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February 26, 2018

Acting Director Mick Mulvaney
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

Re: *In the Matter of Integrity Advance, LLC and James R. Carnes,*
No. 2015-CFPB-0029

Mr. Mulvaney:

I am writing on behalf of my clients, Integrity Advance, LLC and James R. Carnes, regarding the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") pending enforcement action, *In the Matter of Integrity Advance, LLC and James R. Carnes*, CFPB No. 2015-CFPB-0029.

The above-referenced enforcement action was initiated by the Bureau's Office of Enforcement on November 18, 2015, heard before an Administrative Law Judge ("ALJ") pursuant to the CFPB's Rules of Adjudication, and is currently pending before the Director of the CFPB on appeal from the ALJ's recommended decision. The former director of the Bureau, Richard Cordray, stayed the final decision on this matter pending the resolution of *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016).¹ The DC Circuit recently issued its decision in *PHH*, and the ruling—as well as a variety of other factors set out briefly below—warrants the immediate dismissal of the Office of Enforcement's action against Carnes and Integrity Advance. Accordingly, we respectfully request that the Bureau dismiss this action with prejudice.

The CFPB's enforcement action against Integrity Advance and Mr. Carnes represents the overreach and "regulation by enforcement" approach of the Bureau under its former Director. In short, this enforcement action is the antithesis of the Bureau's mission to protect innovation and access to credit, government transparency, and fairness in the financial market.

¹ This order can be located on the CFPB's administrative docket, Docket No. 208, available at <https://www.consumerfinance.gov/administrative-adjudication-proceedings/administrative-adjudication-docket/integrity-advance/>.

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Integrity Advance was a nonbank short-term, small-dollar lender licensed and regulated by the Delaware Department of Banking, which operated between May 2008 and December 2012. Integrity Advance offered short-term, small-dollar loans to consumers, which ranged in value from \$100–\$1000. Mr. Carnes was the CEO and president of the company. Counsel for the Office of Enforcement (hereinafter “Enforcement Counsel”) engaged in a retroactive enforcement action against Integrity Advance and Mr. Carnes, which had operated under Delaware laws and regulatory oversight, and had stopped operating before the CFPB obtained enforcement authority over non-banks. In pursuing Integrity Advance and Mr. Carnes, Enforcement Counsel sought to reach back in time to make a lawful financial product retroactively unlawful, and to hold the CEO of a company personally liable for an enormous sum—over \$50,000,000 between Integrity Advance and Mr. Carnes—merely because Enforcement Counsel disapproved of the financial product at issue.

Enforcement Counsel’s action represents an attempt to second-guess state laws and oversight through after-the-fact analysis. As was shown during the hearing, Mr. Carnes ran his business so that it complied with all relevant laws, as those laws were understood at the time. To this end, the State of Delaware regularly reviewed Integrity Advance’s loan documents and consistently renewed its lending license, as well. Indeed, during most of the time that Integrity Advance operated, the State of Delaware’s Office of the State Bank Commissioner was the Company’s only regulator.

The retroactive and unlawful application of governmental authority alone warrants dismissal of this matter. Enforcement Counsel compelled Integrity Advance and Mr. Carnes to respond to a Civil Investigative Demand and, subsequently, defend themselves against an enforcement action. The burden of doing so was compounded by the fact that the Company had already stopped operating. This action, however, should have never been brought. As explained to Enforcement Counsel prior to the filing of the action, and subsequently in public filings, the CFPB did not obtain enforcement authority over nonbanks until then-director Richard Cordray was lawfully confirmed by the Senate in July 2013. Prior to this confirmation, Bureau could not engage in such enforcement actions. Integrity Advance had shut down prior to the vesting of the Bureau’s nonbank enforcement authority and therefore never fell within the CFPB’s jurisdiction.² In short, neither Integrity Advance nor Mr. Carnes offered or provided a consumer financial service or product at a time when the Bureau had jurisdiction to pursue enforcement actions against nonbanks; by the time then-Director Cordray was constitutionally confirmed, Integrity Advance no longer operated.

The D.C. Circuit’s *en banc* decision in *PHH Corp. v. CFPB* also supports dismissal of this matter. The statutory question linking *PHH* to this case is whether statutes of limitations

² Integrity Advance and Mr. Carnes briefed the issue of the Bureau’s lack of authority most comprehensively in the following filings on the adjudication docket: Docket Nos. 28, 34, 184.

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apply to the CFPB in administrative adjudications. A three-judge panel of the D.C. Circuit held that statutes of limitations *do* apply, and described the then-director's contrary position as "flatly wrong," "nonsensical," and "absurd." 839 F.3d at 53-55. The full court, sitting *en banc*, recently upheld the panel's decision on this question. *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. Jan. 31, 2018). Accordingly, Enforcement Counsel had three years after the date of discovery of the alleged violations to file a Notice of Charges. 12 U.S.C. § 5564(g)(1). Yet, Enforcement Counsel failed to bring its case within this time frame; the date of discovery preceded the filing of the Notice of Charges by more than three years. Since Enforcement Counsel did not bring its claims within three years of discovery, and did not execute a tolling agreement with Mr. Carnes, all claims as to Mr. Carnes are time-barred.³

