UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	)	ORDER DENYING RESPONDENTS' MOTION TO DISMISS
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,	)	
Respondents.	)	

Procedural History

On March 26, 2020, Respondents filed *Respondents' Motion to Dismiss* and *Respondents' Brief in Support of their Motion to Dismiss* (Doc 260) and requested oral argument. On April 9, 2020, the Consumer Financial Protection Bureau ("CFPB" or "Bureau") filed *Enforcement Counsel's Consolidated Opposition to Respondents' Motion to Dismiss and Respondents' Motion to Amend Answer* (Doc. 264). On April 15, 2020, Respondents filed a consolidated reply brief which addressed *inter alia Respondents' Motion to Dismiss* (Doc. 265).

Respondents' Motion

Counsel for Respondents ("RC") assert that the CFPB does not have legal enforcement authority over Respondents. They contend that the CFPB did not obtain the ability to regulate nonbanks until there was a lawfully appointed Director; that the CFPB's first Director was not lawfully appointed until July 16, 2013; that Respondents never engaged in conduct within the CFPB's jurisdiction; and that the CFPB's lack of authority cannot be cured. Doc. 260 at 5-13. RC also argue that Counts I and II should be dismissed because the *Notice of Charges* fails to state a claim under the Truth in Lending Act (TILA) and its implementing regulation, Regulation Z. *Id.* at 13-16. Lastly, RC argue that Counts III, IV, and V should be dismissed because the CFPB failed to provide fair notice of the prohibited conduct. *Id.* at 16-18.

CFPB's Response

Enforcement Counsel ("EC") for the CFPB assert that the Bureau had a confirmed Director and was vested with the full powers granted by Congress on the date that this proceeding was initiated, and there is no basis to argue that the Bureau can only enforce laws against those who continued violating the law after a Director was confirmed. Doc. 264 at 5-9. They also argue that the *Notice of Charges* properly states a claim for violations of TILA. *Id.* at 9-13. Lastly, EC argue

that Respondents have forfeited a fair notice defense after more than four years into the proceeding and even if it has not been forfeited, Respondents had fair notice of the prohibited conduct. *Id.* at 13-15.

ANALYSIS

I. Legal Standard

Pursuant to the Bureau's *Rules of Practice for Adjudication Proceedings* ("*Rules*"), "[a] respondent may file a motion to dismiss asserting that, even assuming the truth of the facts alleged in the notice of charges, it is entitled to dismissal as a matter of law." 12 C.F.R. § 1081.212(b). RC argue that a motion to dismiss should be granted if an agency cannot show that Congress has delegated authority over the defendant. Doc. 260 at 4 (citing *FTC v. Compagnie De Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1315 (D.C. Cir. 1980)). Additionally, they argue that a motion to dismiss should be granted if the complaint does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). EC argue, in opposition, that administrative proceedings are governed by different standards and that "[a]n administrative agency merely has to show that respondents 'understood the issue' and were 'afforded full opportunity' to defend their conduct." Doc. 264 at 3 (quoting *Aloha Airlines, Inc. v. Civil Aeronautics Bd.*, 598 F.2d 250, 262 (D.C. Cir. 1979)).

Since there is no case law analyzing the Bureau's standard for dismissal under Rule 212(b), and Federal Rule of Civil Procedure (FRCP) 12(b)(6) is sufficiently similar, the case law regarding FRCP 12(b)(6) will be generally relevant to my analysis. I note, however, that if the *Notice of Charges* is sufficiently pled under the standards set forth for FRCP 12(b)(6), it will necessarily survive review under the broader standard set forth by EC.

II. Does the CFPB have legal enforcement authority over Respondents?

RC assert that the CFPB did not have legal enforcement authority over Respondents, or any nonbank, until a Director was lawfully appointed. Doc. 260 at 5. They assert that the Treasury Secretary was only authorized to execute the functions enumerated in Subtitle F of the Consumer Financial Protection Act ("CFPA"), which includes transferred authorities but not enforcement over nonbanks. *Id.* Rather, they contend that the Director was lawfully appointed on July 16, 2013, according to the Supreme Court's analysis in *NLRB v. Canning*.[1] *Id.* at 8-9. They further argue that Respondents were never a "covered person" under the CFPA because Integrity Advance ceased operations in December 2012, before any lawfully appointed Director had enforcement authority. *Id.* at 10. Finally, they argue that Director Cordray's *Notice of Ratification* did not and cannot create authority that never existed in the first place and therefore, the lack of legal authority cannot be cured. *Id.* at 11-13.

