

The Law of Unintended Consequences: How the CFPB's Unprecedented Legislative Authority and Enforcement Approach Has Invited Increasing Challenges

By John Villa and Ryan Scarborough

With the passage of the Dodd-Frank legislation in the aftermath of the Great Recession, Congress created a new federal agency charged with regulating and enforcing 18 different financial services statutes. Its mandate is clear: "Regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws."¹ In practice, that typically boils down to protecting consumers from conduct that the Consumer Financial Protection Bureau (CFPB) deems to be unfair, deceptive, or abusive acts or practices (UDAAP). In a unique approach, Congress insulated the bureau from oversight by giving its director a five-year term,² limiting the president's ability to remove the director except for cause,³ and shielding the bureau's funding from the congressional appropriations process.⁴ Ironically, this unique structure has provoked

a number of challenges to the validity of the bureau based on questions of its constitutionality.

Likewise, the bureau's muscular approach toward regulation has prompted an increasing number of challenges by affected companies. Since the designated transfer date, July 21, 2011, the bureau has instituted an expansive enforcement program that sometimes runs counter to past agency guidance and settled industry norms, frequently foregoing (or at least preceding) formal notice-and-comment rule-making.⁵ Richard Cordray, director of the bureau, has made it clear that these enforcement actions are intended to "provide detailed guidance for compliance officers across the marketplace about how they should regard similar practices at their own institutions," and rejected criticism that this amounts to "regulation by enforcement."⁶ He has maintained that these actions "convey[] an intelligible direction to the marketplace, so as to create deterrence that can be readily understood and implemented."⁷

To date, relatively few regulated entities have challenged the bureau's positions or its assertions of unfair, deceptive or abusive conduct. Nearly 80 percent of companies subject to threatened CFPB enforcement actions agree to consent orders, often with substantial civil money penalties, without testing the bureau's assertions in litigation.⁸ There are, however, a handful and growing number of companies who have chosen to contest the bureau's threatened enforcement actions rather than capitulate: Most notable among the challenges are PHH Corporation's appeal of a \$109 million disgorgement order from Director Cordray for alleged kickbacks in violation of the Real Estate Settlement Procedures Act (RESPA) (presently on appeal in the US Court of Appeals for the District of Columbia Circuit); State National Bank of Big Spring's lawsuit

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challenging the constitutionality of the bureau (presently pending in the trial court upon remand from the D.C. Circuit, which found that the bank had standing to challenge the bureau's structure); and for-profit educational provider ITT Educational Services, Inc.'s ongoing defense against allegations that it abused students by pressuring them to take out high-cost private loans.

This article provides a litigator's perspective on the Consumer Financial Protection Bureau's enforcement process. It describes the nuts and bolts of the enforcement process, and discusses some of the litigation hurdles facing the bureau in both its enforcement actions and proposed rule-making. Finally, it raises questions whether the bureau's approach to regulating payday lending and bank overdrafts may unintentionally harm consumers who lack access to traditional forms of credit.

The Bureau's Enforcement Process

The Dodd-Frank Wall Street Reform and Consumer Protection Act authorized the bureau to "conduct hearings and adjudication proceedings" to enforce the act itself as well as 18 other consumer financial laws enumerated in the statute.⁹ For any given enforcement action, the bureau can choose between bringing suit in federal court, and initiating an administrative proceeding, both of which the bureau has used in the past. For the latter, Dodd-Frank empowered the bureau to design and control all aspects of the proceeding, and the bureau has modeled its process on the approaches taken by the Securities and Exchange Commission, the Federal Trade Commission, and the Office of the Comptroller of the Currency, among other federal agencies. Respondents have no say in determining the forum, nor has the bureau published any guidance on the factors it considers when deciding where to bring an enforcement action. Some believe that the date of the underlying conduct may be a factor given the bureau's announced position that its ability to regulate past conduct is not constrained by any statute of limitations if it brings an administrative action.¹⁰

Unlike enforcement actions brought in federal court, which are subject to the full panoply of procedural protections (including standard discovery and the Federal Rules of Evidence), an administrative enforcement action affords respondents far fewer protections.

