UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Consumer Financial Protection Bureau, Case No. 17-cv-0166-RHK-KMM

Plaintiff,

vs.

TCF National Bank,

Defendant.

MEMORANDUM IN OF LAW SUPPORT OF DEFENDANT'S MOTION TO DISMISS

TCF National Bank ("TCF") offers its customers an overdraft service that allows customers to withdraw funds or complete purchases—instead of having these transactions declined—if their account balance drops below zero. Enrolling is free and optional, but TCF charges a fee each time it extends this short-term, unsecured credit to customers. As one might expect in a heavily regulated industry, the Federal Reserve issued a regulation governing overdraft fees in 2009, called "Regulation E." This regulation prohibits banks from charging overdraft fees for ATM and non-recurring *debit card transactions* unless the customer has consented to the service.

The regulation focuses on obtaining customer consent after providing written disclosures. TCF met each condition established by the regulation. It provided all required written disclosures to its customers, including (1) a separate notice called "*What You Need to Know About Overdrafts and Overdraft Fees*"

("Notice"), and (2) a New Account Agreement ("Agreement") that described TCF's overdraft service and associated fees. These disclosures explained the voluntary nature of TCF's overdraft service and the amount of the overdraft fee. TCF did not enroll any customers who did not affirmatively communicate to TCF their consent to enroll in overdraft service.

Plaintiff Consumer Financial Protection Bureau ("CFPB" or "Bureau") acknowledges in its complaint that TCF provided these disclosures, but filed suit nonetheless, claiming that TCF used unlawful *methods* to obtain customers' consent:

- For New Customers (defined by Regulation E as customers who opened accounts after July 1, 2010), the Bureau alleges that TCF engaged in deceptive and abusive conduct by sequencing the account opening process to separate the Notice from the enrollment decision and by giving "cursory," "uninformative," and "one-sided" oral explanations. Compl. ¶¶ 3, 105–18.
- For Existing Customers (defined as customers who already had TCF accounts before Regulation E's effective date), the Bureau alleges that TCF violated Regulation E by asking an ice-breaker question that allegedly framed the decision in a way that turned overdraft service "into the default position." Compl. ¶¶ 121–23.

These allegations are insufficient to state a claim. Failing to orally summarize terms and conditions already provided in unambiguous written disclosures is not deceptive or abusive conduct. Written disclosures are integral to consumer financial regulation. Consumers are presumed to read and understand documents provided by sellers as part of consumer transactions—particularly where, as here, there are no allegations that the documents themselves were confusing or misleading. This notion lies at the heart of the Federal Reserve's approach to Regulation E, which focuses exclusively upon the adequacy of written disclosures and makes no mention of the substance or cadence of any oral description.

The CFPB attempts to sidestep this bedrock principle of consumer financial regulation by pleading only oral misconduct while ignoring the clear written disclosures that customers reviewed or signed, and asserting its belief that "consumers rarely read these disclosures." *Id.* ¶ 76. But, this principle cannot be so easily dismissed. If the Bureau had sued a rental car company challenging its oral presentations at the rental counter, but downplayed the rental agreements in its complaint, this Court would not countenance the effort to leave out this crucial aspect of the story. Yet that is exactly what the Bureau seeks to do here.

The Bureau, moreover, does not claim TCF's documentation can be ignored because TCF contradicted a writing with misleading oral statements. Instead, the

CFPB alleges that it has located a handful of former employees—out of thousands who worked at TCF over the years—who allegedly *perceived* pressure on employees to enroll customers and give cursory or "uninformative" answers to customer questions. Compl. ¶¶ 44, 70. But none of those employees claims to have engaged in misconduct, such as misrepresenting overdraft service or enrolling customers without their consent. Even if oral explanations were abbreviated or incomplete, no reasonable customer who read TCF's disclosures could have failed to understand that they were making a voluntary decision to enroll in an overdraft service that authorized TCF to charge a fee if the customer overdrafted.

This enforcement action is an attempt to impose upon TCF a series of oral disclosure and sequencing requirements that are found nowhere in Regulation E. If the CFPB has regulatory concerns about the manner in which customers and bank employees orally interact, then it should give financial institutions advance notice and address those concerns through *prospective* rule-making, not by concocting novel interpretations and then applying them *retroactively* to conduct that occurred many years ago. It is not fair to change the rules after the game, and then penalize TCF for allegedly falling short of those new rules. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 49 (D.C. Cir. 2016), *pet. for reh'g en banc granted* (Feb. 16, 2017) (No. 15-1177). While the judgment of the *PHH* panel was vacated upon grant of *en banc* review, and therefore has no legal effect, this Court can still look

to the panel opinion for its highly persuasive reasoning.[1] There are also a number of timeliness and retroactivity barriers to applying these new interpretations to conduct reaching back to 2010.

It is unfortunate that, in its effort to generate publicity (including a gratuitous reference to a boat owned by a now-deceased corporate officer), the CFPB brought this meritless lawsuit—as part of a fusillade of suits filed days before the change in administration[2]—against a consumer-oriented bank serving this community for nearly 100 years. Dismissal is required.

BACKGROUND

I. TCF's Business Model Prioritizes Consumer Convenience and No-Minimum-Balance Checking.

TCF has a substantial retail presence—over 360 branches across seven states. Compl. ¶ 16. "Unlike many other banks its size, TCF does not generate substantial revenue from credit cards and home mortgage loans." *Id.* ¶ 26. Instead, TCF has a business model focused on a "limited portfolio of consumer banking products," *id.* ¶ 26, such as no-minimum-balance checking. Its consumer-

[1] Per the rules of the D.C. Circuit, "[i]f rehearing *en banc* is granted, the panel's judgment, but ordinarily not its opinion, will be vacated." D.C. Cir. R. 35(d). The order granting rehearing *en banc* did exactly that, ordering that the "judgment . . . be vacated," but remaining silent on the panel's opinion.

[2] *See* Press Release, Navient, *Navient Rejects CFPB Ultimatum To Settle by Inauguration Day or Be Sued* (Jan. 18, 2017), *http://news.navient.com/releasedetail.cfm?ReleaseID=1008347*.

oriented business model—geared "primarily for personal, family, or household purposes," *id.* ¶ 15—is focused on customer convenience.

Part of this convenience is giving customers the ability to complete their debit card purchases even when they do not have sufficient funds. Not all transactions that involve negative balances when they are approved result in a fee, though some do. Sometimes an account has sufficient funds when the transaction settles because of an intervening deposit. When this happens, TCF does not charge a fee. Many customers have never incurred an overdraft fee but nevertheless have enjoyed the benefit of this "swipe negative/settle positive" policy, which would only be available after the rule change if the customer opted in.

