UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	)	
	)	**JOINT STATEMENT**
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,	)	
Respondents.	)	

JOINT STATEMENT

On July 10, 2018, Acting Director Mulvaney ordered Enforcement Counsel and Respondents to file a "joint statement" regarding further proceedings in the above-captioned matter. Specifically, the order requires the parties to address the applicability of *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018), and *Lucia v. SEC*, 138 S. Ct. 2044 (2018), to this proceeding. The order also requires the parties to address whether there is any possibility that this matter could be resolved through settlement.

The parties agree that the *Lucia* decision applies to this matter, and that the Administrative Law Judge (ALJ) who presided over the proceedings below was not constitutionally appointed. The parties disagree, however, as to how the remedy afforded in *Lucia* should be applied to this case, particularly given the threshold jurisdictional and authorities

questions currently pending before the Acting Director. The parties also agree that, at this time, settlement of the underlying claims is unlikely.

The parties disagree regarding the import of the *PHH* en banc decision, and therefore also disagree about how this matter should proceed. Respondents believe that all of Enforcement Counsel's claims are time-barred or otherwise precluded on threshold jurisdictional grounds, and the Acting Director should so rule now. Enforcement Counsel's position is that *Lucia* requires a new hearing before a properly appointed ALJ, and therefore this matter should be remanded to the Bureau's ALJ to address all of the issues raised in this Joint Statement (including statutes of limitations) in whatever further proceedings the ALJ decides are necessary to comply with the *Lucia* decision. As allowed by the July 10 order, the parties have laid out their respective positions in more detail below.

I. Procedural History

Enforcement Counsel filed a Notice of Charges against Respondents Integrity Advance and James Carnes on November 18, 2015. *See* Dkt. 1. The Notice asserts Truth in Lending Act (TILA), Electronic Fund Transfer Act (EFTA), and Consumer Financial Protection Act (CFPA) claims against Respondents related to their operation of a company that originated online payday loans. *Id*. Respondents filed a motion to dismiss, asserting that applicable statutes of limitations or the Bureau's lack of jurisdiction and authority with respect to Respondents barred all of the asserted legal claims. *See* Dkt. 28. The ALJ denied Respondents' motion, relying at least partially on the Bureau Director's decision in *PHH Corp., et al*., 2014-CFPB-0002. *See* Dkt. 75.

After a trial before the ALJ and the issuance of a recommended decision (Dkt. 176), Respondents appealed to the Bureau Director on numerous grounds, including that the claims were barred by statutes of limitations and that the Bureau lacked the authority to pursue UDAAP claims against Respondents as nonbank covered persons. *See* Dkt. 184. During the time between

the ALJ's denial of Respondents' motion to dismiss and Respondents' opening appellate brief, a panel of the United States Court of Appeals for the District of Columbia Circuit reversed portions of the Director's *PHH* decision and ruled that the three-year statute of limitations found in the Real Estate Settlement Procedures Act (RESPA) applied to the Bureau's RESPA cause of action. *See PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir 2016). Respondents argued in their appellate brief that application of the court's reasoning required the dismissal, on statute of limitations grounds, of the claims in this matter. *See* Dkt. 184. Enforcement Counsel disagreed with this position. *See* Dkt. 186. On March 31, 2017, the Bureau Director stayed the above-captioned matter while the en banc D.C. Circuit considered the petition for review in *PHH*. *See* Dkt. 208. Earlier this year, the full D.C. Circuit reinstated the portion of the panel decision finding that the Bureau's RESPA claims were time-barred. *PHH Corp. v. CFPB*, 881 F.3d 75, 83 (D.C. Cir. 2018).