An administrative law judge (ALJ) is assigned to oversee the action (presently, the bureau uses hearing officers from the SEC). Proceedings move rapidly, starting with the answer being due within 14 days of service,¹¹ followed shortly thereafter by a scheduling conference.¹² Interrogatories and discovery depositions are not permitted, and document discovery from the bureau is limited to a narrow list of categories within the Office of Enforcement, such as documents obtained during the bureau's investigation, witness statements, and examination reports that the bureau intends to use.¹³ Although the parties are permitted to call expert witnesses, each side is limited to five experts (including rebuttal experts) and the ALJ has the discretion to dispense with experts altogether in appropriate cases.¹⁴

Once the parties complete discovery and motions practice, the ALJ conducts an evidentiary hearing. The bureau's enforcement counsel proceeds first, as it bears the burden of proof. Admissibility rules are relaxed—the Federal Rules of Evidence do not apply, hearsay is permitted, and the ALJ is given discretion to permit prior sworn statements "in the interests of justice."¹⁵ Respondents must exercise care to build a robust factual record (including offers of proof) and to preserve arguments for appeal.

Upon the conclusion of the hearing, the parties submit proposed findings of fact and conclusions of law. The ALJ must issue a recommended decision—including both factual findings, prospective injunctive relief, and financial consequences (*e.g.*, restitution and civil money penalties)—to the director within 300 days from when the bureau initiated the action by filing its Notice of Charges.¹⁶ The director makes the final decision, and has the discretion to adopt or reject the ALJ's recommendations. Only then may the respondent avail itself of a federal court forum. Respondents may seek judicial review of the director's order by filing an appeal either in the US Court of Appeals for the District of Columbia Circuit, or the in the federal court of appeals for the circuit in which respondent's principal office is located. The filing of any appeal does not automatically stay the director's order.¹⁷

Challenges to the Bureau's Enforcement Authority

There are a number of pending and future challenges that the bureau will have to overcome as it

flexes its enforcement muscle. Some of these are the unavoidable result of choices that Congress made when it established the bureau—for example, constitutional questions surround the structure of the bureau, its use of ALJs to oversee administrative enforcement actions, and the scope of its rule-making authority. Others may result from the bureau’s strategy of using enforcement actions as a means of setting standards and its reliance upon administrative proceedings for enforcement when there is sharply increasing judicial hostility to that trend.

Constitutional Challenges

Separation of Powers

One of the foremost constitutional challenges to the bureau relates to the consolidation of power in a single director with a five-year tenure who can only be removed for cause and can requisition funding directly from the Federal Reserve System without congressional oversight. PHH has made this constitutional question one of the centerpieces of its appeal,¹⁸ contending that “[n]ever before has so much power been accumulated in the hands of one individual so thoroughly shielded from democratic accountability. The combination of these unprecedented structural features violates the separation of powers.”¹⁹ The bureau has defended its structure, arguing that a single-member agency is more directly accountable than a multi-member commission, and pointing to the US Supreme Court’s decision in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935) concerning the constitutionality of the FTC Act as precedent for upholding the for-cause removal authority established in the Consumer Financial Protection Act.²⁰

PHH’s constitutional challenge clearly has some traction in the DC Circuit. Before the oral argument occurred, the panel hearing the case issued an order directing the parties to be prepared to answer specific and pointed questions, including:²¹

- What independent agencies now or historically have been headed by a single person?
- If an independent agency headed by a single person violates Article II..., what would the appropriate remedy be?