II. The Federal Reserve Issued a New Overdraft Regulation in 2009.

Before Regulation E became effective, TCF "provided overdraft coverage…as a standard feature on checking accounts." *Id.* ¶ 19. Consistent with industry practice, it did not offer customers an opportunity to decline the service. In November 2009, the Federal Reserve decided customers ought to have a choice and "limit[ed] the ability of a financial institution to assess an overdraft fee for paying automated teller machine (ATM) and one-time debit card transactions that overdraw a consumer's account, *unless the consumer affirmatively consents, or*

opts in, to the institution's payment of overdrafts for these transactions."[3] Electronic Fund Transfers, 74 Fed. Reg. 59,033, 59,033 (Nov. 17, 2009) (emphasis added). The amended regulation, known as Regulation E, prohibits financial institutions from charging a fee for debit card transactions unless they had previously:

1) Provided the customer with a written notice that contained federally prescribed content about overdraft services;
2) Provided a reasonable opportunity for the customer to consent;
3) Actually obtained the customer's consent; and
4) Provided the customer written confirmation of the decision, which included a statement that the customer could revoke that consent.

See 12 C.F.R. § 205.17(b)(1)(i)–(iv).

The default under Regulation E is to opt out of overdraft service—i.e. unless a customer affirmatively consents to opt in, the Bank declines transactions when the balance is insufficient (which by definition includes declining what would otherwise be swipe negative/settle positive transactions). After July 2010, the only way customers could receive TCF overdraft service was to enroll. *Id.* § 205.17(c). The Federal Reserve considered the prevalence of swipe negative/settle positive transactions when finalizing the rule. 74 Fed. Reg. at 59,034.

[3] The Federal Reserve excluded from this rule overdrafts caused by checks and ACH transactions. 74 Fed. Reg. at 59,034.

III. Opt-In Rates Vary Significantly.

Although the CFPB alleges that TCF's 66% opt-in rate is higher than other banks, Compl. ¶ 5, there is no "proper" or "legal" enrollment rate. Indeed, the CFPB has acknowledged elsewhere[4] that "opt in rates vary widely,"[5] and that its comparison data "come from a small number of large banks" and "cannot be considered fully representative of the checking account market as a whole."[6] As a result, a "high" opt-in rate does not suggest misconduct.

(The complaint carefully avoids admitting that TCF's enrollment rate for customers who opted in *online*—and who therefore could not have been subjected to any allegedly misleading oral presentations—is not materially different from the enrollment rate for TCF's entire customer population. The Bureau learned this fact during its investigation, but chose not to mention it in the complaint.)

[4] The Court may take judicial notice of the Bureau's public statements. *See, e.g.*, *Stahl v. U.S. Dep't of Agric.*, 327 F.3d 697, 700 (8th Cir. 2003) ("The district court may take judicial notice of public records and may thus consider them on a motion to dismiss."); *Hile v. Jimmy Johns Highway 55*, 899 F. Supp. 2d 843, 847 (D. Minn. 2012) (Kyle, J.) ("[W]hen ruling on a motion under Rule 12(b)(6), public records are not beyond the pleadings.").

[5] CFPB Fall 2015 Rulemaking Agenda, Nov. 20, 2015, at 2 (Declaration of Brian J. Hurd in Support of Defendant TCF National Bank's Motion to Dismiss ("Hurd Decl.") at Ex. 1). Indeed, the CFPB publicly reported that new-account opt-in rates at one bank were up to eight times higher than others, and that opt-in rates at some study banks "surpassed 50% in 2012." *CFPB Study of Overdraft Programs* at 31–32 (June 2013) (Hurd Decl. Ex. 2).

[6] *CFPB Data Point: Checking Account Overdraft* at 7 (July 2014) (Hurd Decl. Ex. 8).

IV. TCF Provided Disclosures Before, During, and After the Enrollment Decision.

A. TCF Provided All Customers with the Federally-Prescribed Notice Before an Enrollment Decision.

The complaint alleges that "[t]he Opt-In Rule requires depository institutions to provide consumers with a [written] notice describing the institution's overdraft service, including, among other things, an explanation of the consumer's Opt-In right and instructions for how to Opt In." Compl. ¶54. The "first step" in TCF's account opening process was to give customers "a copy of TCF's version of the Notice." *Id.* ¶ 59.

The Federal Reserve developed a model Notice, Form A-9, entitled, "*What You Need to Know About Overdrafts and Overdraft Fees*." Hurd Decl. Ex. 3. Regulation E mandates that banks provide a notice to customers that is "substantially similar" to this model. 12 C.F.R. § 205.17(d). In particular, they must provide: (1) a description of the overdraft service; (2) a disclosure of the fees imposed; (3) a disclosure of the limits on the fees charged; (4) an explanation of the fact that the customer had the right to opt in; and (5) a description of any alternative plans that were available to cover overdrafts. *See id.* § 205.17(d)(1)–(5); 12 C.F.R. pt. 205 app. A (Hurd Decl. Ex. 4).

The CFPB does not dispute that TCF's version of the required Notice is substantially similar to the federal model. Among other things, it explains that

customers have a choice whether to enroll in overdraft service, and details (in **bold**) the fee TCF charges for an overdraft transaction.

What You Need to Know about Overdrafts and Overdraft Fees

We will not authorize and pay overdrafts for the following types of transactions unless you ask us to:

- ATM transactions
- Everyday debit card transactions

- We will charge you a fee of up to **$35** each time we pay an overdraft.

➢ **What if I want TCF to authorize and pay overdrafts on my ATM and everyday debit card transactions?**

If you also want us to authorize and pay overdrafts on ATM and everyday debit card transactions, call us at 1-800-TCFBANK (1-800-823-2265) or 612-823-2265 (if calling from the Minneapolis-St. Paul metropolitan area), stop by any TCF branch, or complete the Opt-In election in your Account Agreement. You may also send a written request, including your name, address, date of request, and account number(s), to us at:

➢ **What if I want to revoke my decision to have TCF authorize and pay overdrafts on my ATM and everyday debit card transactions?**

If you opt-in and decide later that you want to revoke your decision to have TCF authorize and pay overdrafts on ATM and everyday debit card transactions, call us at 1-800-TCFBANK (1-800-823-2265) or 612-823-2265 (if calling from the Minneapolis-St. Paul metropolitan area), stop by any TCF branch, or send a written request, including your name, address, date of request, and account number(s), to us at:

The Federal Reserve also required that the Notice be a separate document "segregated from all other information." 12 C.F.R. § 205.17(b)(1)(i). The complaint tacitly recognizes that TCF complied with this requirement too. Compl. ¶ 63 ("After the Notice was set aside, the employee printed out a New Account Agreement[.]").

Regulation E required TCF to provide the Notice to all customers. 12 C.F.R. § 205.17(d). The CFPB alleges that TCF provided New Customers the Notice as the "first step in the [account opening] presentation" and informed them "in

substance: 'This is the federally-prescribed notice describing our overdraft service.'" Compl. ¶ 59. The CFPB does not allege that TCF failed to deliver the Notice to Existing Customers before they were asked to enroll.

