

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’ RESPONSE TO THE
DIRECTOR’S ORDER DIRECTING
THE PARTIES TO RESPOND**

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Pursuant to Director Cordray’s March 9, 2017 Order Directing Parties to Respond, Dkt. 204, Respondents respectfully submit this Response.

As a general matter, Respondents agree that withdrawal of the notification that this matter has been submitted for final Bureau decision would “help minimize unnecessary or duplicative proceedings and would facilitate a more efficient resolution of this matter.” Dkt. 204 at 2. However, Respondents seek clarification as to the timing of the Director’s proposed re-notification submitting this matter for final Bureau decision. Specifically, Respondents take the position that re-notification in this matter would be more appropriate not only “once *PHH* has been resolved,” but also upon the resolution of *Lucia v. SEC*, No. 15-1345 (D.C. Cir. 2016) and *Bandimere v. SEC*, No. 15-9586 (10th Cir. 2016). Further, Respondents take the position that “resolution” in this sense means not only decisions by the Circuit Courts of Appeal, but also resolution of any subsequent petitions for certiorari to, or decisions by, the United States Supreme Court in *PHH*, *Lucia*, and *Bandimere*.

As the Director acknowledged, in granting *en banc* review in *PHH* the D.C. Circuit directed the parties to address the effect of a potential finding in *Lucia* that the Security and Exchange Commission's ("SEC's") administrative law judge ("ALJ") was an "inferior officer," required to be appointed pursuant to Article II of the Constitution, and not merely an employee. In so doing, the D.C. Circuit has recognized the interconnected nature of *PHH* and *Lucia* – particularly that the resolution of the Appointments Clause issue as to the SEC's ALJs could apply to ALJs used by the CFPB as well.

Relatedly, as the Director is aware, a panel of the Court of Appeals for the Tenth Circuit issued a decision in *Bandimere v. SEC* holding that the SEC's ALJ was an "inferior officer," who was not appointed in accordance with Article II of the Constitution. *See* Respondents' Notice of Supplemental Authority, Dkt. 197. In that case, the Tenth Circuit set aside the SEC's order, holding that doing so was the only remedy for the constitutional defect in the appointment of the ALJ. *See id.* Thus, *Bandimere* is directly at odds with the D.C. Circuit's now-vacated panel decision in *Lucia*. *Id.* On March 13, the SEC sought *en banc* review of the panel's decision in *Bandimere*, raising arguments that largely track the *Lucia* panel opinion.

Here, Respondents have the option under 12 U.S.C. § 5563(b)(4) to appeal a decision of the Director to either the D.C. Circuit or the "circuit in which the principal place of the covered person is located,"¹ which in this case would include the Tenth Circuit by virtue of Respondents residing in Kansas.² Thus, for the same reasons that a final Bureau decision in this matter should

¹ By citing this provision, Respondents do not concede or in any way waive their arguments that Respondents are not and were not "covered persons" during any time when the Bureau has had authority to nonbanks. *See, e.g.*, Respondents' Opening Appeal Brief, Dkt. 184 at 8-9.

² Answer, Dkt. 21, ¶ 6.

follow resolution of *PHH* and *Lucia*, the Director's future re-notification also should follow resolution of *Bandimere*.

Respectfully submitted,

Dated: March 24, 2017

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CERTIFICATION OF SERVICE

I hereby certify that on the 24th day of March, 2017, I caused a copy of the foregoing Respondents' Response to the Directors Order Directing Parties to Respond 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 (aljdoctcenter@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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