Lest there be any doubt about the seriousness accorded this issue, Judge Kavanaugh observed at oral argument, “You’re concentrating in a single person a huge amount of

power and the president has no authority over that It is very dangerous in our system to put such huge power in a single person.”²² Whether the panel decides this issue is another question, though, as the panel could avoid the constitutional question altogether if it decides to reverse the director’s order based on other arguments advanced by PHH—namely, whether PHH’s actions violated the statutory language of RESPA or whether the bureau provided fair notice that it was changing previously settled interpretations of the law.

Due Process

Although the bureau recognizes the importance of rule-making, the director has made it clear that the bureau will not refrain from bringing enforcement actions in the absence of a formal rule-making or other agency guidance if it believes that a regulated entity has engaged in unfair, deceptive, or abusive conduct that contravenes the clear language of the statute. As Director Cordray explained in responding to criticism of the bureau’s enforcement approach:

Others have framed this criticism [of regulation by enforcement] as a suggestion that law enforcement officials should think through and explicitly articulate rules for every eventuality before taking any enforcement actions at all. But that aspiration would lead to paralysis because it simply sets the bar too high. Particularly in an area like consumer financial protection, the vast majority of our enforcement actions involve some sort of deception or fraud. And courts have long noted that trying to craft specific rules to root out fraud or untruth is a hopeless endeavor, as they would likely fail to cabin “the ingenuity of the dishonest schemer.”²³

When the statutory text is clear, this strategy makes sense. But clarity lies in the eye of the beholder. Regulated entities may be able to point to contrary agency guidance, or at least the absence of any formal rule-making or agency guidance, to show that they lacked fair notice of the bureau’s interpretation and that any punishment or disgorgement related to their conduct would offend due process.

Indeed, the *PHH* case presents exactly this scenario. The bureau took the position that PHH’s actions violated the plain terms of RESPA, but additionally contended that if there was any ambiguity it was

properly resolved by deferring to Director Cordray’s interpretation that RESPA’s safe-harbor provision—which exempts any payment of compensation for services actually performed²⁴—did not apply. As the director explained, although the safe-harbor provision of RESPA “is perhaps not entirely clear when read in isolation,” the “text, structure, and goals of RESPA” are advanced by the director’s interpretation and it therefore warrants *Chevron* deference.²⁵ According to PHH, this was directly contrary to decades-old guidance provided by the US Department of Housing and Urban Development (HUD), which had enforcement authority over RESPA before the bureau was created. Not surprisingly, PHH argues that this new interpretation violated the Constitution’s Due Process Clause because it imposed liability without giving fair notice of forbidden conduct. PHH framed the issue as follows: “The CFPB violated these basic constitutional requirements by imposing massive, nine-figure liability on [PHH] based on two radical new interpretations of RESPA that abruptly ‘reject’ almost two decades of agency and judicial interpretation and application.”²⁶ At oral argument, Judge Kavanaugh compared this situation to a police officer saying it was okay for someone to cross the street and then giving the person a huge ticket for jaywalking once they reached the other side. It is unclear whether the panel hearing the *PHH* case will address this issue in its order.

Appointments Clause

Another challenge likely to be raised in future disputes is whether ALJs are deemed to be officers of the United States, or mere employees, and whether they are insulated from removal by the president. Currently these questions are hotly disputed in challenges to SEC enforcement actions, but they would logically apply with equal weight to administrative enforcement actions brought by the bureau, given that the bureau borrows SEC ALJs and has modeled its adjudication procedures on those of the SEC. These issues have arisen due to the SEC’s increasing propensity to impose penalties administratively rather than seeking such penalties in federal court in the wake of Dodd-Frank’s expansion of the SEC’s ability to do so.