B. TCF's New Account Agreement Disclosed Relevant Information.

After providing the Notice to New Customers, TCF employees then "printed out a New Account Agreement and placed it in front of the consumer." *Id.* ¶ 63. The complaint references particular items in the Agreement, *id.* ¶¶ 64–67, and acknowledges that "the Opt-In section of the New Account Agreement included a written disclosure," *id.* ¶ 76; *see also* Hurd Decl. Ex. 5.

The three-page Agreement included an Overdraft Fee Acknowledgement that explained TCF's overdraft fee policy. Compl. ¶ 65; *see also* Hurd Decl. Ex. 5 at 3. The next section, entitled "ATM and Everyday Debit Card Overdrafts," referenced the Notice and explained that TCF "does not charge overdraft fees...unless you have asked us to authorize and pay those transactions under the 'Opt-In Election' below." Hurd Decl. Ex. 5 at 3. It then stated, in bold, "**You are not required to initial the 'Opt-in Election' below.**"[7] *Id.*

[7] While the content of the Agreement and Notice varied slightly over the years, the relevant disclosures were substantially similar throughout the alleged period.

OVERDRAFT FEE ACKNOWLEDGEMENT

TCF charges a fee of $35 each time an item is presented to us for payment from your Account and the item exceeds your Available Balance.

ATM AND EVERYDAY DEBIT CARD OVERDRAFTS

TCF does not charge overdraft fees on ATM and everyday (that is, one-time or nonrecurring) debit card transactions unless you have asked us to authorize and pay those transactions under the "Opt-In Election" below. TCF has given you a notice called *What You Need to Know About Overdrafts and Overdraft Fees* that describes our policy. **You are not required to initial the "Opt-In Election" below. You may opt-in for some accounts but not others.** Whether or not you opt-in, TCF has the right to authorize, or not authorize, these transactions when they exceed your Available Balance. You have the right to revoke your election at any time. Check transactions, recurring electronic transactions, and other kinds of withdrawals and debits are not subject to op

OPT-IN ELECTION (OPTIONAL)

I want TCF to authorize and pay overdrafts on my ATM and everyday debit card transactions for the checking account listed above.

1. Initial ____________ 2. Initial ____________ 3. Initial ____________ 4. Initial ____________

Even though the complaint acknowledges that the Agreement contained these written disclosures, it makes the astonishing allegation that "consumers rarely read these disclosures." Compl. ¶ 76. There are no allegations that TCF employees told customers not to read the Notice or prevented customers from reading the Notice if they chose to.

According to the complaint, TCF employees presented the New Customer Opt-In decision by stating:

> This next section covers the Opt-In / Not Opt-In Election. By initialing here, you are allowing TCF to authorize and pay overdrafts on your ATM and everyday debit card transactions for this account. Please note that your decision does NOT affect any other transactions such as checks, ACH, or recurring debit card transactions.

Id. ¶ 68. The Bureau contends that this explanation was so short and uninformative that customers "tended not to pay attention to the decision," *id.* ¶ 70, and "did not understand the decision they had made," *id.* ¶ 83. It alleges that "[t]he script…left consumers with the impression that opting in was mandatory," *id.* ¶ 71, even though the place in the Agreement where customers would initial stated in bold that the decision was "**OPTIONAL**."

The CFPB also contends that unspecified statements from TCF employees left the "net impression" with customers "that there was no cost to opting in," *id.* ¶ 114, even though 1) there actually is no cost for opting in (as opposed to incurring an overdraft), and 2) the immediate preceding section of the Agreement, *which customers were required to acknowledge in writing*, explained that TCF charges fees for overdrafts.

The CFPB does not allege that TCF employees made any untruthful statements to New Customers.

C. TCF Used Scripts When Communicating with Existing Customers Over the Phone About their Opt-in Choices.

After TCF had sent Existing Customers the Notice, TCF employees contacted Existing Customers by phone and used scripts to guide those

conversations.[8] The CFPB relies upon these scripts, Compl. ¶ 88, and quotes them on several occasions, *id.* ¶¶ 89, 92–94.

Prior to the August 15, 2010 effective date of Regulation E, TCF scripts opened with an ice-breaker question asking whether the customer wanted his debit card to "continue working as it does today," *id.* ¶ 89, followed by a series of required disclosures,[9] *id.* ¶ 94, and then the mandatory enrollment question, "do you want TCF to continue authorizing and paying overdrafts on your ATM and everyday debit card transactions for this account?" *Id.* ¶ 96; *see also* Hurd Decl. Ex. 6. Customers were not enrolled unless they answered "yes" to *that* question. *Id.*

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[8] The CFPB asserts that "TCF's communication strategy for [] other channels more or less tracked the approach the Bank used in the call campaign." Compl. ¶ 103.

[9] The first script, in effect from March 22 to April 26, 2010, asked customers whether they wanted to hear some important regulatory disclosures, *id.* ¶ 98; subsequent scripts required TCF employees to recite the required disclosures without asking that question. *See* Hurd Decl. Ex. 6.

IMPORTANT: YOU MUST DISCLOSE TO THE CUSTOMER EVERYTHING THAT IS SHOWN IN BOLD TYPE BELOW.

Introduction:

- **[Required] Hello, may I speak with (customer's name)? (Mr./Mrs./Ms. Customer's last name), this is __________ with TCF Bank. I am calling today regarding your TCF Check Card and some upcoming changes that would limit the usage of your card effective August 15, 2010. While reviewing your account activity I see you use your TCF Check Card often. Would you like your TCF Check Card to continue to work as it does today?**

- **[Required] Currently, TCF may, at its discretion, authorize your card transactions whether or not you have enough funds at the time of the transactions. There may be times when TCF would not authorize your purchases. For example, if your account was not in good standing.**

[Optional] Customer Q: Can you give me an example of how this works?

- For instance, you are at the grocery story or a gas station and you want to use your card for a purchase but you don't have enough available funds in your account at the time of the transaction. Currently, TCF is able to authorize this transaction. After August 15, 2010, TCF will not authorize this purchase unless you have opted-in to TCF Overdraft Service.

[Optional] Customer Q: Is this free? or Customer Q: What does it cost?

- **[Required] You will pay nothing extra for TCF's Overdraft Service. However, you will be charged an overdraft fee, currently $35 per item, if you overdraft your account. This includes overdrafts by check, teller withdrawals, ATM and card transactions, ACH and other electronic transactions. This fee may increase or change in the future.**

- **[Required] TCF encourages you to avoid overdrafts whenever possible, However, if this does happen, you must pay any overdraft immediately.**

- **[Required]** TCF Q: **So just to clarify, do you want TCF to continue authorizing and paying overdrafts on your ATM and everyday debit card transactions for this account?**

- **[Required]** Customer response: **Yes or No**

  - **IF THE CUSTOMER SAYS "YES" ENTER "I" ON THE OPT-IN TCHG FIELD.**
  - **IF THE CUSTOMER SAYS "NO", YOU MUST ENTER "O"IN THE TCHG FIELD – YOU CANNOT LEAVE THE OPT-IN FIELD BLANK.**

The CFPB contends that TCF considered a "yes" answer to the ice-breaker question as "an indication that the customer wanted to Opt In," Compl. ¶ 90, and that asking the question in this way "changed the election from an Opt-In to an Opt-Out," *id.* ¶ 122. The CFPB cites no facts to support the conclusion that the ice-breaker question somehow changed the default or undermined the customer's consent to overdraft service after the other disclosures were provided. There is no allegation that answering "yes" to the ice-breaker question was relied on by TCF to enroll a customer in overdraft service without also confirming consent based on the final question in the script.