In their appeal to the Director from the ALJ's recommended decision, Respondents also argued that the ALJ had not been appointed in conformance with the Constitution's Appointments Clause. *See* Dkt. 184. Enforcement Counsel disagreed with Respondents' position (*see* Dkt. 186), and the issue was left unresolved given the *PHH*-related stay referenced above. After the en banc D.C. Circuit ruling in *PHH*, Acting Director Mulvaney ordered that this matter remain stayed pending the Supreme Court's ruling in *Lucia v. SEC*, which concerned whether a Securities and Exchange Commission (SEC) ALJ was subject to the Constitution's Appointments Clause. The Court ruled in June of this year that the ALJ was an "Officer of the United States" subject to the Appointments Clause. *Lucia*, 138 S. Ct. 2044 (2018).

II. The Parties Agree that the *Lucia* Decision Applies to This Case

Respondents and Enforcement Counsel agree that the Supreme Court's decision in *Lucia v. SEC* applies to this matter. The Bureau's administrative process, wherein an ALJ issues a

recommendation to an agency-level decision-maker, mirrors the SEC process described in the Court's decision. *Id*. at 2053-54. The ALJ who presided over the pre-trial and trial stages of this matter also exercised the authorities (ruling on motions, making evidentiary determinations, etc.) that the Court referenced in deciding that the SEC's ALJs should be considered "Officers of the United States." *Id*. Finally, the parties are aware of no evidence that the presiding ALJ here was appointed by a "Head of Department."

III. Respondents' Position as to the Application of the *Lucia* Decision to this Case

There are several dispositive issues currently pending before the Acting Director. Resolution of these issues, discussed below, would eliminate some or all of Enforcement Counsel's claims, removing the need to remand this matter for additional proceedings. Importantly, dismissing this proceeding on issues currently before the Acting Director would conserve agency resources. Resolution of this matter on one of these grounds is also appropriate under the well-established doctrine of constitutional avoidance because it would allow the Acting Director to avoid ruling on the constitutional question inherent in *Lucia*. *See, e.g.*, *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

The Acting Director should dismiss the notice of charges for the reasons set out below.

A. The Bureau Lacks Authority to Pursue CFPA Claims Against Respondents

Respondents were never "covered persons" within the meaning of the CFPA at a time after authority as to nonbank covered persons had vested in the Bureau through the lawful appointment and confirmation of a Director. The Bureau may only take action under the CFPA against 'covered persons." 12 U.S.C. §§ 5531, 5536(a). The Bureau, however, did not have authority to exercise consumer financial protection laws over nonbank "covered persons" until a

Director was lawfully appointed. Section 1066(a) of the CFPA provides that the Bureau could *only* exercise its *transferred* authority – that is the authority that transferred to the agency from the federal banking (or prudential) regulators – before there was a lawfully-appointed Director. In other words, prior to the lawful appointment of a Director, the Secretary of the Treasury's interim authority was limited to transferred authorities "under Part F," *see* 12 U.S.C. § 5586(a), which *does not include* the authority to enforce consumer financial protection laws as to nonbanks, such as Respondents. Moreover, the FTC did not transfer any authorities to the Bureau, *id.* § 5581(b)(5)(A), so the notion that the Bureau "stepped into the shoes" of the FTC is incorrect.

Section 1066 of the CFPA mandates that there be a lawfully-appointed Director in order for the agency's full powers and authorities to be effective. Before July 16, 2013, there was no individual who had been appointed according to the Appointments Clause, as necessary, to carry out the agency's full authorities. *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2577–78 (2014) (holding that Director Cordray's recess appointment was unconstitutional). The CFPA creates specific agency authorities that are "substantial powers" and "may be discharged only by persons who are 'Officers of the United States' within the language" of the Appointments Clause. *Printz v. United States*, 521 U.S. 898, 922 (1997). Here, Integrity Advance stopped making loans in December 2012, which the Bureau does not dispute. By July 16, 2013, when the Bureau had a Director who was lawfully in place and in whom the authorities of the Bureau vested, Respondents were not engaged in business activities that were within the Bureau's jurisdiction;

indeed, Integrity had wound down operations pursuant to the sale of the company's assets and existed only as nonoperational LLC.[1]

Notably, the timing of the Bureau Director's lawful appointment and Respondents' cessation of business activities presents a question of the Bureau's authority that is unique to this case. Respondents are not aware of any other Bureau enforcement action in which a respondent ceased business activities after the statutory transfer date but before July 13, 2013 when the Bureau Director was both lawfully appointed and the requisite nonbank covered person authority vested in the Bureau. And, given that it is currently more than five years from July 13, 2013, the five-year statute of limitations governing government enforcement actions generally, 28 U.S.C. § 2462, would bar any future Bureau actions involving conduct that began before July 2013 such that the authorities question presented here is *sui generis*.