The Appointments Clause of the U.S. Constitution vests the power to appoint all “inferior officers” in “the President alone, in the Courts of Law, or in the Heads of Departments.”²⁷ Employees are not subject to the

Appointments Clause.²⁸ If ALJs hired by an SEC office (not by an SEC Commissioner) and borrowed by the bureau qualify as inferior officers, then their actions are arguably unconstitutional because they were not constitutionally appointed. The SEC contends ALJs are employees, and buttresses its argument by emphasizing that they cannot issue final orders;²⁹ by contrast, challengers contend that ALJs exercise significant authority tantamount to an officer of the United States when they “take testimony, conduct trials, rule on the admissibility of evidence, and... enforce compliance with discovery orders.”³⁰ Likewise, respondents contend that the ALJs are impermissibly insulated from presidential removal. These questions are percolating in a number of pending SEC enforcement actions, although most courts—including the US Court of Appeals for the Second Circuit—have rebuffed attempts to raise the issues directly without first going through the administrative enforcement process.³¹ If the bureau chooses to pursue an enforcement action in an administrative proceeding, the respondent could be expected to raise these Article II challenges to the ALJ hearing the case.

Non-Delegation

The Dodd-Frank legislation required the bureau to study the use of mandatory arbitration provisions in connection with consumer financial products or services and determine whether it was in the public interest to impose conditions or limits on those clauses.³² The bureau completed its study and published a proposed rule in May 2016 that would prohibit companies from putting mandatory arbitration clauses in new contracts that prevent class action lawsuits. Under the proposal, companies would still be able to include an arbitration clause in their contracts but the arbitration clause would have to include an exception to make clear that it would not prevent consumers from being part of a class action in court. They would also have to report certain information to the bureau about the underlying arbitral proceedings. Congress did not, however, repeal Section 2 of the Federal Arbitration Act, which provides that a written arbitration agreement in a contract affecting interstate commerce is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,”³³ nor did it pass a law overturning established US Supreme Court precedent holding that the Federal Arbitration Act “is a congressional declaration of a liberal federal policy favoring arbitration agreements.”³⁴ If, as expected, the

bureau adopts a formal rule imposing limits on the enforceability of mandatory arbitration clauses in the class-action context, courts will have to grapple with the constitutional question of whether Congress abdicated its responsibility when it delegated its legislative authority to decide this question to the bureau.

Statutory Challenges

Statute of Limitations

The bureau has also taken the position that the Dodd-Frank legislation does not impose any statute of limitations on administrative enforcement actions, although it concedes that enforcement actions brought in federal court must be brought within three years of when they are discovered.³⁵ The bureau reasons that separate provisions of Dodd-Frank authorize the bureau to enforce “enumerated consumer law” either through an administrative proceeding or a civil action in federal court, and only the provision governing court “actions” includes a statute of limitations.³⁶ An ALJ recently sided with the bureau’s interpretation that no statute of limitations applies to an administrative proceeding, adopting the interpretation advanced by the bureau in *PHH*.³⁷

The bureau’s position will be challenged on several fronts. The bureau’s counsel faced withering questioning from the *PHH* panel on this issue. The panel noted that there was a limitations period when HUD enforced RESPA and described the bureau’s position, if taken to its logical extreme, as amounting to an “abomination.” First, to the extent the bureau seeks to enforce an enumerated consumer statute, its position runs counter to the statute of limitations set forth in the underlying statute. For example, the bureau maintains that RESPA’s three-year statute of limitations is inapplicable to *PHH*’s conduct because the bureau never invoked RESPA’s enforcement provision; instead, it only invoked its enforcement powers under the Dodd-Frank Act.³⁸ No court has yet ruled on this issue, although it may be addressed in the forthcoming *PHH* appellate decision.

Second, the bureau’s assertion that an agency proceeding is not an “action” will face substantial opposition. Indeed, numerous other parts of the Dodd-Frank Act refer to administrative “actions,”³⁹ although the ALJ overseeing the *Integrity Advance* hearing recently rejected these arguments in light of the director’s position, calling them “anomalies” that “should not be

given more weight than the bulk of the statute.”⁴⁰ The bureau may find it difficult to maintain that an “action” is limited to federal court and does not encompass administrative proceedings.