D. TCF Provided Written Confirmation After the Enrollment Decision.

Finally, financial institutions must provide customers with written confirmation of their enrollment decision, including a statement informing them of their right to revoke their consent. 12 C.F.R. § 205.17(b)(1)(iv). The complaint includes no allegations that TCF failed to provide written confirmation to every customer who enrolled in TCF's overdraft service.

LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). The Court need not, however, accept factual assertions contradicted by the complaint or documents upon which the complaint relies. *See, e.g.*, *Cohen v. United States*, 129 F.2d 733, 736 (8th Cir. 1942) (court need not accept "facts which appear by a record or document included in the pleadings to be unfounded"); *Montero v. Bank of Am., N.A.*, No. 13-cv-850 (SRN/JSM), 2014 WL 562506, at *5 (D. Minn. Feb. 13, 2014) (dismissing claim "[b]ecause the documents attached to the Complaint directly contradict Plaintiff's assertions").

The CFPB referenced or quoted certain documents but declined to attach them to the complaint. These documents are incorporated by reference and should be considered in their entirety for completeness. *See Silver v. H&R Block, Inc.*,

105 F.3d 394, 397 (8th Cir. 1997) (court dealing with claim of misleading statements could consider "the *complete statements* in granting the motion to dismiss"; plaintiff "cannot defeat a motion to dismiss by choosing not to attach the full statements to the complaint" (emphasis added)); *see also Dylla v. Aetna Life Ins.*, No. 07-3203 (RHK/JSM), 2007 WL 4118929, at *2 (D. Minn. Nov. 16, 2007) (Kyle, J.) ("[T]he Court may consider materials that are outside the pleadings if such materials are necessarily embraced by them. For example, materials are necessarily embraced by the complaint if they were mentioned or incorporated by reference in the complaint." (citation and internal quotation marks omitted)).

ARGUMENT

I. TCF Did Not Engage in Deceptive or Abusive Acts or Practices.

Counts I and II assert claims as to New Customers, but the alleged violations are based on virtually identical facts. Both fail as a matter of law and should be dismissed.

A. TCF Did Not Deceive New Customers (Count II).

In light of the unchallenged written disclosures TCF provided to New Customers before, during, and after their enrollment decision, the CFPB cannot maintain a viable claim for consumer deception.

To state a claim for deceptive practices, the Bureau must show that there was a material "representation, omission, or practice that is *likely to mislead the*

consumer...acting reasonably [under] the circumstances." Federal Trade Commission (FTC) Policy Statement on Deception (emphasis added), *appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174–76 (1984).[10] A representation or practice should not be viewed in isolation but instead "[t]he entire advertisement, transaction or course of dealing [should] be considered." *Id.* Deception only occurs if the "net impression" of the transaction is materially misleading to a reasonable consumer. *See id.* at 176 n.7; *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992).

The CFPB alleges that New Customers were deceived because TCF "created the net impression that initialing the Opt-In section of the Agreement was mandatory," when in fact it was optional. Compl. ¶¶ 116–17. While the basis for the CFPB's allegation of what an untold number of customers understood is never disclosed in the complaint, the substance of the disclosures referenced in the complaint undermines this astonishing assertion.

- The Notice that TCF employees handed customers as the "first step" in the account opening process specifically told customers that TCF

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[10] While the Consumer Financial Protection Act ("CFPA") does not define a "deceptive" practice, the Bureau has stated that the definition is identical to Section 5 of the FTC Act, 15 U.S.C. § 45(a). *See Consumer Fin. Prot. Bureau v. Mortg. Law Grp., LLP*, No. 14-cv-513-bbc, -- F. Supp. 3d --, 2016 WL 3951226, at *12 (W.D. Wis. July 20, 2016).

"will not authorize and pay overdrafts for [certain] transactions unless you ask us to[.]" Hurd Decl. Ex. 4.

- The Agreement stated that enrollment was optional. It expressly referred customers back to the Notice, and told customers that TCF "does not charge overdraft fees...unless you have asked us to authorize and pay those transactions under the 'Opt-In Election' below" and that "**You are not required to initial the 'Opt-In Election' below.**" Hurd Decl. Ex. 5 at 3. If the customer chose to opt-in, he initialed the Agreement directly under a bold, upper-case heading, "**OPT-IN ELECTION (OPTIONAL)**." *Id.*

The CFPB also alleges that "the net impression left [on New Customers] by TCF's process was that there was no cost to opting in" though overdraft fees could be charged to customers that opted in and used the service. Compl. ¶¶ 114–15. TCF's disclosures flatly contradict this contention:

- The Notice detailed (in **bold**) the fee TCF charged for an overdraft transaction. Hurd Decl. Ex. 4. Also, there was *no fee for enrolling in overdraft services*, only for incurring overdrafts.
- The Agreement required customers to acknowledge TCF's overdraft fee policy under the heading, "**OVERDRAFT FEE ACKNOWLEDGEMENT**." Hurd Decl. Ex. 5 at 3.

The deception claim cannot withstand these unambiguous disclosures. The law does not require that every material term found in a written disclosure be repeated orally at contract signing. Yet that is apparently the standard the CFPB seeks to impose on TCF. Compl. ¶ 59 (faulting TCF employees for not summarizing Notice); *id.* ¶ 74 (faulting oral script for failure to mention fees); *id.* ¶ 113(c) (oral script "did not adequately disclose other relevant terms and conditions, including fees"). And the Bureau cannot assert a "net impression" claim of consumer deception without presenting both the relevant oral statements *and* the documents the consumers reviewed or signed contemporaneous with hearing those oral statements.

Consumers are charged with acting "reasonably under the circumstances" and are presumed to be able to read and comprehend disclosure documents. *See Karakus v. Wells Fargo Bank, N.A.*, 941 F. Supp. 2d 318, 340 (E.D.N.Y. 2013) ("[A] reasonable consumer...is expected to read and be familiar with the terms of a document she signs.").

Although the CFPB contends that bank customers "rarely read these disclosures," Compl. ¶ 76, this assertion is legally irrelevant. Courts routinely reject unfair and deceptive practices claims when the customer received accurate and understandable written disclosures. *See, e.g.*, *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1161–62, 1168–69 (9th Cir. 2012) (affirming dismissal of claim

that advertisement was unfair and deceptive for failing to mention fees because disclaimer said "other restrictions may apply" and terms and conditions disclosed fees); *cf. FTC v. IFC Credit Corp.*, 543 F. Supp. 2d 925, 946 (N.D. Ill. 2008) (granting motion to dismiss unfair practices claim because consumer could reasonably avoid harm simply by reading the contract before signing).

