product or service," such as the loans that Respondents offered here. *See* 12 U.S.C. § 5481(6)(A); *see also id.* §§ 5481(5), (15)(A)(i) ("extending credit" "for use by consumers primarily for personal, family, or household purposes" qualifies as "consumer financial product or service"). But it does not follow that an entity must *still* engage in conduct qualifying it as a "covered person" to face liability for past violations committed when it was undeniably a "covered person." Ceasing their "covered person" activity may remove Respondents from the law's applicability going forward, but it does not absolve them of violations committed in the past. The fact that the Bureau did not have a Senate confirmed Director at the time Respondents indisputably met the definition of covered persons does not magically immunize them from liability for violations they committed at that time.

Respondents nonetheless seek such immunity by claiming that the use of the present tense in the definition of "covered person" somehow insulates them from the Bureau's enforcement authority.[5] According to Respondents, the present-tense definition means that the Bureau can only take enforcement action against entities who were (currently) involved in offering consumer financial products or services "at some point in time when the Bureau had authority as to that conduct." Resp. Br. at 16. In other words, because the Bureau (in Respondents' view) could not have taken enforcement action against Respondents while their conduct was ongoing, it cannot take action now either.

Respondents never explain how they make that leap. They emphasize that present-tense language generally does not "extend to past actions." Resp. Br. at 14-15. But this principle does not preclude an agency from enforcing the law after a violation has occurred. The present-tense language at most suggests that the provisions do not extend

[5] Notably, Respondents' "covered person" argument has no bearing on the TILA and EFTA claims in this case, as those statutes' requirements are not limited to "covered persons." *See* 15 U.S.C. §§ 1631, 1638 (TILA); *id*. § 1693(k) (EFTA). And Respondents make no other argument addressing those claims. Thus, Respondents apparently focus solely on the Bureau's power to "enforce its UDAAP authority or otherwise bring a claim arising from an alleged violation of the CFPA." Resp. Br. at 14.

to "past actions" *that predate the provisions' effective date*. *Cf. Carr v. United States*, 560 U.S. 438, 441 (2010) (concluding that statutory prohibition phrased in present tense did not apply to conduct that "occurred prior to [the statute's] effective date"). But by the statute's plain terms, the CFPA's substantive prohibitions took effect on July 21, 2011—at a time when Respondents' conduct was still ongoing. CFPA § 1037, *codified at* 12 U.S.C. § 5531 note (providing that subtitle C "shall take effect on the designated transfer date"); 75 Fed. Reg. 57252, 57252 (Sept. 20, 2010) (establishing July 21, 2011 as "designated transfer date").[6] To the extent that Respondents suggest that these laws were somehow not effective until the Director was confirmed—because (under their theory) the Bureau did not have authority to enforce those prohibitions against nonbanks until that time—they are wrong. Any such contention is flatly contradicted by the statute's express effective dates. And there is of course no principle—and Respondent point to none—that a substantive prohibition does not take effect until a federal government agency gains the power to enforce it.

Further, Section 1053—the provision establishing the Bureau's administrative enforcement authority—does not limit the Bureau to bringing enforcement proceedings only against people who presently, at the time of the enforcement proceeding, engage in conduct qualifying them as "covered persons." *See* 12 U.S.C. § 5563(b)(1)(A)

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[6] Moreover, the definition of "covered person" that Respondents emphasize took effect one year earlier, on July 22, 2010. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 4, *codified at* 12 U.S.C. § 5301 note. And the statutes on which the other claims in this case are based took effect long before that: TILA took effect in 1969, Pub. L. No. 90-321 § 504(b) (1968), *codified at* 15 U.S.C. § 1631 note, and EFTA in 1979, Pub. L. No. 95-630 § 2101 (1978). In any event, as noted above (*see supra* note [[5]]), Respondents' "covered person" argument has no apparent relevance to the TILA and EFTA claims.

(authorizing the Bureau, when it believes a "covered person or service provider is engaging or *has engaged in*" a violation of law, to "serve upon the covered person or service provider a notice of charges") (emphasis added). Indeed, Respondents expressly disclaim any argument to that effect. *See* Resp. Br. at 16 ("Respondents are not arguing that a company must be currently engaged in the offering or provision of a consumer financial product or service to be called a 'covered person' under the CFPA."). And for good reason. The provision authorizes the Bureau to initiate enforcement proceedings not just against a "covered person" who "is engaging" in a violation, but also against a "covered person" who "has engaged in" a violation, and not just to halt ongoing unlawful conduct, but also to require "affirmative action to correct the conditions resulting from" past violations. 12 U.S.C. § 5563(b)(1)(A), (D). And nothing suggests that this authority ends the moment an entity stops offering consumer financial products or services, no matter what violations they already committed and what harm they already caused. The use of the present tense in the "covered person" definition certainly does not create such a loophole[7]—and, in any event, not even Respondents dare to suggest that much.