Finally, the bureau’s position appears to contradict the D.C. Circuit’s opinion in *Proffitt v. Federal Deposit Insurance Corp.*, in which the court rejected the FDIC’s argument that it had an unfettered right to bring an action for removal and prohibition without regard to when the underlying conduct or harm occurred and therefore applied 28 U.S.C. § 2462’s five-year statute of limitations.⁴¹ *Proffitt*, as well as the apparent skepticism expressed by the *PHH* panel, may presage the judiciary’s overall hostility toward the notion that no limitations period applies to the bureau’s administrative enforcement proceedings.

Retroactivity

Retroactivity poses another challenge to the bureau, particularly in the early stages of the bureau’s enforcement efforts, if it seeks to sanction conduct that occurred prior to the July 21, 2011 Transfer Date.⁴² Retroactive application is disfavored absent clear congressional intent to the contrary.⁴³ Although there are some un-adjudicated consent orders that purport to sweep in conduct that occurred prior to the bureau’s Transfer Date,⁴⁴ this issue does not appear to have been raised yet in any litigated proceeding.⁴⁵ It is another potential hurdle that the bureau may face if it seeks restitution, disgorgement, or penalties stemming from conduct that occurred before July 21, 2011.

Some of the challenges facing the bureau today were probably unavoidable—after all, it cannot change its single-member structure or funding arrangement—but others are the result of positions it has staked out. If any lesson can be drawn from the bureau’s first five years of existence, it is that it will not be ignored and is willing to push the regulatory envelope to advance its consumer-protection mission.

Regulating Non-Traditional Forms of Lending

The bureau has signaled its intent to implement far-reaching reform with regard to non-traditional forms of lending, such as payday loans and bank overdrafts. The bureau’s laudable goal is to help consumers avoid getting trapped in a debt spiral. But the implementation of these

rules may have the unintended consequence of hurting some of the most vulnerable consumers who literally have nowhere else to turn, and may in turn spawn litigation over the scope and implementation of this rule. After all, not all consumers can get access to traditional forms of credit, such as credit cards or bank loans. These customers will have little choice but to turn to pawn shops, loan sharks, or other forms of short-term financing that may spring up to meet the customers' needs.

The bureau recently issued a proposed rule for public comment that would provide significant restrictions on payday and vehicle title lenders.⁴⁶ Under the terms of the bureau's proposal, short-term lenders (who loan money for 45 days or less) would be required to underwrite loans to determine whether the consumer has the ability to repay the loan. This would include verifying the consumer's net income, verifying the consumer's debt obligations using a registered database, and verifying or estimating the consumer's housing costs and living expenses, and would impose a "presumption of unaffordability" for new short-term loans that are sought within 30 days of another covered loan. The only exception would be for short-term loans no larger than \$500. Lenders could avoid engaging in the ability-to-repay determination for these loans provided that the customer renews it no more than two times and reduces the outstanding balance by one-third with each renewal. Longer-term lenders (who loan money for more than 45 days) would be required to underwrite the loan to determine whether the borrower has the ability to repay, and also would have presumptions of unaffordability. The only exceptions to these underwriting requirements would be for (1) loans between \$200 and \$1,000 with a term less than six months provided that the interest rate does not exceed that allowable under the National Credit Union Administration's Payday Alternative Loan program, or (2) loans with a term less than 24 months provided that the total cost of credit does not exceed 36 percent and has a projected annual default rate below 5 percent. For all such borrowers, lenders would be required to report information on the borrower to a registered information database at the time of origination, update the information over the life of a loan, and report when the loan ceases to be outstanding.

If adopted, the bureau's payday lending rule appears almost certain to dramatically shrink the scope of the

payday and vehicle title lending industries, at least as they are currently configured. The goal is that the bureau's rulemaking will push out questionable lenders and trigger a flight to quality lenders who modify their business models along the lines established in the bureau's rule. But the reality may be something far different, as the bureau's rules may drive out short-term lenders altogether or cause them to raise their underwriting standards to the point at which those consumers who have the most need for short-term money are deprived of their only available source for that money.