This approach accords with bedrock legal principles. A party cannot claim ignorance of the terms of a written agreement of which he had notice and to which he assented. *See, e.g.*, *Villines v. Gen. Motors Corp.*, 324 F.3d 948, 953 (8th Cir. 2003); *Gartner v. Eikill*, 319 N.W.2d 397, 398 (Minn. 1982) (en banc); Restatement (Second) of Contracts § 157 cmt. b (Am. Law. Inst. 1981) ("Generally, one who assents to a writing is presumed to know its contents and cannot escape being bound by its terms merely by contending that he did not read them; his assent is deemed to cover unknown as well as known terms.").

Nor can parties avoid responsibility for signing a contract by later contending that they had insufficient time to review. *See, e.g.*, *Karakus*, 941 F. Supp. 2d at 340 (rejecting deceptive practices claim based in part on allegation that defendant rushed plaintiff to sign loan documents; "This allegation is not nearly sufficient to overcome the principle that a reasonable consumer, at least in New York, is expected to read and be familiar with the terms of a document she

signs.").[11] Unsurprisingly, courts—including this one—have uniformly upheld other terms of the Agreement against challenges from consumers who claimed not to have read them.[12]

The holding in *Rickher v. Home Depot, Inc.*, 2007 WL 2317188 (N.D. Ill. Jul. 18, 2007), *aff'd*, 535 F.3d 661 (7th. Cir. 2008) is particularly instructive. There, a customer brought a class action against Home Depot under the Illinois Consumer Fraud and Deceptive Business Practices Act ("CFA"),[13] alleging that Home Depot deceived him into believing that an optional "damage waiver" for tool rentals was in fact mandatory. *Rickher*, 2007 WL 2317188, at *3. Like the CFPB, the customer alleged that Home Depot employees failed to make sufficient oral disclosures about the damage waiver. *Id.* at *4. The court rejected the claim

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[11] The New York Deceptive Practices Act is modeled on the FTC Act and "New York State Courts have looked to FTC Act case law in interpreting" that law. *Assocs. Capital Servs. Corp. v. Fairway Private Cars, Inc.*, 590 F. Supp. 10, 15 (E.D.N.Y. 1982) (citing *Lefkowitz v. Colo. State Christian Coll.*, 346 N.Y.S.2d 482, 487–91 (Sup. Ct., N.Y. Cty. 1973)).

[12] *See Williams v. TCF Nat'l Bank*, No. 12 C 05115, 2013 WL 708123, at *1, *4 (N.D. Ill. Feb. 26, 2013) (arbitration agreement found in separate "Terms and Conditions" pamphlet enforceable because consumer "had actual possession of the Terms"); Order at 10, *Pellett v. TCF Bank, N.A.*, No. 10 C 3943 (D. Minn. Nov. 24, 2010) (Doty, J.) ("Plaintiffs may not avoid their signed agreements by claiming that they did not read or understand the contents of those agreements"); *Pivoris v. TCF Fin. Corp.*, No. 07 C 2673, 2007 WL 4355040, at *4 (N.D. Ill. Dec. 7, 2007) (arbitration agreement enforceable where "Account Agreement itself made mention of the arbitration provision in plain English and in bold print").

[13] That law, like the CFPA, defines deceptive acts or practices with reference to the FTC Act. 815 Ill. Comp. Stat. 505/2.

because 1) the rental agreement notified customers that the damage waiver was optional, and 2) the customer admitted he did not read that part of the contract. *Id.* at *4, *5. As the court explained, "failure to read the agreement dooms his CFA claim" because "Plaintiff simply chose not to read the agreement and discover...for himself" that the damage waiver was optional. *Id.* at *5–6.

While written disclosures may not always cure otherwise deceptive practices—such as when there are explicit misrepresentations,[14] or where the written disclosure is buried in a lengthy document[15] or located in an unusual place one would not think to look[16]—the complaint contains absolutely no allegations of that kind. No TCF customer acting reasonably under the circumstances could have been deceived. The Bureau's apparent view that TCF customers should not be held to the clear disclosures they were provided breaks with longstanding principles of law. Count II should be dismissed.

B. TCF Did Not Abuse New Customers (Count I).

The CFPB likewise cannot maintain a viable claim for consumer abuse because the complaint has not plausibly alleged that TCF interfered with the

[14] *See, e.g.*, *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 632–33 (6th Cir. 2014) (disclosures contradicted by oral representations and only provided after consumer enrolled).

[15] *Id.* at 633 (deceptive practice where "disclaimers and more accurate information were buried in written documents").

[16] *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1200–01 (9th Cir. 2006) ("fine print notices" on rear of check).

decision of customers to enroll; the complaint does not allege that TCF prevented New Customers from reading the disclosures or otherwise made oral statements that contradicted them.

To state a claim for abusive practices, the CFPB must allege that TCF "*materially interfere[d]* with the ability of a consumer to understand a term or condition of a consumer financial product or service."[17] 12 U.S.C. § 5531(d)(1) (emphasis added). Recycling almost all the allegations underlying the deception claim, the CFPB contends that TCF "materially interfered with its New Customers' ability to understand" the terms and conditions governing overdraft service. Compl. ¶ 110. These allegations fall into three general categories, all of which fail as a matter of law.

First, the CFPB attacks TCF's decision to give customers the Notice at the start of the account opening process and ask for an enrollment decision later, after a series of other disclosures and acknowledgments. But that allegation ignores the fact that separation is consistent with Regulation E, which required that the Notice be "segregated" from the Agreement. 12 C.F.R. § 205.17(b)(1)(i). And, there is nothing abusive about giving the required Notice at the outset. The Agreement referred customers back to the Notice, stating, "TCF has given you a notice called

[17] The CFPA also prohibits as abusive an act or practice that "takes unreasonable advantage of" a consumer in various ways. 12 U.S.C. § 5531(d)(2). The Bureau relies only on the "material interference" aspect of an abusiveness claim. *See* Compl. ¶ 111.

What You Need to Know About Overdrafts and Overdraft Fees that describes our policy." Hurd Decl. Ex. 5. If anything, providing the Notice first attributes greater prominence to the disclosure.

The CFPB's newly-minted criticism also upends years of formal guidance from the Federal Reserve, which permits banks to provide the Notice "*prior to* or at account-opening" and includes no reminder requirement other than the written confirmation of enrollment provided afterwards. *See* 74 Fed. Reg. 59,033, 59,055 (Nov. 17, 2009), Official Staff Interpretations Comment 17(b)-5 (emphasis added). It is improper for the CFPB to attempt to impose liability based on its interpretation that contradicts official guidance in place at the time TCF enrolled New Customers. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (refusing to apply new agency interpretation of "ambiguous regulations to impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced"); *PHH Corp.*, 839 F.3d at 49 (due process prevented the CFPB from retroactively applying different rules than predecessor regulator without fair notice).