EC assert that the Bureau had authority to enforce the law when it filed the *Notice of Charges* and that it is irrelevant whether the Bureau could have brought the proceeding earlier. Doc. 264 at 5-6. They assert that Respondents' view that the Bureau only has authority over

[1] *NLRB v. Canning*, 573 U.S. 513, 517-21, 556-57 (2014)

Respondents at the time they acted as "covered persons" and thus cannot be held liable now for unlawful actions committed before is nonsensical. *Id.* at 6.

The parties do not dispute that at least by July 16, 2013, and certainly by November 18, 2015, when the CFPB filed the *Notice of Charges*, the CFPB had a lawfully appointed Director and was vested with all of the powers prescribed by Congress in the Dodd-Frank Act. EC do not address the question of whether the Director was lawfully appointed before July 16, 2013. There is no reason that the Supreme Court's analysis in *NLRB v. Canning*, finding President Obama's recess appointments of three NLRB members to be unconstitutional, would not apply to the Bureau where the recess appointment of the Director was made on the same day and in the same manner. The question, therefore, is whether the CFPB could have initiated this proceeding before the Director was lawfully appointed on July 16, 2013, and if not, whether the CFPB has authority to initiate proceedings for unlawful conduct that occurred before the Director was lawfully appointed.[2]

RC's analysis of the Dodd-Frank Act language to argue that the Treasury Secretary was only authorized to execute functions enumerated in Subtitle F of the CFPA is compelling. 12 U.S.C. § 5586(a) states that "[t]he Secretary is authorized to perform the functions of the Bureau *under this part* until the Director of the Bureau is confirmed by the Senate in accordance with section 5491 of this title." (emphasis added). As RC note, the power to bring Enforcement actions was established under Subtitle E of the CFPA, a different "part" than that recognized in the quoted language above (Subtitle F). "It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word." *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879).

One may argue that the functions that the Secretary was authorized to perform include "all authority to . . . issue orders . . . pursuant to any Federal consumer financial law," 12 U.S.C. § 5581(a)(1)(A), which would necessarily include orders promulgated from hearings or adjudication proceedings pursuant to 12 U.S.C. § 5563. However, a closer reading of the rest of 12 U.S.C. § 5581 makes clear that while § 5581(a) *could* allow for a broader definition of "consumer financial protection functions" to include "orders" promulgated through administrative proceedings, § 5581(b) limits the consumer financial protection functions to those transferred from the enumerated transferor agencies. Supervision of nonbank lenders, including Respondents, was not one of these transferred functions.

Additionally, the Inspectors General of the Department of the Treasury and Board of Governors of the Federal Reserve System interpreted this same section to grant "authority to the Secretary of the Treasury (Secretary) to perform the Bureau's functions included under subtitle F of title X of the Dodd-Frank Act."[3] Until a director was confirmed, the Inspectors General found

[2] I note that RC do not specify to which counts their arguments concerning jurisdiction apply. Since they rely on an analysis of the CFPA language and the definition of "covered person," and never discuss whether the CFPB had jurisdiction under TILA and EFTA (Counts I and V, respectively), I assume these arguments apply only to Counts II, III, IV, VI, and VII.

[3] Letter, Joint Response by the Inspectors General of the Department of the Treasury and Board of Governors of the Federal Reserve System: Request for Information Regarding the Bureau of Consumer Financial Protection, 2 (Jan. 10, 2011), *available at* https://oig.federalreserve.gov/reports/Treasury_OIG_Posted_PDF_-_Response_CFPB.pdf.

that the Secretary had the authority to carry out only the functions described in Subtitle F, the transferred authorities found at 12 U.S.C. §§ 5581(b), 5583. *Id.* at 5, 5 n.3.