[7] Indeed, it is not uncommon for statutory definition provisions to use the present tense to refer to past conduct. *See, e.g.*, *McNeill v. United States*, 131 S. Ct. 2218, 2222 (2011) (rejecting argument that "use of the present tense" in federal sentencing provision defining "serious drug offense" as certain crimes for which a ten-year or longer maximum prison term "is prescribed by law" means that federal courts must "determine the maximum sentence ... by looking to the state law in effect at the time of the federal sentencing" and holding instead that the maximum sentence "must be determined according to the law applicable" at the time of the underlying crime); *Rajabi v. Attorney General*, 555 Fed. Appx. 251, 256 (3d Cir. 2014) (unpublished) (rejecting argument that "the statutory definition for a Tier III terrorist organization uses present tense language, and thus the material support bar should not apply where the supported organization is no longer actively engaged in terrorist conduct" and holding instead that present-tense term "engages in" "describes the acts the organization must have undertaken at the time the support was given").

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

Respondents' statute of limitations arguments all suffer from the same fundamental flaw. They rely on provisions that only apply to civil actions in court, not to administrative proceedings like this one. Respondents' arguments are foreclosed by the decision in the *PHH* administrative proceeding, which itself is firmly grounded in Supreme Court precedent. *See PHH Corp., et al.*, 2014-CFPB-0002, Decision of the Director at 10 (June 4, 2015) (relying on *BP America Production Co. v. Burton*, 549 U.S. 84, 91 (2006)), in holding that the Real Estate Settlement Procedures Act's three-year statute of limitations applies only in civil actions brought in court and that it does not apply in Bureau administrative proceedings); *see also CFPB v. ITT Educ. Servs., Inc.*, No. 1:14-CV-00292-SEB, 2015 WL 1013508, at 33 (S.D. Ind. Mar. 6, 2015) (holding that TILA's statute of limitations applied in federal court but noting that it did not apply in Bureau administrative proceedings). As the Director stated in *PHH*, "[t]he section of the CFPA that authorized the Bureau to enforce laws through administrative proceedings does not contain a statute of limitations." *PHH Corp*, Decision of the Director at 10 (June 4, 2015) (citing 12 U.S.C. § 5563). The Director's holding on this issue is binding in this forum and fatal to Respondents' statute of limitations arguments.[8]

As a general matter, statutes of limitations do not apply against the government unless expressly provided by statute. *See Guaranty Trust Co. of N.Y. v. United States*, 304 U.S. 126, 132 (1938) (the government is not subject to any limitations period unless

[8] Although the *PHH* decision is currently on appeal in the United States Court of Appeals for the District of Columbia Circuit, the decision remains the Bureau's official interpretation unless and until it is overruled by the court of appeals or the United States Supreme Court.

Congress explicitly provides otherwise). Furthermore, "[u]nless 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 *Burton*, 549 U.S. 84 (2006); *Intercounty Construction Corp. v. Walter*, 422 U.S. 1 (1975)).[9] Hence, for any statute of limitations to govern the Bureau's claims in this administrative forum, such limitation must be directly set forth in a federal statute.

Respondents first contend that the Bureau's unfairness and deception counts against Carnes are time-barred due to 12 U.S.C. § 5564(g)(1). Resp. Br. at 16-17. However, the Bureau filed this administrative proceeding pursuant to 12 U.S.C. § 5563, not § 5564. *See* Notice ¶¶ 1-2. As seen above, the Director clearly ruled in *PHH* that § 5563 does not contain a statute of limitations. *PHH Corp., et al.*, 2014-CFPB-0002, Decision of the Director at 10 (June 4, 2015). As the Director further explained in his decision, a statute of limitations expressly limited to "actions," cannot be extended to a § 5563 administrative proceeding. *Id.* The Director's holding in *PHH* was a straightforward application of Supreme Court precedent found in *Burton*. *See* 549 U.S. at 91 (holding that the term "action" is "ordinarily used in connection with judicial, not administrative proceedings"). Section 5564(g)(1) applies only to "action[s]" brought by the Bureau. 12 U.S.C. § 5564(g)(1) ("Except as otherwise permitted by law or equity, no *action* may be brought under this title more than 3 years after the date of discovery of the violation to

