IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Consumer Financial Protection Bureau, *Plaintiff*, vs. TCF National Bank, *Defendant*.	Case No. 17-cv-00166-RHK-KMM

MEMORANDUM OF LAW OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.[1]

INTRODUCTION

The amended complaint ("AC") filed by the Consumer Financial Protection Bureau constitutes a textbook example of regulatory overreach. The Bureau believes that (a) a new legal standard should be applied retroactively to conduct that took place before the standard was enacted into law; and (b) its ability to bring certain enforcement actions is not limited by a statute of limitations. These are unjustified positions given the governing legal principles and the practices of other regulatory agencies, but the Bureau has previously made the

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[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief.

same or similar claims—and lost in court. *See PHH Corp. v. Consumer Fin. Protection Bureau*, 839 F.3d 1, 41-55 (D.C. Cir. 2016).[2]

The CFPB's failure to abide by established norms that other federal regulatory agencies routinely follow is a direct consequence of the Bureau's unique statutory structure enshrined in the Dodd-Frank Act. The agency's broad regulatory authority is exercised by a single Director, who also has exclusive authority to appoint Bureau staff. The Director may be removed by the President only for cause—and has the ability to spend nearly $650 million dollars each year on Bureau operations, funded by transfers from the Federal Reserve, without seeking or obtaining the approval of Congress and the President.

These characteristics distinguish the Bureau from every other government agency that regulates private entities. Most other independent regulatory agencies are headed by bipartisan, multi-member bodies[3]; when a department or

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[2] The panel opinion in *PHH* was vacated when the full D.C. Circuit voted to rehear the case en banc on February 16, 2017. Oral argument before the en banc court will be held this spring.

[3] *See, e.g.*, 7 U.S.C. § 2(a)(2)(A) (Commodity Futures Trading Commission composed of five Commissioners, with no more than three from any political party); 12 U.S.C. § 241 (Federal Reserve System headed by seven-member Board of Governors); *id.* § 1752a(b)(1) (National Credit Union Administration headed by three-member bipartisan board); *id.* § 1812(a)(1) (Federal Deposit Insurance Corporation headed by five-member board); 15 U.S.C. § 41 (Federal Trade Commission composed of five bipartisan Commissioners); *id.* § 78d(a) (Securities and Exchange Commission composed of five bipartisan Commissioners); *id.* § 2053(a) (Consumer Product Safety Commission composed of five Commissioners); 42 U.S.C. § 7171(b)(1) (Federal Energy Regulatory Commission

agency is headed by a single individual, that person almost always serves at the pleasure of the President; and most components of the federal government (including Congress and the Office of the President) must obtain spending authority through annual appropriations laws. No other federal agency with the power to regulate private parties—let alone the broad regulatory, prosecutorial, and adjudicatory authority exercised by the Bureau's Director—is headed by a single individual who may be removed only for cause and who can spend funds without obtaining an annual appropriation.

The CFPB's unprecedented structure conflicts fundamentally with the self-governance and accountability principles on which the Constitution rests, and the absence of any historical precedent in our history for a federal agency with the Bureau's structure and regulatory power provides strong additional evidence of its unconstitutionality. For that reason alone, the complaint in this case should be dismissed.

If the amended complaint is not dismissed, it should be dismissed to the extent it seeks to apply Sections 1031 and 1036 of the Consumer Financial Protection Act ("CFPA") to events prior to their effective date. Nothing in the CFPA evinces anything close to the clear expression of congressional intent needed to justify applying a statute retroactively.

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composed of five bipartisan Commissioners); 47 U.S.C. § 154(a) (Federal Communications Commission composed of five bipartisan Commissioners). *See generally PHH*, 839 F.3d at 17–18.

The amended complaint's allegations under the Electronic Funds Transfer Act ("EFTA") and implementing regulations should also be dismissed to the extent they cover events outside EFTA's one-year statute of limitations. In authorizing the Bureau to enforce EFTA, Congress did not expand the limitations period that applied to EFTA actions. Allowing the Bureau to expand EFTA's limitations period through the CFPA would upset the clear expectations of the financial services industry, with harmful consequences for the marketplace.