Thus, I conclude that the Secretary was not authorized to initiate this proceeding before the Director was lawfully appointed on July 16, 2013. So, the remaining question is whether the CFPB can bring a proceeding for unlawful conduct that occurred before the Director was lawfully appointed. RC argue that because the CFPB could not have brought an enforcement action against Respondents before July 16, 2013, Respondents never offered or provided a consumer financial product or service or otherwise engaged in any business activities over which the CFPB has jurisdiction, and therefore were never a "covered person" under 12 U.S.C. § 5481(6). Doc. 260 at 10; *see also* Doc. 265 at 1. Here, RC conflate the CFPB's lack of authority to initiate an enforcement proceeding at a certain time with the existence of laws prohibiting certain conduct during that same time.

A "covered person" is defined as "(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person." 12 U.S.C. § 5481(6). RC argue that because it is defined in the present tense, the definition does not extend to past actions and a "covered person" cannot include "a person or entity that provided a consumer financial product or service in the past." Doc. 260 at 10; *see also* Doc. 265 at 1. RC are correct to the extent that the present tense definition means that a person or entity cannot be deemed a "covered person" for actions that occurred before the definition was effective. However, the definition of "covered person" went into effect on July 22, 2010.[4] This means that beginning on that date, Respondents were "covered persons," in the then-present tense.

The substantive provisions under which the CFPB brought this action went into effect on July 21, 2011, the designated transfer date.[5] Regardless of whether the Bureau had the authority to enforce the law, the prohibition against conduct deemed unlawful under the CFPA was effective on that date. As EC note, there is "no principle . . . that a substantive prohibition does not take effect until a federal government agency gains the power to enforce it." Doc. 264 at 8. Respondents were "covered persons" who were subject to the CFPA's prohibitions on "covered persons" by July 21, 2011. It would render the law's effective dates meaningless to find that the CFPB could not enforce violations of the law that occurred prior to the constitutional appointment of a Director.

Therefore, I find that the Bureau has legal enforcement authority over Respondents for alleged violations of the CFPA beginning on July 21, 2011. As such, I need not reach RC's argument regarding ratification.

III. Does the *Notice of Charges* fail to state a claim under TILA and Regulation Z for Counts I and II?

[4] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 4, *codified at* 12 U.S.C. § 5301 note.

[5] *Id.* § 1037, *codified at* 12 U.S.C. § 5531 note ("This subtitle [subtitle C (§§ 1031–1037), enacting this part] shall take effect on the designated transfer date."); 75 Fed. Reg. 57252, 57252 (Sept. 20, 2010) (designating July 21, 2011, as the "designated transfer date").

RC assert that the *Notice of Charges* fails to state a claim under TILA and Regulation Z for Counts I and II because Integrity Advance's TILA disclosure reflects the single-payment legal obligation between Integrity Advance and consumers, complying with TILA's strict disclosure requirements under 12 C.F.R. §§ 1026.17, 1026.18. Doc. 260 at 14. They assert that the *Notice of Charges* attempts to create a new TILA disclosure standard that accounts for the likely extension of the contract after consummation, which is not required under TILA or Regulation Z. *Id.*

EC assert that because "Regulation Z requires that loan disclosures 'reflect the terms to which the consumer and creditor are legally bound as of the outset of the transaction,'" and Integrity Advance's contracts were designed to automatically roll over without any additional action from consumers, that Respondents' disclosures violated TILA as a matter of law. Doc. 264 at 9.

Whether the loan contracts were for a single payment obligation with the option to renew or whether they were multi-payment installment loans is an issue I need not address here. For the purpose of Rule 212(b), we assume as true that the loans were multi-payment installment loans while the disclosures were for single-payment loans. As such, I find that the *Notice of Charges* "state[s] a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.

The *Notice of Charges* describes in detail over twenty-two paragraphs the application process to obtain a loan from Respondents and the contract utilized for the loans. These pleadings represent more than "threadbare recitals" and are supported by more than "mere conclusory statements," as it describes in an additional nine paragraphs how Respondents' alleged conduct violates TILA. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). The pleadings contain sufficient factual content to allow for the "reasonable inference that the [respondent] is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

As noted above, by virtue of meeting the pleading requirements outlined in *Twombly* and *Ashcroft*, I find that the *Notice of Charges* also meets the requirements outlined in the Bureau's *Rules* and gives Respondents sufficient notice to understand the issue and afford them full opportunity to defend their conduct. *See Aloha Airlines, Inc.*, 598 F.2d at 262.