Second, the CFPB contends that TCF materially interfered with New Customers' ability to understand their enrollment decisions by instructing employees to give "uninformative" and "cursory" responses to questions and use "one-sided" hypotheticals. Compl. ¶¶ 3, 85–86, 110. Accepting the truth of these

allegations only for the purposes of this motion, they do not amount to "material interference" as a matter of law.

It cannot be that "uninformative" or "cursory" oral explanations (as the complaint's totally conclusory allegations describe them) materially interfere with a customer's decision where the law requires *no* explanation. Financial institutions throughout America can and do enroll millions of customers *online*. If the allegedly cursory summaries are not detailed enough, then online enrollment must be *per se* abusive. Yet the Federal Reserve's guidance expressly permits online enrollment and does not require *any* oral disclosure. 74 Fed. Reg. at 59,055 (Official Staff Interpretation Comment 17(b)-4(iii)) (allowing customers to opt-in via "electronic means" including "at its Web site").

The CFPB further alleges that many customers did not bother to read the Notice or the Agreement. But individual decisions to read or not read disclosures do not dictate whether TCF's account-opening process was abusive. To properly allege abuse, the complaint must show that *TCF* took some action that "materially interfered" with a customer's ability to understand the decision he was making.

The complaint only contains the conclusory allegation that TCF interfered with customer understanding through one-sided hypotheticals and cursory explanations. It does not explain how TCF's alleged practices prevented New Customers from reading TCF's clear, unambiguous disclosures, or how TCF

undermined customers' understanding that overdraft service was optional and a fee would be charged if the customer overdrafted. By providing customers with unambiguous written disclosures before, during, and after the enrollment decision, TCF gave New Customers the ability to understand the service it offered.

Third, the CFPB alleges that TCF deprived customers of the ability to understand overdraft service terms by incentivizing employees to reach unreasonably aggressive enrollment targets. Compl. ¶ 110. But employee incentives or goals are not *per se* abusive without a connection to actual improper conduct and resulting harm. Unlike other cases where the CFPB has alleged that improper conduct *actually resulted from* incentives,[18] there are no allegations that *any* TCF employee engaged in any improper behavior, let alone improper behavior motivated by incentives. *See* Compl. ¶¶ 35–48.

Nothing in Regulation E or any other federal law prohibited the payment of financial incentives to employees, prohibited TCF from actively soliciting its customers to enroll in overdraft service, or required any particular oral statements to supplement the mandatory Notice and written confirmation. No matter how "uninformative" the Bureau says TCF's scripts were, it has not pleaded facts sufficient to withstand dismissal of its abusiveness claim.

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[18] *See, e.g.*, Consent Order at 4–5, *In re Wells Fargo Bank, N.A.*, CFPB No. 2016-CFPB-0015 (Sept. 8, 2016) (incentives led employees to open accounts without consumer's knowledge or consent).

C. The Bureau Cannot Retroactively Assert Claims that Pre-Date July 21, 2011.

"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." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Thus, there is a "deeply rooted" presumption against retroactive application of legislation. *Id.*

In its zeal to address overdraft service, the CFPB is ignoring this bedrock principle by attempting to retroactively impose duties and penalties. The Court should reject this effort.

Counts I and II allege that TCF violated Sections 1031 and 1036 of the CFPA. Those provisions—and the Bureau's authority to enforce them—did not become effective until July 21, 2011 (the "Effective Date"). Pub. L. No. 111-203, § 1037, 124 Stat. 1376 (July 21, 2010) (Sections 1031 and 1036 "shall take effect on the designated transfer date."); 75 Fed. Reg. 57,252 (Sept. 20, 2010) (setting designated transfer date as July 21, 2011). Consequently, the CFPB cannot use these provisions to challenge conduct that occurred before the Effective Date.

Courts apply the two-part test from *Landgraf* to determine if a law may be applied retroactively. *See* 511 U.S. at 280; *In re ADC Telecomms., Inc. Sec. Litig.*, 409 F.3d 974, 976 (8th Cir. 2005) (applying *Landgraf* test). First, courts ascertain "whether Congress has expressly prescribed the statute's proper reach." *Landgraf*,

511 U.S. at 280. If so, "'there is no need to resort to judicial default rules.'" *ADC Telecommunications*, 409 F.3d at 976 (quoting *Landgraf*, 511 U.S. at 280). If not, "the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. If it does, then the statute cannot be applied to past conduct. *Id.*

The CFPB cannot get past step one. Not only does the CFPA provide no express authorization of retroactivity, Congress's intent was the opposite. Congress specifically set the Effective Date of the CFPA *in the future*. Pub. L. No. 111-203, § 1037, 124 Stat. at 2011. By contrast, Congress made the effective date of other provisions of Dodd Frank immediate. *See id.* § 4, 124 Stat. at 1390 ("Except as otherwise specifically provided...this Act and such amendments shall take effect 1 day after the date of enactment of this Act."). Given Congress's decision to make some provisions immediately effective and others effective at some future date, it necessarily follows that Congress intended the new provisions of the CFPA to apply only prospectively.

Even absent this clear expression of Congressional intent, the abusive and deceptive prohibitions still could not be applied retroactively under *Landgraf* step two. As to Count I's allegations of abusive conduct, prior to passage of the CFPA

there was no law or regulation applicable to TCF that prohibited "abusive" conduct now covered by § 5531. Subjecting TCF to legal consequences for engaging in allegedly "abusive" behavior that pre-dates the Effective Date therefore would be the paradigmatic example of "impos[ing] new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280.

The CFPB also cannot enforce retroactively the deceptive prong of the CFPA. First, unlike with abusiveness, the FTC Act prohibited TCF from engaging in deceptive conduct before the Effective Date, but Congress nevertheless precluded the CFPB from enforcing the FTC Act. *See* 12 U.S.C. §§ 5481(14) (definition of Federal consumer financial law "does not include the Federal Trade Commission Act."); 5481(12) (definition of enumerated consumer laws excludes FTC Act); 5581(b)(5)(B)(ii) (giving the CFPB authority to enforce *regulations* related to unfair and deceptive acts promulgated under the FTC Act, not authority to enforce violations of the FTC Act itself). To allow the Bureau to prosecute deceptive conduct that allegedly occurred before the Effective Date—ostensibly under the CFPA, but bootstrapped by reference to the FTC Act—would let in the backdoor that which is explicitly prohibited from entering through the front.

Second, the CFPA exposes TCF to greater potential penalties than TCF faced before its enactment. Before the Effective Date, only the Office of the Comptroller of the Currency ("OCC"), through 12 U.S.C. § 1818, could seek a

civil money penalty against TCF for deceptive practices under the FTC Act. Under the CFPA, the CFPB can now also seek—and has sought in this case—civil money penalties under 12 U.S.C. § 5565.