ARGUMENT

I. The Amended Complaint Should Be Dismissed Because The Bureau's Structure Violates The Constitution.

The Bureau's unprecedented structure violates the Constitution in two separate, but related, ways. *First*, the complete insulation of the Bureau from accountability to citizens' elected representatives (the President and Congress) for the Director's entire five-year term is inconsistent with the Constitution's fundamental principle of self-governance. *Second*, the grant of broad power to a single Director unaccountable to the President violates basic separation-of-powers principles. The Supreme Court has repeatedly looked to history in construing the Constitution's structural protections and these conclusions are bolstered by the complete absence of any historical precedent for a federal agency resembling the Bureau.

A. Lack of accountability

"Our Constitution was adopted to enable the people to govern themselves, through their elected leaders." *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). It embodies "that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government." The Federalist No. 39 (James Madison) (Lillian Goldman Law Library, 2008), http://avalon.law.yale.edu/18th_century/fed39.asp; *see also, e.g.*, *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 548 (1830) ("The power of self government is a power absolute and inherent in the people.").

For that reason, all "legislative Powers" of the federal government are "vested in a Congress of the United States," consisting of the people's elected Representatives and Senators. U.S. Const. Art. I, § 1. And "[t]he executive Power" is "vested in a President of the United States" (Art. II, § 1), who is "chosen by the entire Nation" (*Free Enterprise Fund*, 561 U.S. at 499). Conferring legislative and executive authority directly, and solely, on the representatives chosen by the people is essential for accountability to the people—and therefore to the self-government on which the constitutional structure rests.

That is because "[t]he diffusion of power carries with it a diffusion of accountability," which "subverts . . . the public's ability to pass judgment on" the efforts of those whom they elect. *Id.* at 498; *see also id.* ("[w]ithout a clear and

effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall'" (quoting The Federalist No. 70, p. 476 (Alexander Hamilton) (J. Cooke ed. 1961)).

The Bureau's structure was expressly intended to achieve the opposite result: unprecedented insulation of the Director's actions from control by Congress or the President. That insulation violates the Constitution.

To begin with, the Director's authority is extremely broad. It extends to any person or business who engages in any of ten specified activities that are common throughout the economy, as well as service providers to such businesses.[4] And the Director may initiate enforcement actions; adjudicate enforcement actions brought administratively; and issue regulations—not just under the Dodd-Frank Act but also under eighteen other federal laws.

The Director's exercise of this broad authority is not subject to any of the mechanisms for accountability to the people's elected representatives that apply to other agencies. The President may not remove the Director at will, to ensure the implementation of his policy priorities. And Congress may not use its "power of the purse" to circumscribe the Director's exercise of his authority.

The goal of insulating the Director, and the Bureau, from accountability to the President and Congress, and therefore to the people, is also apparent in a number of less sweeping provisions of the statute. Any penalties and fines

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[4] *See, e.g.*, 12 U.S.C. §§ 5481(15) & (26), 5514, 5531, 5536.

collected by the Bureau are deposited into a separate account and, if not used to compensate affected consumers, may be expended by the Director—without any approval by the President or Congress—"for the purpose of consumer education and financial literacy programs." 12 U.S.C. § 5497(d)(2). The Director is specifically empowered to provide "legislative recommendations, or testimony, or comments on legislation" to Congress without prior review by "any officer or agency of the United States." *Id.* § 5492(c)(4). And the Director is authorized to appoint his own Deputy, who serves as Acting Director in the absence of a Director. *Id.* § 5491(b)(5).

The combination of all of these provisions creates an extraordinarily attenuated "chain of command" that uniquely limits the people's ability to exercise their right to self-government with respect to matters within the Bureau's jurisdiction. That unprecedented disconnection of federal executive and legislative power from all of the mechanisms for ensuring accountability, and therefore self-government, is unconstitutional.