IV. Should the UDAAP claims in Counts III, IV, and VII be dismissed for failure to provide fair notice?

RC assert that the claim alleging unfairness in Count III and the claims alleging deception in Counts IV and VII should be dismissed because Respondents were not provided fair notice of the prohibited conduct. Doc. 260 at 16.

EC counter that this defense should be rejected because Respondents have forfeited it and even if they could assert it, Respondents did have fair notice of the Bureau's unfairness and deception claims. Doc. 264 at 13.

As I described in my *Order Denying Motions to Stay and Dismiss* (Doc. 257), the D.C. Circuit Court has analyzed the timeliness of affirmative defenses under FRCP 8(c), and stated that

"it is well-settled that a party's failure to plead an affirmative defense generally results in the waiver of that defense and its exclusion from the case."[6] Additionally, while "some circuits permit parties to raise affirmative defenses for the first time in dispositive motions where no prejudice is shown," the D.C. Circuit held that "Rule 8(c) means what it says: a party must first raise its affirmative defenses in a responsive pleading before it can raise them in a dispositive motion."[7]

As I concluded previously, the Bureau's Rule 201(b) is clear that affirmative defenses must be set forth in the answer absent any special circumstances. I do not find any such special circumstances in the matter at hand, and RC assert none.[8]

On the contrary, I find that since Respondents themselves note that a number of courts have previously considered and rejected such fair notice arguments regarding the unfairness and deception provisions of the CFPA, even if RC could make a case that there were circumstances in this case that should allow them to assert this defense at this stage of the proceedings, their defense is without merit. I see no reason to depart from the well-established precedent that the CFPA provides fair notice of its prohibition against unfair and deceptive acts or practices.[9] Additionally, "other consumer protection statutes and regulations use these terms, and their meaning provides 'the minimal level of clarity that the due process provision demands of noncriminal economic regulation.'"[10]

ORDERS

1. Respondents' request for oral argument is **DENIED**.

2. Respondents' *Motion to Dismiss* is **DENIED**.

SO ORDERED this 24th day of April 2020.

Christine L. Kirby

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Date: 2020.04.24 15:00:19 -04'00'

HON. CHRISTINE L. KIRBY
Administrative Law Judge

Signed and dated on this 24th day of April 2020 at Washington, D.C.

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[6] *Harris v. Sec'y, U.S. Dep't. of Veterans Affairs*, 126 F.3d 339, 343 (D.C. Cir. 1997) (quoting *Dole v. Williams Enters., Inc.*, 876 F.2d 186, 189 (D.C. Cir. 1989) (emphasis in original, internal quotation marks and alterations omitted)); *see also Wood v. Milyard*, 566 U.S. 463, 470 (2012) ("An affirmative defense, once forfeited, is excluded from the case.").

[7] *Harris*, 126 F.3d at 344-345.

[8] I have also addressed this issue further in my *Order Denying Respondents' Motion to Amend Answer* (issued simultaneously with this Order).

[9] *See Think Finance, LLC*, No. CV-17-127-GF-BMM, 2018 WL 3707911, at *3 (D. Mont. Aug. 3, 2018); *CFPB v. Navient Corp.*, No. 17-101, 2017 WL 3380530, at *7 (M.D. Penn. Aug. 4, 2017); *CFPB v. D&D Mktg.*, No. 15-9692, 2017 WL 5974248, at *5 (C.D. Cal. Mar. 21, 2017).

[10] *Think Finance*, 2018 WL 3707911, at *3 (quoting *CFPB v. CashCall, Inc.*, CV15-7522, 2016 WL 4820635, at *12 (C.D. Cal. Aug. 31, 2016)); *see also CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 906 (S.D. Ind. 2015).

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the *Order Denying Respondents' Motion to Dismiss* upon the following parties and entities in Administrative Proceeding 2015-CFPB-0029 as indicated in the manner described below:

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Jameelah Morgan
Docket Clerk
Office of Administrative Adjudication
Bureau of Consumer Financial Protection

Signed and dated on this 24th day of April 2020 at Washington, D.C.