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[9] *See also Sanford Home for Adults*, 280 N.L.R.B. 1287, 1288 (July 31, 1986); *Rentacolor, Inc., et al.*, No. 9163, 1984 WL 565383, at *19 (F.T.C. Apr. 16, 1984) ("No statute of limitations attaches to administrative proceedings brought under Section 5 of the Federal Trade Commission Act or by the Commission under the Truth in Lending Act[.]"); *Philco-Ford Corp. (Aeronautics Div.)*, No. 14251, 1970 WL 1109 (A.S.B.C.A. Oct. 1, 1970).

which an *action* relates.") (emphasis added). Hence, the statute of limitations in § 5564 simply does not apply to claims brought in this proceeding. *See PHH Corp.*, at 10.[10]

Respondents' arguments regarding the statutes of limitations in 15 U.S.C. § 1640(e) (TILA) and 15 U.S.C. § 1693m(g) (EFTA), Resp. Br. at 19-21, fail for similar reasons: they apply only to actions, not administrative proceedings. The CFPA authorizes the Bureau to enforce violations of TILA and EFTA either administratively, pursuant to § 5563, or in court, pursuant to § 5564. The CFPA is very clear in this distinction between administrative proceedings and civil actions brought in court. Section 5563 plainly authorizes the Bureau to conduct administrative proceedings—like this one—to enforce compliance with the CFPA and statutes like TILA and EFTA. 12 U.S.C. § 5563(a). Section 5564, by contrast, provides that the Bureau may also "commence a civil action" in a "United States district court or in any court of competent jurisdiction of a state in a district in which the defendant is located or resides or is doing business." 12 U.S.C. § 5564(a), (f). Finally, 12 U.S.C. § 5565 expressly provides that the Bureau may obtain the same relief in either an administrative proceeding or in court.

[10] Even if § 5564(g)(1) applied—which it does not—Respondents' arguments regarding the date of discovery are utterly without merit. Respondents offer no reasons as to why the Bureau "knew or should have known" that Carnes's conduct was unlawful as of July 21, 2011 (the designated transfer date) or January 4, 2012 (the date of Director Cordray's recess appointment). Indeed, Respondents' argument that the Bureau knew or should have known that Carnes was violating the law *before* the Office of Enforcement issued its first civil investigative demand (CID) on January 7, 2013, requires the Bureau to "know" about Carnes's unlawful conduct before it had conducted *any* investigation of Carnes. Respondents did not make their last production in response to the January 2013 CID until December 2013, and they never certified that their production was complete. Respondents did not provide their response under the Bureau's Notice and Opportunity to Respond and Advise process until November 14, 2014. Thus, even if § 5564 applied, there is no argument that the Bureau knew or should have known of Carnes's unlawful conduct as of November 18, 2012, the date three years prior to the filing of the Notice of Charges in this matter.

Because both provisions relied upon by Respondents apply expressly to "actions" rather than proceedings, they do not apply to this administrative proceeding. *See PHH*, at 10-12; 15 U.S.C. § 1640(e) (stating that "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") (emphasis added); 15 U.S.C. § 1693m(g) (stating in the section entitled "Jurisdiction of courts; time for maintenance of *action*" that "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") (emphasis added). Furthermore, both of the statute of limitations provisions that Respondents invoke apply only to actions "under this section"—and the relevant "sections" for both statutes govern only private actions by private litigants (or, in the case of TILA, actions by state attorneys general), not federal government administrative proceedings. *See* 15 U.S.C. § 1640 (TILA); *id*. § 1693(m) (EFTA).

Finally, it is indisputable that federal government enforcement of TILA is governed by 15 U.S.C. § 1607(a)(6) and federal government enforcement of EFTA is governed by 15 U.S.C. § 1693o. Both of these statutory provisions are entitled "Administrative Enforcement" and mention the Bureau explicitly. Neither includes a statute of limitations provision.

Respondents' attempt to rely on *ITT Educ. Servs., Inc.*, 2015 WL 1013508, only further serves to support Enforcement counsel's position. Respondents assert that this case supports their position that TILA's statute of limitations applies to administrative enforcement proceedings. Resp. Br. at 20. However, that was a case in which the Bureau chose to proceed in Federal district court, not through an administrative proceeding.

Although the court there found that the statute of limitations in 15 U.S.C. § 1640(e) applied to Bureau actions to enforce TILA *in court*, it expressly noted that the statute of limitations would not apply when the agency instead "resort[ed] to the administrative actions under its power"—like the administrative proceeding here. *ITT Educ. Servs., Inc.*, 2015 WL 1013508, at *33.[11] Indeed, Respondents virtually concede this point in their brief during their discussion of *ITT*, noting that "[t]he ITT court distinguishes between instances when a TILA claim is brought in federal district court and when the claim is brought in a[n] ... administrative forum." Resp. Br. at n.12.