B. Separation of powers

The Constitution charges the President with "tak[ing] Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. In order to exercise the entire executive power of the federal government, the President necessarily must act with "the assistance of subordinates." *Myers v. United States*, 272 U.S. 52, 117 (1926).

But, because "[t]he buck stops with the President" under Article II (*Free Enter. Fund*, 561 U.S. at 493), the President remains responsible for supervising and controlling the actions of his subordinates. *See Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1238 (2015) (explaining that Article II "ensures that those who exercise the power of the United States are accountable to the President, who himself is accountable to the people").

And in order effectively to control his subordinates, the President must be able to remove them. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.") (internal quotation marks omitted); *see also, e.g., Myers*, 272 U.S. at 119 ("[T]hose in charge of and responsible for administering functions of government, who select their executive subordinates, need in meeting their responsibility to have the power to remove those whom they appoint.").

To be sure, in *Humphrey's Executor v. United States*, 295 U.S. 602, 632 (1935), the Supreme Court held that Congress could create administrative agencies whose officers were protected from presidential removal except for cause. But the Court based this exception to the general rule of unfettered presidential control on the understanding that such officers would "be nonpartisan," "act with entire impartiality," exercise "neither political nor executive" duties, and apply "the trained judgment of a body of experts

'appointed by law and informed by experience.'" *Id.* at 624. The Court reasoned that such an expert body was not truly executive and thus could be insulated from presidential control. *Id.* at 628.

The extent to which the rationale of *Humphrey's Executor* extends to the labyrinth of administrative agencies established since 1935 is far from clear. But it surely does not reach the Bureau, whose Director bears no resemblance to the multi-member Federal Trade Commission before the Court in *Humphrey's Executor*—or to any other federal regulatory agency. That is because every agency that regulates the private sector and is headed by officials whom the President may remove only for cause has a multi-member commission structure.[5] Because the terms of such commission members are staggered, a President inevitably will have the ability to influence the commission's deliberations by appointing one or more members. And, of course, many of these statutes establishing these agencies expressly require bipartisan membership. Those features provide at least some accountability to the President.

In addition, as the D.C. Circuit panel explained in detail (*PHH*, 834 F.3d 25-28), a multi-member commission structure means that members have the

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[5] Apart from the Bureau, the Federal Housing Finance Agency ("FHFA"), the Office of Special Counsel, and the Social Security Administration also have single heads who are removable only for cause. But these agencies do not enforce laws against private persons—FHFA, for example, oversees government-sponsored entities, two of which are in conservatorship with the FHFA as the conservator. 12 U.S.C. § 4511(b); FHFA, *FHFA as Conservator of Fannie Mae and Freddie Mac*, goo.gl/XzeAYr; *see also PHH*, 834 F.3d at 19-20.

ability to check each other and thus guard against the arbitrary exercise of power:

> [N]o single commissioner or board member possesses authority to do much of anything. Before the agency can infringe your liberty in some way – for example, initiating an enforcement action against you or issuing a rule that affects your liberty or property – a majority of commissioners must agree. That in turn makes it harder for the agency to infringe your liberty.

839 F.3d at 26.

C. Historical practice

The Supreme Court has repeatedly emphasized the importance of "longstanding practice" in explicating the Constitution's structural protections. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (internal quotation marks omitted); *see PHH*, 834 F.3d at 22-23 (collecting quotations). Thus, "[p]erhaps the most telling indication of [a] severe constitutional problem . . . is [a] lack of historical precedent." *Free Enterprise Fund*, 561 U.S. at 505.

The lack of *any* historical precedent for an agency with a structure like the Bureau's (*see PHH*, 839 F.3d at 17-21)—is therefore telling proof that it violates the Constitution. Congress may not vest such sweeping executive power in the hands of a single person who is not accountable to the President, Congress, or the American people.