One alternative for these consumers to meet their short-term credit needs is to overdraw their bank account. Overdrafts occur when bank customers use their ATM or debit card, write a check, or authorize an Automated Clearing House (ACH) transaction and have insufficient funds in their bank account to cover the transaction when it is presented for settlement, which can occur on the same day as the transaction but sometimes several days later. Financial institutions typically charge overdraft fees for overdrafts resulting from ATM or debit cards, and not sufficient funds (NSF) fees or return item fees for checks or ACH transactions that overdraw accounts. Bank overdrafts may be one possible safety valve for consumers who need money in the short-term and cannot turn to payday or vehicle title lenders, but the bureau appears poised to restrict this avenue as well. The bureau has published two reports on overdrafts, which (combined with NSF fees) exceeded \$11 billion in 2015 for financial institutions over \$1 billion in size. In its payday lending proposed rule, the bureau noted that it "is also separately engaged in research and evaluation of potential rulemaking actions on deposit account overdraft."⁴⁷ It appears to be motivated by the fact that while many customers use overdraft protection programs as a safety net or to ensure that they can get early access to money on or shortly before payday, there tends to a small percentage of the population who incur overdraft fees more frequently.

If the bureau adopts onerous restrictions on bank overdrafts (such as by limiting the number of overdraft fees that a consumer can be charged within a given time period), then there are likely to be several collateral consequences for consumers who previously relied on payday loans or bank overdrafts. First, banks and other financial institutions may decide that it is no

longer worthwhile to offer to pay consumer overdrafts and charge a fee. As a result, consumers may face substantial NSF and return item fees even though they are no longer being assessed overdraft fees. Second, if overdraft fees are no longer a viable source of revenue, then financial institutions may change their free-checking business models and charge monthly account fees to consumers who do not meet certain heightened requirements (such as minimum account balances, multiple accounts, mortgages, or retirement accounts). As a result, the poorest consumers may find themselves paying higher fees or, alternatively, may be driven out of the formal banking system altogether.

Although the bureau's rule-making and enforcement approaches have been polarizing at times, the bureau has not retreated from pursuing its laudable mandate of protecting consumers. There are, however, good faith disputes about how this should be accomplished and whether regulatory initiatives designed to protect consumers will force some of them outside of legitimate sources of credit. These and other questions will be resolved in coming years as the bureau brings actions that challenge the business model and existence of whole segments of consumer finance. Some of these questions are clearly destined to be resolved in federal courts as the bureau's authority will be contested.

Notes

1. 12 U.S.C. § 5491(a).
2. *Id.* § 5491(c)(1).
3. *See id.* § 5491(c)(3).
4. *See id.* §§ 5497(a)(1) & (a)(2)(c) (providing that bureau funding shall come from the Federal Reserve System's budget without congressional review).
5. The Administrative Procedures Act requires notice to be given to the public unless the agency determines that good cause exists to conclude that it is "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B).
6. Prepared Remarks of CFPB Director Richard Cordray at the Consumer Bankers Association, Mar. 9, 2016, available at <http://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-consumer-bankers-association/>, last accessed July 4, 2016.
7. *Id.*
8. The bureau handled 59 cases in which companies settled allegations of wrongdoing and 11 cases that led to lawsuits in 2015. That compares with 23 settlements and 11 lawsuits for 2014, and 21 settlements and 7 lawsuits for 2013. *See* Yuka Hayashi, "Consumer Financial Protection Bureau Roughly

Doubled Caseload in 2015," *The Wall Street Journal* (Jan. 11, 2016), available at <http://www.wsj.com/articles/consumer-financial-protection-bureau-roughly-doubled-caseload-in-2015-1452551403>, last accessed July 4, 2016.