B. Only Claims Against Respondents In A Final Order Are Subject To Constitutional Remedies Under *Lucia*

1. A New Hearing Should Be Held Only As To Claims Entered Against Respondents in a Final Order by the Bureau

Respondents were subject to an unconstitutional process when Enforcement Counsel elected to pursue an administrative enforcement action before a hearing officer who was not properly appointed under the Constitution. *Lucia*, 138 S. Ct. at 2055. If any claims against Respondents survive the instant appeal, those claims would be necessarily included in a final order against Respondents and, as a result, those claims would be subject to relief from the constitutional violation. As shown in the Supreme Court's decision in *Lucia*, the relief for such constitutional violations should be tailored to the injured party. In *Lucia*, the Court remanded the

[1] Respondents incorporate by reference their arguments in the Motion to Dismiss (Dkt. 28-A & 34) and its briefing on appeal to the Bureau Director.

case for a new hearing after the appellant's other grounds for appeal had been rejected by the lower court. The Court also added the condition that the new proceeding must occur before a new ALJ. *Id.*

The fact that Enforcement Counsel elected to proceed in an unconstitutional manner does not, therefore, provide Enforcement Counsel with a second bite at the entire apple. If the Acting Director dismisses any claims raised on this appeal, the constitutional relief to which Respondents are entitled under *Lucia* would be moot as to those claims. Moreover, to require Respondents to relitigate claims that could be disposed of by the Acting Director serves only to compound the constitutional violation that Respondents have suffered. Such a result flies in the face of the Supreme Court's decision in *Lucia*, and ignores the severity of fundamental constitutional violations. *See Edmond v. United States*, 520 U.S. 651, 659 (1997) (stating that the Appointments Clause is one of "the most significant structural provisions of the constitutional scheme"). Such a result also ignores the important goal of discouraging constitutional violations. *Lucia*, 138 S. Ct. at 2055 (citing *Ryder v. United States*, 515 U. S. 177, 183 (1995) ("Appointments Clause remedies are designed not only to advance those purposes directly, but also to create '[]incentive[s] to raise Appointments Clause challenges.'").

2. Enforcement Counsel Must File a New Notice of Charges To Proceed On Any Claims Not Dismissed In This Appeal

To remedy the constitutional violation inherent in this proceeding, and to discourage such constitutional violations, a new hearing must be held as to claims not dismissed by the Acting Director pursuant to this appeal. *See Freytag*, 501 U.S. at 879 (a defect in the appointment of an adjudicator "goes to the validity of the [administrative] proceeding"); *L. A. Tucker Truck Lines*, 344 U.S. at 38 (failure to appoint an ALJ in compliance with the Administrative Procedure Act "was an irregularity which would invalidate a resulting order"). Crucially, a new hearing before a

constitutionally-appointed ALJ[2] would require that Enforcement Counsel file a new Notice of Charges. Indeed, all pre-hearing briefing and argument in the prior, unconstitutional proceeding is necessarily invalid.

3. Applicable Statutes of Limitations Prohibit Enforcement Counsel from Subjecting Mr. Carnes to a New Proceeding

While a new proceeding is the appropriate Constitutional remedy for any claims that are not dismissed by the Acting Director, as discussed herein, that remedy is inapplicable to Mr. Carnes. Because the statute of limitations applicable to Bureau actions has expired with respect to Mr. Carnes's alleged conduct (to the extent these activities were ever within the Bureau's authority), the proceedings against him must be dismissed.