D. The Bureau's Unconstitutional Structure Has Harmful Consequences For The Businesses It Regulates.

"[S]tructural protections against abuse of power," the Supreme Court has explained, are "critical to preserving liberty." *Bowsher*, 478 U.S. at 730. The

Bureau's short history already has confirmed the truth of this principle—its unconstitutional structure has led to unfair, unjustified actions that have inflicted significant harm on the many businesses in the large sectors of the economy within the Bureau's jurisdiction. Indeed, as we discuss below (at pages 17-22), the amended complaint in this case provides yet another example of this phenomenon.

1. The Bureau disregards statutory limits on its jurisdiction.

Although the Bureau's statutory authority is extremely broad, it has made a practice of circumventing the limits that Congress imposed.

For example, the CFPA expressly forbids the Bureau from exercising *any* authority over auto dealers (12 U.S.C. § 5519(a)), but the Bureau has sought to end run this restriction by bringing enforcement actions under the Equal Credit Opportunity Act against indirect auto lenders (*i.e.*, banks or other lenders who purchase installment sales agreements from dealers who have extended financing to car buyers) on the theory that the dealers with whom they do business have engaged in discrimination.

As of January 2017, the Bureau had extracted some $200 million in penalties in these actions without ever having to defend in court its disparate-impact legal theory—which has been heavily criticized elsewhere. *See* U.S. House of Reps., Comm. on Fin. Servs., *Unsafe at any Bureaucracy, Part III: The CFPB's Vitiated Legal Case Against Auto-Lenders* at 3 (Jan. 18, 2017). *See also* U.S. House of Reps., Comm. on Fin. Servs., *Unsafe at any Bureaucracy, Part I:*

CFPB Junk Science and Indirect Auto Lending at 46 (Nov. 14, 2015) (explaining that "internal [CFPB] documents reveal that the Bureau's objective from the beginning has been to eliminate dealer discretion and dealer reserve"). This roundabout means of imposing the Bureau's dictates on the auto dealer market flouts the clear limitation in the CFPA.

Similarly, the Bureau has used its Civil Investigative Demand power (12 U.S.C. § 5562(c)) to probe college accreditation bodies. These organizations are outside the Bureau's jurisdiction because they do not offer or provide consumer financial products or services. *See* Br. of Chamber of Commerce of the U.S. as *Amicus Curiae* 4–16, *Consumer Fin. Protection Bureau v. Accrediting Council for Indep. Colleges & Schs.*, No. 16–5174 (D.C. Cir. Dec. 7, 2016).

These and other similarly aggressive assertions of authority harm regulated businesses and the entire economy. The courts, which have the power to invalidate Bureau actions when the agency exceeds its jurisdiction, stand as a check on the Bureau's overreach. But even where the courts rebuff overreach by the Bureau, companies are put to unnecessary effort and expense in defending themselves—and the Bureau may continue to employ the legal theories that courts invalidate.

2. The Bureau does not abide by established regulatory norms followed by other federal agencies.

The Director's unchecked power also has resulted in deviations from the consistent approaches of other federal regulatory agencies—in the form of unfair, arbitrary actions.

For example, unlike its fellow regulators, the Bureau has failed to take reasonable steps to reduce regulatory uncertainty. Other agencies employ robust advisory opinion and no-action letter processes to enable regulated businesses to clarify the rules of the road. *See, e.g.*, 17 C.F.R. § 140.98 (providing for "no-action, interpretative and exemption letters" from Commodity Futures Trading Commission); *id.* § 202.1(d) (providing for informal statements from Securities and Exchange Commission); 16 C.F.R. § 1000.7 (providing for "written advisory opinions" from General Counsel of Consumer Product Safety Commission); *id.* § 1.1(b) (Federal Trade Commission authorization for staff to "consider all requests for advice and to render advice, where practicable"); 28 C.F.R. § 50.6 (providing for "Business Review Procedure" by Department of Justice Antitrust Division); *id.* pt. 80 (providing for opinions by Department of Justice under Foreign Corrupt Practices Act). The Securities and Exchange Commission issues hundreds of no-action letters each year. *See, e.g.*, Sec. & Exch. Comm'n, Div. of Corp. Fin., *No-Action, Interpretive, and Exemptive Letters*, goo.gl/uTVfX3; Sec. & Exch. Comm'n, Div. of Inv. Mgmt., *Staff No-Action and Interpretive Letters*, goo.gl/4lWROs.