V. The Court Does Not Need to Address Respondents' Retroactivity Arguments

Respondents argue that holding Carnes liable for unfair and deceptive practices that occurred prior to the designated transfer date, July 21, 2011, would have an impermissibly retroactive effect. Resp. Br. at 24-28. While the Bureau disagrees with Respondents' argument, it nonetheless clarifies that Counts III, IV, and VII are limited to deceptive or unfair acts and practices that occurred on or after July 21, 2011. As such, Respondents' retroactivity arguments need not be addressed.

VI. The Notice of Charges Properly States a Claim for Violations of the Truth in Lending Act

Respondents contend that the Bureau did not state a TILA claim because Integrity Advance's contracts were single-payment loans and any rollovers were 'post-consummation' changes which do not have to be disclosed under TILA. Resp. Br. at 22-23. Essentially, Respondents claim that—as a matter of law—Integrity Advance's TILA

[11] The Bureau's position is that the statute of limitations in 15 U.S.C. § 1640(e) applies only to private civil actions, not public enforcement actions filed by the Bureau in district court.

disclosures were lawful. This claim is incorrect because under the default terms of the contracts, Integrity Advance rolled loans over automatically without any additional action whatsoever by the consumers.

The plain language of Integrity Advance's contracts, as properly alleged in the Notice and as admitted by Respondents in the Answer, demonstrates that Integrity Advance's disclosures—as a matter of law—violated TILA. The relevant facts are not in dispute. Integrity Advance's contracts disclosed, among other things, the annual percentage rate, the finance charge, and the total of payments. Answer ¶ 25; *see also* Notice ¶ 27 (including an image of the TILA disclosures from an actual Integrity Advance contract). Integrity Advance calculated the amounts contained in the TILA disclosures by assuming that the loan would be fully repaid in one payment. Answer ¶ 26; *see also* Notice ¶ 26. Integrity Advance also admits that "unless a consumer contacted Integrity Advance *to change the terms of the loan* . . . Integrity Advance renewed the consumer's loan." Answer ¶ 29 (emphasis added); *see also* Notice ¶ 29 (alleging that Integrity Advance automatically renewed consumer loans). Thus, Respondents have admitted that unless customers contacted Integrity Advance to "change the terms" of the loans, the contract's terms *at signing*, albeit in confusing fine print, provided that the loans would roll over automatically. Answer ¶ 29. And thereby Respondents have conceded that consumers had to take additional actions after signing to change the terms of the loans in order for consumers to pay only the amounts disclosed in the contracts. *See* Answer ¶¶ 25, 26, 29.

Respondents' statements otherwise in their motion are disingenuous at best. *See* Resp. Br. at 23 ("There is no question that the contract between Integrity Advance and consumers *at the time of loan consummation* was for a single payment loan which could be extended, *at the consumer's option*, beyond the maturity date.") (emphasis added); *id*. at 24 ("Here, any change to the loan terms necessarily resulted from a payment decision made after the loan was consummated. If consumers did not indicate that they would repay the loan under the initial terms, or if consumers elected to request a renewal, the consumer's repayment obligation changed in accordance with the terms of the contract."). These statements suggest that Integrity Advance would withdraw only a single payment for the full amount owed absent some additional action by consumers, but under the terms of the contract just the opposite was true: Integrity Advance rolled the loans over automatically, which Respondents admitted in their Answer.

The fact that Integrity Advance's contracts were designed to roll over automatically, and thereby accrue additional finance charges, rendered the APR, finance charge, and total of payments contained in the TILA disclosures false. Notice ¶¶ 33-38. Indeed, under the default terms of the contracts, an Integrity Advance consumer would pay five times the disclosed finance charge before any payments were applied to principal, and on a $300 loan would make 11 separate payments totaling $1,065, not $390 as the TILA disclosure would have shown. Thus, as Respondents essentially concede, Integrity Advance disclosed the costs of its loans in a manner that was inaccurate unless consumers took affirmative steps *after* signing the contracts to change the terms of the loans to align them with the disclosures. Any argument that this practice complies with the letter or spirit of TILA strains credulity.