9. 12 U.S.C. §§ 5481, 5563.
 10. Decision of the Director, *In the Matter of PHH Corporation*, Docket No. 2014- CFPB-0002, Dkt. 226 (hereinafter "PHH Director Decision"), at 10–12 (June 4, 2015).
 11. 12 C.F.R. § 1081.201(a).
 12. *Id.* § 1081.203(b).
 13. *Id.* § 1081.206(a). The bureau need not provide a document-specific privilege log. The bureau's regulations permit the bureau to assert privilege on a categorical basis without individually logging or describing each document. *See id.* § 1081.206(c).
 14. *Id.* § 1081.210(b) & (f).
 15. *Id.* § 1081.303(b) & (h).
 16. *Id.* § 1081.400(a).
 17. *Id.* § 1081.407(e).
 18. The factual background is fairly simple. PHH was a loan originator. Some of its borrowers needed to obtain mortgage insurance. The bureau contends that PHH had a kickback arrangement in place when it referred these borrowers to certain mortgage insurers; the mortgage insurers, in turn, purchased reinsurance from a PHH subsidiary at fair market value. The bureau contends that the reinsurance payments were kickbacks because PHH did not refer borrowers to insurers who did not purchase reinsurance from PHH's subsidiary; PHH contends that they were *bona fide* compensation for services actually rendered. Although RESPA broadly prohibits kickbacks in connection with real estate settlement transactions, it contains a safe harbor for referrals that reflect *bona fide* payments for services actually rendered. *See* 12 U.S.C. § 2607(c).
 19. Opening Brief for Petitioners, *PHH Corp., et al., v. Consumer Financial Protection Bd.*, No. 15-1177, at 46 (D.C. Cir. Dec. 12, 2015).
 20. Brief of Respondent, *PHH Corp., et al., v. Consumer Financial Protection Bd.*, No. 15-1177, (hereinafter "PHH Respondent Brief") at 55–57 (D.C. Cir. Nov. 5, 2015).
 21. Order, *PHH Corp., et al., v. Consumer Financial Protection Bd.*, No. 15-1177, at 1 (D.C. Cir. April 4, 2016).
 22. *5 Takeaways from DC Circ. Arguments in 1st CFPB Appeal*, Law360 (Apr. 15, 2016), available at <http://www.law360.com/articles/784685/print?section=competition>, last accessed July 4, 2016 (subscription required).
 23. Prepared Remarks of CFPB Director Richard Cordray at the Consumer Bankers Association, Mar. 9, 2016, available at <http://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-consumer-bankers-association/>, last accessed July 4, 2016.
 24. 12 U.S.C. § 2607(c).
 25. PHH Director Decision at 15; PHH Respondent Brief at 33–37.
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26. PHH Respondent Brief at 25.
27. U.S. Const. Art. II, § 2, cl.2.
28. *Buckley v. Valeo*, 424 U.S. 1, 128 n.162 (1976) (“Officers of the United States’ [as used in the Appointments Clause] does not include all employees of the United States Employees are lesser functionaries subordinate to officers of the United States.”).
29. *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994).
30. *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 881–82 (1991).
31. See, e.g., Slip Op., *Tilton v. S.E.C.*, Dkt. No. 15–2013, at 5 (2d Cir. June 1, 2016) (holding that Congress implicitly precluded federal district court jurisdiction over an Appointments Clause challenge prior to a final decision by the commission); *Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015) (affirming dismissal of concurrent Appointments Clause challenge to ALJ); *Bebo v. SEC*, 2015 WL 905349, at *4 (E.D. Wis. Mar. 3, 2015) (holding that court lacked jurisdiction to hear respondent’s Article II challenge to the ALJ conducting an ongoing administrative proceeding), *aff’d*, 799 F.3d 765 (7th Cir. 2015); but see *Hill v. SEC*, 114 F. Supp. 3d 1297 (N.D. Ga. 2015) (concluding that court did have jurisdiction to hear respondent’s Article II challenge to the ALJ).