The CFPB, by contrast, created an extremely restrictive no-action letter process that the Bureau expects will be used only in "exceptional circumstances"—and result in a mere *one to three actionable requests each year*. *See* Policy on No-Action Letters; Information Collection, 81 Fed. Reg. 8686, 8691

(Feb. 22, 2016). To our knowledge, the Bureau has yet to issue a single no-action letter.

Similarly, the Bureau has refused to institute a public proceeding to clarify the scope of its power under 12 U.S.C. § 5531(a) to prosecute "unfair, deceptive, or abusive act[s] or practice[s]"—even though the Director himself has testified to Congress that the "unreasonable advantage" element of the cause of action for "abusiveness" was "something of a vague term that needs definition." *How Will the CFPB Function Under Richard Cordray: Hearing Before the Subcomm. on TARP, Financial Services and Bailouts of Public and Private Programs*, 112th Cong. 112-107, at 70 (2012). Instead, the Bureau has issued only vague guidance that recites the general statutory standard. *See* CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts (July 10, 2013), perma.cc/JXE2-LLMC.

Other agencies recognize the importance of such guidance. For example, the FTC long ago issued detailed policy statements clarifying the meaning of "unfair" and "deceptive" practices under the FTC Act. *See* FTC Policy Statement on Deception (Oct. 14, 1983), *appended to* Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984), perma.cc/KK7Q-3BQE; FTC Policy Statement on Unfairness (Dec. 17, 1980), *appended to* Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984), perma.cc/3AUE-4943.

The result of the Bureau's refusal to provide guidance is that businesses seeking to understand the scope of this authority must either err on the side of

complying with the broadest possible interpretation of the statutory terms or read the tea leaves provided in the Bureau's enforcement actions and Director Cordray's public statements.

Courts have long recognized that this sort of uncertainty about regulatory standards produces inefficiency and harms competition. *See, e.g.*, *Apotex, Inc. v. FDA*, 449 F.3d 1249, 1252 (D.C. Cir. 2006) (per curiam) (agreeing with FDA's conclusion that a regulatory test that would "undermine marketplace certainty and interfere with business planning and investment" was "ill-advised") (alterations and internal quotation marks omitted); *AT&T Inc. v. FCC*, 452 F.3d 830, 836 (D.C. Cir. 2006) (noting that "even the Commission recognizes that regulatory uncertainty in itself may discourage investment and innovation") (internal quotation marks and ellipsis omitted); *Fed. Home Loan Bank Bd., Washington, D.C. v. Empie*, 778 F.2d 1447, 1450 (10th Cir. 1985) (noting potential for "entities in [the] regulatory domain, as well as the general public, [to] suffer from . . . regulatory uncertainty").

When businesses are unsure what standards apply to their conduct, what those standards require, and even whether they are subject to a regulator's jurisdiction in the first place, law-abiding businesses may avoid risk by tightening underwriting requirements, eliminating product features, or exiting a product category. Competition in turn is reduced, resulting in higher prices and reduced product choice for consumers.

This state of affairs is exactly the opposite of what Congress sought to accomplish when it created the Bureau. The Bureau was intended to "set and enforce clear rules of the road across the financial marketplace." Statement by the President on Financial Regulatory Reform (Mar. 22, 2010), perma.cc/Q2EC-MC2P; *see also* Pub. L. No. 111-203 § 1061(b)(7), 124 Stat. 1376, 2038 (2010) (transferring financial regulatory functions from other agencies to the Bureau). By relying on a closed, opaque decision-making process and eschewing notice and comment rulemaking, the Bureau is failing to perform the mission Congress gave it and denying the regulated community the clarity and certainty it needs.