The limitations period set out in 12 U.S.C. § 5564(g)(1) and 28 U.S.C. § 2462 prohibit the Bureau from re-starting enforcement proceedings as to Mr. Carnes – whose alleged violations occurred more than five years ago. Section 5564(g)(1) states that "[e]xcept 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 which an action relates." 12 U.S.C. § 5564(g)(1). Section 2462 states that a "proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462. The Bureau has failed to do so here.

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[2] The Bureau's organizational chart shows one ALJ, the Honorable Christine L. Kirby. However, Respondents have not identified any record indicating that the ALJ was appointed by a "Head of a Department" as required under the Appointments Clause, or, indeed, appointed in any manner. Even if former Director Cordray purported to appoint ALJ Kirby, any such appointment is defective because the Bureau "is established in the Federal Reserve System," 12 U.S.C. § 5491(a), and is not a "Department," and, therefore, former Director Cordray was not the "Head of an Department." *See Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010) (holding that a "department" must be "a free-standing component of the Executive Branch, not subordinate to or contained within any other component"). Respondents reserve all rights with respect to the deficiency of the appointment of ALJ Kirby.

The Bureau brings or "commences" an adjudicative proceeding by filing a Notice of Charges. 12 C.F.R. § 1081.200. However, because none of the ALJs available to the Bureau at the time Enforcement Counsel elected to pursue administrative adjudication and filed the Notice of Charges had been constitutionally appointed, the Notice of Charges itself was invalid and null. *See Freytag*, 501 U.S. at 879 (discussing the validity of adjudicative proceedings); *cf. Papasan v. Allain*, 478 U.S. 265, 276 (1986) (government action taken pursuant to unconstitutional authority is without legal effect, because the "authorization for such action is a nullity" (citing *Ex parte Young*, 209 U.S. 123, 159-60 (1908)). Since the Notice of Charges had no legal effect, the Bureau never brought or commenced a lawful proceeding against Respondents.

As with any Notice of Charges that the Bureau files, any new hearing brought against Respondents will need to comply with the applicable statutes of limitations. As Mr. Carnes was not subject to any tolling agreement, the applicable statues of limitations continued to run and have now expired. Specifically, it has now been six years since the relevant limitations periods began to run, so charges against Mr. Carnes would fall outside both the CFPA's three-year statute of limitations under 12 U.S.C. § 5564(g)(1), as well as the five-year statute of limitations governing government enforcement actions generally, 28 U.S.C. § 2462. Accordingly, all charges against Mr. Carnes must be dismissed.

IV. Respondents' Position on the *PHH* Decision - The Bureau's CFPA, TILA, and EFTA Claims are Time-Barred[3]

A. Statutes of Limitations Apply to the Bureau's Administrative Adjudications

The Bureau must adhere to the same statute of limitations regardless of whether it brings claims in federal court or administrative adjudication. As noted in the Acting Director's Order, the D.C. Circuit's *en banc* decision in *PHH Corp. v. CFPB* reinstated the panel's holding regarding the application of statutes of limitations in administrative adjudications before the Bureau. The three-judge panel of the D.C. Circuit unequivocally rejected former Bureau Director Cordray's assertion that no statute of limitations applied to the Bureau when proceeding in its administrative forum. Moreover, while the applicable limiting provision at issue in *PHH* fell under the Real Estate Settlement Procedures Act, the court expressly cited *this case* when it explained that the Court's analysis "[w]ould extend to all 19 of the consumer protection laws that Congress empowered the CFPB to enforce. *Cf. Integrity Advance, LLC*, 2015-CFPB-0029, Doc. No. 33, CFPB Opp. to Mtn. to Dismiss, at 12." *PHH*, 839 F.3d at 51.