32. 12 U.S.C. § 5518.
33. 9 U.S.C. § 2.
34. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).
35. PHH Respondent Brief at 38. In another matter, the bureau has asserted that the three-year statute of limitations does not begin to run until the director makes a formal finding that the respondent violated the law. See Complaint ¶ 38, *Intercept Corp. v. Consumer Fin. Prot. Bureau*, No. 3:16-cv-00118-ARS (D.N.D. May 19, 2016), ECF No. 1.
36. See *id.* (comparing 12 U.S.C. § 5563 with § 5564).
37. See Order, *In the Matter of Integrity Advance, LLC, et al.*, 2015-CFPB-0029, at 29 (Apr. 22, 2016) (“The Bureau’s argument that no statute of limitations applies in these administrative proceedings—even if the same suit would be time-barred in a federal court—is convincing Ultimate authority for issuing a Decision and Order in this case rests with the Director. I decline to adopt a position contrary to his.”).
38. See PHH Respondent Brief at 38–39.
39. See 12 U.S.C. § 5497(d)(1) (“If the Bureau obtains a Civil penalty against any person in any judicial or administrative action under Federal consumer financial laws, the Bureau shall deposit into the Civil Penalty Fund, the amount of the penalty collected.”); *id.* § 5565(c) (“Civil money penalty in court and administrative actions”).
40. See Order Denying Motion to Dismiss, *In the Matter of Integrity Advance, LLC, et al.*, 2015-CFPB-0029, at 26 (Apr. 22, 2016).
41. 200 F.3d 855, 862 (D.C. Cir. 2000).
42. 12 U.S.C. § 5582.
43. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (“Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.”); *Ahmad v. Morgan Stanley & Co., Inc.*, 2 F. Supp. 3d 491, 497 (S.D.N.Y. 2014) (noting that any Dodd-Frank provision that “creates an entirely new [...] cause of action, with its own prohibited conduct, statute of limitations, and remedies” is not retroactively enforceable).
44. See, e.g., *In re Flagstar Bank. F.S.B.*, Consent Order, No. 2014-CFPB-0014 (Sept. 29, 2014) (CFPB obtained \$37.5 million settlement resolving UDAAP allegations from January 1, 2011 through September 29, 2014).
45. The bureau appears to be aware of this potential issue. In several federal court cases it specifically limited its claims to conduct that occurred after the Transfer Date. See, e.g., *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, No. 1:14-CV-00292-SEB, 2015 WL 1013508 (S.D. Ind. Mar. 6, 2015) (allegations limited to behavior starting in July 2011); Order Denying Motion to Dismiss, *In the Matter of Integrity Advance, LLC, et al.*, 2015-CFPB-0029, at 6 (Apr. 22, 2016) (“[T]he Bureau conceded that it does not seek to bring UDAAP claims for any conduct occurring prior to July 21, 2011”); Plaintiff’s Response to Defendants’ Motion to Dismiss at 38 n.102, *CFPB v. Frederick J. Hanna & Associates, P.C. et al.*, No. 1:14-cv-02211-AT (N.D. Ga. Oct. 3, 2014), ECF No. 26, (the Bureau conceded that it “does not seek to enforce the CFPA as to conduct that occurred before that date.”); Complaint for Permanent Injunction and Other Relief ¶ 8, *CFPB v. Corinthian Colleges, Inc. et al.*, No. 1:14-cv-07194 (N.D. Ill. Sept. 16, 2014), ECF No. 1 (allegations limited to conduct allegedly occurring “[a]t different times during the period July 21, 2011 to the present . . .”).
46. Proposed Rule, *Payday, Vehicle Title, and Certain High-Cost Installment Loans*, Dkt. No. CFPB-2016-0025.
47. See *id.*