This action, and the forum and manner in which it has been pursued, constitute a violation of Mr. Carnes's and Integrity Advance's due process and equal protection rights, as well. Enforcement Counsel, faced with a weak case, problematic arguments, and having gone far past the deadline for bringing any action against Mr. Carnes, filed its case in the Bureau's administrative forum, seeking the "home turf" advantage of such a forum—an "unchecked and unbalanced administrative power" that has been criticized and also the subject of much litigation.⁴ The rules of this forum subjected Integrity Advance and Mr. Carnes to an accelerated litigation schedule while denying them fact discovery and the protections that the Federal Rules of Civil Procedure and the Federal Rules of Evidence provide to litigants in federal court. For example, Enforcement Counsel's entire damages case consisted of testimony from a "data specialist," who had assembled an excel spreadsheet that (apparently) listed all lending transactions over a time period as evidence that tens of millions of dollars in restitution was appropriate. Enforcement Counsel offered no damages analysis, let alone the testimony of an economist who could support such an analysis. In federal district court, a mere excel spreadsheet—introduced by a "data specialist"—could never alone prove the need to impose tens of millions of dollars in restitution.

Moreover, Enforcement Counsel never produced evidence of, consumer harm. Indeed, even when forced to brief the subject of consumer injury, Enforcement Counsel merely pointed to the alleged "overcharges," that were derived solely from Enforcement Counsel's legal theories. The ALJ acknowledged that Enforcement Counsel's delay in articulating any damages claims "was unhelpful to the court in the damages assessment," but nonetheless allowed

³ A summary of arguments concerning the statute of limitations can be found in Docket No. 203.

⁴ See, for example, Judge Rakoff's critiques of this forum in *Gupta v. SEC*, 796 F. Supp. 2d 503, 508 (S.D.N.Y. 2011) and *SEC v. Citigroup Global Mkts., Inc.*, 34 F. Supp. 3d 379, 381 n.8 (S.D.N.Y. 2014). Indeed, the Bureau has sought public comment regarding its administrative adjudication, including the fundamental question of whether it should be used, and noted the "undue burdens, impacts, or costs on the parties subject to these proceedings." *Request for Information*, 83 Fed. Reg. 5055 (Feb. 5, 2018).

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Enforcement Counsel to proceed unhindered by its omissions. Accordingly, Integrity Advance and Mr. Carnes were not able to cross-examine or otherwise test the efficacy of Enforcement Counsel's damages theory, and were not even able to fully brief these issues. Even when Enforcement Counsel was forced to address the issue of consumer harm (mostly, after trial, at that), it offered only total numbers and stonewalled all attempts to further quantify or explore the specifics of how the Bureau thought consumers had been injured by Integrity Advance's loan products.

Finally, dismissal is warranted in this matter because the ALJ who initially heard the case, and whose rulings and recommended decision form the administrative record and inform any appeal of this matter, was not properly appointed pursuant to Article II of the Constitution. In the context of the Securities and Exchange Commission, which utilizes an administrative forum nearly identical to the CFPB's, we have argued—and the Administration has taken the position—that ALJ's are inferior officers who should be subject to the Appointments Clause. The Tenth Circuit has held that such a fundamental constitutional defect can only be remedied by dismissal with prejudice. *Bandimere v. SEC*, 844 F.3d 1168, 1188 (10th Cir. 2016).⁵

This enforcement action represents the worst of the CFPB's "envelope-pushing" under the prior administration. Using an overly-extended theory of its unfair, deceptive, or abusive acts or practices ("UDAAP") prohibition and its "home turf" advantages, Enforcement Counsel pursued a case in which the majority of the activity at issue occurred before the agency was even created—and all of which occurred before the CFPB had authority to pursue its claims. Time and again, federal courts checked the CFPB's overreach in other cases, but here Enforcement Counsel has insulated itself from such balancing measures by litigating this case solely "in-house," in a friendly forum, with an appeal to none other than the CFPB Director who approved the bringing of the action in the first instance.

In short, the Office of Enforcement brought a case predicated on the retroactive application of the law against a Company and individual who stopped offering or providing a consumer financial product or service before the Bureau even had authority over nonbanks. Indeed, companies can never organize their business operations with certainty if business decisions are always the potential subject of an enforcement action that applies new legal standards to yesterday's conduct, without any notice or warning.

⁵ Briefing regarding the unconstitutional nature of the CFPB's ALJ can be found at Docket Nos. 184 and 197. Mr. Carnes is a resident of Kansas, and Integrity Advance operated in Kansas, making the Tenth Circuit a critical source of precedent in this matter. The Tenth Circuit has recently been followed Fifth Circuit. See *Burgess v. FDIC*, No. 17-60579 (5th Cir. Sept. 7, 2017) (holding that movant established a likelihood of success on the merits regarding his challenge to the appointment of FDIC ALJs, and staying an FDIC enforcement action pending further litigation).

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These issues, as well as the many other bases to dismiss this action with prejudice, have been briefed more fully in the administrative record. We are also happy to provide additional briefing, should the Acting Director determine that further exploration of any of these topics would be helpful. We respectfully assert that the legal and equitable outcome here is to dismiss this case with prejudice in favor of Integrity Advance and Mr. Carnes.

Please feel free to contact me if you have any questions about this or anything else. I can always be reached at abbaker@venable.com or at 202-344-4708. Thank you very much for your attention to this matter.

Respectfully submitted,



Allyson B. Baker
Peter S. Frechette

cc: Alusheyi Wheeler, Enforcement Counsel