Neither the former Director nor Enforcement Counsel has ever provided a justification for why Congress would allow the Bureau to disregard limiting provisions in its administrative forum, but not when proceeding in federal court on identical causes of action and seeking identical remedies. Such an application of the CFPA is illogical, and tantamount to Congress rejecting, through silence, well-established principles of fairness and reasonable repose that underlie all such statutes of limitations. As the D.C. Circuit stated, Congress does not "hide elephants in mouse holes." *Id.* at 52. Accordingly, there can be no meaningful dispute that the

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[3] After application of the relevant statutes of limitations and tolling agreements, only Enforcement Counsel's CFPA claims against Integrity Advance were filled within the permitted time period.

limitations provisions relevant to this case – 12 U.S.C. § 5564(g)(1) (CFPA), 15 U.S.C. § 1640(e)(1) (TILA), and 15 U.S.C. § 1693m(g) (EFTA) – apply to actions brought in the Bureau's administrative forum.

B. Claims Against Mr. Carnes Were Brought Outside of the CFPA's Limiting Provisions

The CFPA's statute of limitations bars claims against Mr. Carnes. As Respondents have explained in prior briefing, Enforcement Counsel knew or should have known about Integrity Advance's alleged violations and Mr. Carnes's role with the company (which serves as the basis for his liability), over three years before filing its Notice of Charges. *See, e.g.*, Dkt. 184. Since no tolling agreement was ever executed as to Mr. Carnes, Enforcement Counsel's claims against him were time barred when it filed the Notice of Charges.

C. TILA and EFTA Claims Against Integrity Advance Were Brought Outside of the statutes' Limiting Provisions

Applicable statutes of limitations, which expired prior to the execution of any tolling agreements, bar claims against Integrity Advance under TILA and EFTA. TILA and EFTA each have a one-year statute of limitations regarding civil liability, which time-bars Count Numbers I and V. The Bureau is bound by the "one-year statute of limitations imposed by TILA's civil liability provision." *CFPB v. ITT Educ. Servs., Inc.*, No. 1:14-CV-00292-SEB, 2015 WL 1013508, at *33 (S.D. Ind. Mar. 6, 2015). An identical analysis applies to EFTA in § 1693m. As Respondent's have explained, application of the one-year statute of limitation under TILA and EFTA is appropriate whether Enforcement Counsel elects to pursue actions in federal court or in the Bureau's administrative forum. *See, e.g.*, Dkt. 184.

To the extent the Acting Director is not inclined to dismiss the charges on any of the grounds described by Respondents in this Joint Statement, Respondents respectfully request the opportunity for additional briefing.

V. Enforcement Counsel's Position on the *PHH* Decision

Given that *Lucia* requires "a new hearing before a properly appointed official,"[4] the Acting Director should remand this matter to the Bureau's constitutionally appointed ALJ for the required "new hearing." Remand would ensure that any decision by the Bureau Director on the Bureau's authority or the statute of limitations would not be subject to challenge on the ground that it was tainted by the earlier proceedings conducted by an improperly appointed ALJ.

On remand, the ALJ can decide what further proceedings are necessary to comply with the Supreme Court's mandate, and rule in the first instance on Respondents' arguments. Allowing the ALJ to decide these issues on remand is particularly appropriate given that, for those claims subject to the statute of limitations in 12 U.S.C. § 5564(g)(1), resolution of Respondents' statute of limitations defense will involve questions of fact regarding, among other things, when Enforcement Counsel discovered the alleged violations. More generally, remand comports with the structure of the Bureau's administrative rules, which provide that the ALJ first hears evidence and issues a recommended decision based on her findings of fact and conclusions of law (12 C.F.R. § 1081.400(c)), and only then does the Bureau Director issue a final decision "[u]pon appeal from or upon further review of a recommended decision." 12 C.F.R. § 1081.405(a).

If the Acting Director is inclined not to remand the issues raised in this Joint Statement to the ALJ, Enforcement Counsel respectfully requests the opportunity to fully brief the issues.

VI. Parties' Position on Settlement

The parties agree that there are no reasonable prospects for settlement at this time.

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[4] 138 S. Ct. at 2055 (internal quotation marks omitted).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of August 2018, I caused a copy of the foregoing Joint Statement to be filed by electronic transmission (e-mail) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), and served by email on the Respondents' counsel at the following addresses:

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