Importantly, the CFPA did not displace the OCC's authority to bring suit under the FTC Act, creating the possibility that TCF could now face *two* enforcement actions—and two separate penalties—for the same conduct, when before it could only face one. *See* 12 U.S.C. § 5581(b)(2)(A), (c)(2)(C)(ii) (partially transferring OCC authority to enforce Federal consumer financial laws (which exclude FTC Act), while maintaining the OCC's authority to enforce 12 U.S.C. § 1818). This risk is not merely theoretical—in recent cases the CFPB and OCC have each sought (and received) civil money penalties for the same unfair or deceptive practices.[19] Thus, if given retroactive effect the CFPA would impermissibly "attach[] new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. The Court should therefore dismiss Counts I and II for conduct that pre-dates July 21, 2011.

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[19] *See, e.g.*, Consent Order at 13–15, 31, *In re First National Bank of Omaha*, CFPB No. 2016-CFPB-0014 (Aug. 25, 2016) (civil money penalty of $4,500,000 to CFPB); Consent Order for a Civil Money Penalty at 2–3, *In re First National Bank of Omaha*, OCC No. 2016-076(Aug. 18, 2016) ($3,000,000 civil money penalty to OCC).

II. TCF Did Not Violate Regulation E (Count III).

Count III must be dismissed because the complaint does not plausibly contend TCF failed to comply with Regulation E in connection with its efforts to enroll Existing Customers in overdraft service.

Unlike New Customers, Existing Customers were accustomed to overdraft service, but were slated to default to opt-out status on August 15, 2010 if they did not affirmatively choose to enroll. The Bureau does not allege that TCF failed to provide the Notice to Existing Customers, nor does it contend that TCF failed to provide written confirmation of their enrollment decision. Instead, it claims that TCF violated Regulation E when it asked Existing Customers whether they wanted their card to "continue working as it does today." *Id.* ¶ 121. According to the CFPB, this "fram[ed] the decision" in a way that "turned Overdraft Service...into the default position," and, "[a]s a result, Existing Customers did not have a reasonable opportunity to consent nor did they affirmatively consent." *Id.* ¶¶ 122–23. This conclusion is based on a demonstrable misreading of the "reasonable opportunity to consent" requirement.

A. TCF Gave Customers a Reasonable Opportunity To Consent.

Regulation E states that a "financial institution provides a consumer with a reasonable opportunity to provide affirmative consent when, among other things, it provides *reasonable methods* by which the consumer may affirmatively consent."

74 Fed. Reg. at 59,042 (emphasis added). The regulation provides four examples, all of which focus on the *means* and *method* of obtaining affirmative consent, such as providing a mail-in form, a "readily available telephone number," a web-based form, or a form that "the consumer can fill out and present in person...to provide affirmative consent." *Id.*; *see also id.* at 59,055 (Official Staff Interpretations Comment 17(b)-4) (discussing "reasonable opportunity to provide affirmative consent"). The staff commentary for Regulation E makes clear that a "reasonable opportunity to consent" means that banks must provide "*reasonable methods*" to consent. *Id.*

The CFPB does not allege that TCF failed to provide reasonable enrollment options to Existing Customers. Indeed, the Bureau acknowledges that TCF gave customers the opportunity to enroll "through a number of [] communications channels[.]" Compl. ¶ 103. Nothing in the text of the regulation or the staff commentary suggests that the "reasonable opportunity" requirement has anything to do with the presentation or description of the customer's opt-in choice. But that is exactly the meaning the CFPB asks the Court to give it here.

Allowing the CFPB to apply this novel (and incorrect) interpretation of Regulation E to TCF's conduct from 2010 would violate TCF's due process rights in the exact same way that the Bureau violated PHH's rights by attempting to retroactively alter well established regulatory guidelines. *See PHH Corp.*, 839

F.3d at 44 ("But change becomes a problem—a fatal one—when the Government decides to turn around and *retroactively* apply that new interpretation to proscribe conduct that occurred *before* the new interpretation was issued." (emphasis in original)); *see also Christopher*, 132 S. Ct. at 2167. If the CFPB wants to change the meaning of "reasonable opportunity" to require (or prohibit) oral disclosures, or specify the content of those disclosures, it must engage in a prospective rulemaking—which, interestingly, it is already doing.[20] A retroactive enforcement action seeking to establish new interpretations is improper.

B. The Complaint Fails To Allege Plausibly that Customers Did Not Provide Affirmative Consent.

The Regulation E claim also fails because the CFPB does not plausibly allege that TCF failed to obtain "affirmative consent" from customers. Count III asserts that TCF "changed the election from an Opt-In to an Opt-Out," Compl. ¶ 122, by using call scripts that asked Existing Customers "something like" whether they would like their "TCF check card to continue to work as it does today" and then treating that "as *an indication* that the customer wanted to Opt In," *id.* ¶¶ 89–90 (emphasis added).

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[20] *See* CFPB Agency Rule List, Fall 2016 (Hurd Decl. Ex. 9) (listing "Overdraft" in the "Prerule Stage"); *see also* CFPB Fall 2016 Rulemaking Agenda, Dec. 2, 2016 (Hurd Decl. Ex. 10) at 3 ("The Bureau is continuing to engage in additional research and has begun consumer testing initiatives relating to the opt-in process."); CFPB Fall 2015 Rulemaking Agenda, Nov. 20, 2015 (Hurd Decl. Ex. 1) at 2 ("The Bureau is preparing for a rulemaking concerning overdraft programs on checking accounts.").

The CFPB does not allege that TCF actually enrolled customers based solely on the response to this ice-breaker question. To the contrary, it acknowledges—as it must—that TCF's scripts called for additional disclosures about TCF's overdraft service, *including fees*, *id.* ¶ 94, followed by a question asking whether the customer wanted to enroll in overdraft service. *Id.* ¶ 96; *see also* Hurd Decl. Ex. 6.

There is simply no allegation that TCF enrolled Existing Customers without their knowledge, or under false pretenses, or defaulted Existing Customers into Opt-In status. Instead, TCF only enrolled Existing Customers who answered "Yes" to the enrollment question *at the end of the script*. As a matter of law, this does not constitute a violation of Regulation E.

The CFPB's "conversion" argument is also nonsensical. The Bureau alleges that TCF scripts led customers to believe that the default was to be opted into overdraft service because the script informed Existing Customers that "some upcoming regulatory changes...would limit the usage" of their TCF Check Cards, Compl. ¶ 89, and asked "whether they wanted their account 'to continue working as it does today,'" *id.* ¶ 121. But there is nothing wrong or misleading about these statements, the Bureau's *ipse dixit* assertion notwithstanding.

The challenged statements are factually accurate. At the time the calls were placed (i.e., before Regulation E became effective), Existing Customers were all enrolled in overdraft protection; if they did nothing, they automatically would have

been opted out of that service. If that happened, their cards would not have worked as they had—i.e., swipe negative/settle positive transactions would not have been approved and overdraft transactions would not have been honored. The CFPB cannot claim that TCF violated Regulation E by providing its customers with factually accurate information. Count III should be dismissed.