Disclosing a loan as a single payment obligation when that loan automatically renews absent further action from the consumer does not "reflect the credit terms to which the parties are legally bound at the time of giving the disclosures" as Regulation Z requires.[12]

On very similar facts, the only court to address this issue held that—as a matter of law—disclosing the APR, finance charge, and total of payments based on a single payment when the contract automatically rolled over the loan, both violated TILA and was deceptive under the Federal Trade Commission Act. *FTC v. AMG Servs.*, 29 F.Supp.3d 1338 (D.Nev. 2014). In *AMG Services*, as in this case, the defendant made its TILA disclosures by assuming that the loan would be repaid in full in one payment. *Id.* at 1343. The contract in that case also renewed the loan automatically unless the customer contacted AMG Services in advance of the initial repayment date. *Id.* at 1345-6. Based on its review of the contract language, the court in *AMG Services* held that the defendant had violated TILA and that the contract was deceptive. *Id.* at 1354, 1368-72.

Finally, Respondents' claims regarding post-consummation changes cannot salvage its false TILA disclosures. Resp. Br. at 24 (citing 12 C.F.R. § 1026.17(e)). Section 1026.17(e) provides, "If a disclosure becomes inaccurate because of an event that *occurs after* the creditor delivers the required disclosures, the inaccuracy is not a violation of this part, although new disclosures may be required . . . ." 12 C.F.R. § 1026.17(e) (emphasis added). As the official commentary to this section makes clear, this section

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[12] Official Staff Comments, 12 C.F.R. § 226, Supp. I, 226.9(b) cmt. 1 ("*Legal obligation*. The disclosures should reflect the credit terms to which the parties are legally bound at the time of giving the disclosures") (emphasis in original); *see also* 12 C.F.R. § 1026.17(a), (c) (requiring disclosure of "the terms of the legal obligation between the parties."). Courts have been clear that Congress intended that TILA would aid consumers in understanding credit products. *Chase Bank USA, NA v. McCoy*, 131 S.Ct. 871, 874–75 (2011) ("Congress passed TILA to promote consumers' 'informed use of credit' by requiring 'meaningful disclosure of credit terms...'").

applies when the customer has failed to meet his or her obligations under the terms of the agreement, and as a result the creditor has imposed new charges that are allowed by the contract. 12 C.F.R. Pt. 1026, Supp. I, Part 1 ("For example, when the consumer fails a prior commitment to keep the collateral insured and the creditor then provides the coverage and charges the consumer for it, such a change does not make the disclosures inaccurate."). Similarly, the one case cited by Respondents, *Jasper County Savings Bank v. Gilbert*, 328 N.W.2d 287, 291 (Iowa 1982), involves a consumer who protested the failure to include delinquency charges in the TILA disclosures.

The automatic rollover provisions contained in Integrity Advance's contracts simply are not post-consummation changes within the meaning of 12 C.F.R. § 1026.17(e). If an Integrity Advance customer takes no action, and the loan therefore rolls over automatically, the customer has not breached any of his or her obligations under the terms of the loan. The loan is just operating according to its default terms. Indeed, if the customer had taken affirmative action to contact Integrity Advance and request the single payment option—and thereby have the amounts charged actually match the amounts disclosed in Integrity Advance's TILA disclosures—Respondents admit that the customer would be "chang[ing] the terms of the loan." Answer ¶ 29. The fact that the customer does not contact Integrity Advance to "change the terms of the loan" simply is not a situation where the disclosure becomes inaccurate because of an event that *occurs after* the creditor delivers the required disclosures. Integrity Advance's disclosures were inaccurate when made.

VII. Conclusion

Respondents misled consumers for years by providing TILA disclosures that did not reflect the true operation of Integrity Advance's contracts. As demonstrated above, Respondents fail in their efforts to evade liability for their wrongdoing. There is no question that the Bureau had authority to bring this action when it filed the Notice of Charges, and Respondents cannot immunize themselves from liability for their unlawful acts by arguing that their unlawful conduct ceased before the Director was confirmed by the Senate. Further, the statutes of limitations cited by Respondents apply—by their own terms—only to actions, and therefore, they do not apply to this administrative proceeding. Finally, despite Respondents' claims that, as a matter of law, the disclosures were lawful, just the opposite is true: as the well-pleaded allegations of the Notice and Respondents' Answer demonstrate, Integrity Advance's disclosures, as a matter of law, did not "reflect the credit terms to which the parties are legally bound at the time of giving the disclosures" as Regulation Z requires.

For all the foregoing reasons, the Bureau respectfully requests that Respondents' motion be denied in full.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of January 2016, I caused a copy of the foregoing Bureau's Opposition to Respondents' Motion to Dismiss 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), Curtis E. Renoe (Curtis.e.renoe@uscg.mil), Administrative Law Judge Parlen L. McKenna (cindy.j.melendres@uscg.mil), and served by email on the Respondents' counsel at the following addresses:

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