C. The CFPB Cannot Seek Restitution for Existing Customers Who Incurred Their First Overdraft Prior to March 6, 2014.

The CFPB contends that it can enforce alleged violations of Regulation E through the Electronic Funds Transfer Act ("EFTA"), 15 U.S.C. § 1693, and the CFPA, 12 U.S.C. § 5536(a)(1)(A). Claims under both statutes are time-barred to the extent the Bureau seeks restitution for customers who incurred an overdraft before *March 6, 2014*.[21]

The EFTA limits claims for "civil liability" to those brought "within one year from the date of the occurrence of the violation." 15 U.S.C. § 1693m(g). Courts have interpreted this to mean that the one-year limitations period runs from the date of the first challenged transfer. *See, e.g.*, *Harvey v. Google Inc.*, No. 15-cv-03590-EMC, 2015 WL 9268125, at *3 (N.D. Cal. Dec. 21, 2015); *Repay v. Bank of Am., N.A.*, No. 12 CV 10228, 2013 WL 6224641, at *5 (N.D. Ill. Nov. 27,

[21] TCF entered into a series of tolling agreements with the CFPB beginning on February 11, 2015. Accounting for brief lapses between extensions (totaling 23 days), tolling runs from March 6, 2015. Hurd Decl. Ex. 7.

2013); *Pelletier v. Pac. WebWorks, Inc.*, No. CIV S-09-3503 KJM KJN, 2012 WL 43281 (E.D. Cal. Jan. 9, 2012).

Although a question of first impression, the EFTA's one-year limitations period for civil liability governs the Bureau's action here. Where Congress wishes to provide a longer limitations period for government action than private action, it can and does do so explicitly. *See, e.g.*, 12 U.S.C. § 2614 (requiring that suits to enforce §§ 2607 and 2608 be brought within one year, "except that actions brought by [various government agencies] may be brought within 3 years from the date of the occurrence of the violation."). Because there is no separate statute of limitations provision for actions by regulators, the one-year limitations period should apply. *Cf. Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, No. 1:14-CV-00292-SEB-TAB, -- F. Supp. 3d --, 2015 WL 1013508 at *32–33 (S.D. Ind. Mar. 6, 2015) (applying TILA's one-year civil liability limitations period to the Bureau's claims).

Nor does the CFPA's three-year limitations period apply because the CFPA claim is entirely derivative of the alleged EFTA violation. Section 1054 of the CFPA authorizes the CFPB to bring suits in federal court for alleged CFPA violations no later than "3 years after the date of discovery of the violation." 12 U.S.C. § 5564. This general rule, however, is subject to an important caveat: "any action arising solely under an enumerated consumer law," including the EFTA, is

not governed by the three-year limitations period, but instead is governed by "the requirements of that provision of law [i.e. the enumerated consumer financial law], as applicable." *Id.* § 5564(g)(2)(A)–(B).

The Bureau alleges that TCF violated the CFPA, which makes it unlawful to "commit any act or omission in violation of a Federal consumer financial law." 12 U.S.C. § 5536; *see also* 12 U.S.C. § 5481(14) (defining "Federal consumer financial law" to include "enumerated consumer laws"). This means that Count III's CFPA claim is based solely on an alleged violation of an enumerated consumer law—the EFTA—and therefore subject to the one-year limitations period established by the same EFTA. Count III should be dismissed as time-barred for all Existing Customers who incurred their first overdraft fee before March 6, 2014.

III. The CFPB Is Unconstitutionally Structured Due to the Lack of Executive and Congressional Oversight.

The CFPB's structure is unconstitutional. *See PHH Corp.*, 839 F.3d at 8. Its lack of oversight impermissibly interferes with the President's ability to "'take Care that the Laws be faithfully executed,'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010) (quoting U.S. Const. art. II, § 1), and leaves the CFPB accountable only to itself. As a panel for the D.C. Circuit recently said, "when measured in terms of unilateral power, the Director of the

CFPB is the single most powerful official in the entire U.S. Government, other than the President." *PHH Corp.*, 839 F.3d at 17.

The CFPB has several structural infirmities which, considered separately or together, make the Bureau unconstitutionally free from oversight by elected officials. First, unlike nearly all other independent agencies, the CFPB is led by a single Director, not a multi-member commission. 12 U.S.C. § 5491(b)(1). "As compared to a single-Director structure, a multi-member independent agency also helps to avoid arbitrary decisionmaking and to protect individual liberty because the multi-member structure—and its inherent requirement for compromise and consensus—will tend to lead to decisions that are not as extreme, idiosyncratic, or otherwise off the rails." *PHH Corp.*, 839 F.3d at 27.

Second, the CFPB director does not serve at the pleasure of the President—he is appointed for a five-year term spanning across presidencies, and is subject only to for-cause removal. 12 U.S.C. § 5491(c)(1), (c)(3).

Third, the CFPB does not even answer to Congress for its budget—it independently funds itself through the Federal Reserve, and funds taken by the CFPB "shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate." *Id.* § 5497(a)(1), (a)(2)(C).

These structural infirmities create an agency "exceptional in our constitutional structure and unprecedented in our constitutional history." *PHH*

Corp., 839 F.3d at 21. Without oversight from either elected branch of government, the CFPB is unconstitutional. And because it is unconstitutional, it lacks authority to bring this action. *See Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013) (NLRB action "void *ab initio*" when commissioners were unconstitutionally appointed), *aff'd on other grounds*, 134 S. Ct. 2550 (2014).

The proper remedy in this case is to dismiss this action without prejudice to allow the Bureau to reconsider whether to bring an enforcement action *after* its structure conforms to the Constitution's requirements. *See NLRB v. Whitesell Corp.*, 638 F.3d 883, 888–89 (8th Cir. 2011) (after prior decision held NLRB panel was not properly constituted for statutory reasons; "Our prior denial does not preclude the Board, *now properly constituted*, from considering this matter anew and issuing its first valid decision." (emphasis added)); *Fed. Election Comm'n v. Legi-Tech, Inc.*, 75 F.3d 704, 708 (D.C. Cir. 1996) (properly reconstituted after *NRA Political Victory Fund*, *infra*, Federal Election Commission permissibly ratified past enforcement action); *see also Fed. Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993) (after severing unconstitutional structure; "appellants raise the constitutional challenge as a defense to an enforcement action, and we are aware of no theory that would permit us to declare the Commission's structure unconstitutional without providing relief to the appellants in this case").

This enforcement action has been entirely (and therefore unconstitutionally) shielded from executive oversight. Indeed, as noted earlier, the CFPB filed this suit on inauguration eve, likely in an effort to insulate this action from any Presidential review. Therefore, the case should be dismissed.

CONCLUSION

For the foregoing reasons the Complaint should be dismissed.

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Respectfully submitted,

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