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Because the structure of the Bureau is unconstitutional, its amended complaint in this case was outside its statutory authority—and should be dismissed.[6]

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[6] The relevant evidence here indicates that Congress would not have enacted a statute giving an official serving at the pleasure of the President sole authority to spend more than $650 million annually without congressional approval: the proposal submitted by President Obama and the bill enacted by the House of Representatives adopted the traditional multi-member commission structure. *See PHH*, 839 F.3d at 6. The Court thus should not merely sever the "for-cause" removal provision, but invalidate the Bureau's structure entirely and stay the decision to allow Congress to define how the agency should operate going forward. *See N. Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88-89 (1982); *see Free Enter. Fund*, 561 U.S. at 509 (unconstitutional provision cannot be severed from rest of statute if it is "evident that the Legislature would not have enacted those provisions . . . independently of that which is invalid") (brackets and internal quotation marks omitted).

II. The Bureau May Not Invoke Dodd-Frank's Prohibition Of Abusive Or Deceptive Acts Or Practices With Respect To Conduct Occurring Before The Effective Date Of That Statutory Prohibition.

Counts I and II of the Amended Complaint allege that Defendant committed abusive or deceptive acts or practices in violation of Sections 1031 and 1036 of the CFPA (12 U.S.C. §§ 5531, 5536), and bases those claims on alleged conduct stretching back to 2009 and 2010. *See, e.g.*, AC ¶ 49 (alleging that the development of the "communications strategy for Opt-In" began in 2009). To the extent the Bureau seeks penalties or compensatory relief for conduct that occurred prior to July 21, 2011—the effective date of Sections 1031 and 1036—Counts I and II of the Amended Complaint must be dismissed.

"Retroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Applying new laws retroactively to conduct that occurred before their enactment runs counter to "[e]lementary considerations of fairness," which "dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).

For that reason, federal law embodies a strong "presumption against retroactive legislation." *Id.* at 265. In applying the presumption, a court first "determine[s] whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280. If Congress has made clear whether the legislation operates retroactively, that determination controls. But if Congress has not done this,

then a statute cannot be given retroactive effect "absent clear congressional *intent* favoring such a result." *Id.* (emphasis added).

Nothing in the CFPA expressly addresses whether Sections 1031 and 1036 can be applied to conduct that occurred before the Act became law. But the statute comes close to an express bar on retroactivity, providing that these prohibitions "shall take effect on the designated transfer date" for certain authorities from other agencies to the Bureau. Pub. L. No. 111-203, § 1037, 124 Stat. 1376, 2011 (July 21, 2010).[7] Certainly, as the Supreme Court observed in *Landgraf*, "[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Landgraf*, 511 U.S. at 257.

Under the second prong of the *Landgraf* test, Sections 1031 and 1036 may not be applied retroactively unless it is clear that Congress intended that result. There can be no doubt that imposing civil penalties or compensatory relief (such as disgorgement, restitution, or other "compensation" (AC at 32)) for conduct that occurred prior to Sections 1031 and 1036's effective date would cause the statutes to operate retroactively: indeed, such after-the-fact punishment would be the paradigmatic form of retroactive application. *See, e.g.*, *Landgraf*, 511 U.S. at 280 (a statute has retroactive effect if it would "increase a party's liability for

[7] This date was later set by regulation as July 21, 2011. Designated Transfer Date, 75 Fed. Reg. 57,252 (Sept. 20, 2010) ("Pursuant to the Consumer Financial Protection Act of 2010 . . . , the Secretary of the Treasury designates July 21, 2011, as the date for the transfer of functions to the Bureau of Consumer Financial Protection.").

past conduct, or impose new duties with respect to transactions already completed"); *Owner-Operator Indep. Drivers Ass'n, Inc. v. New Prime, Inc.*, 339 F.3d 1001, 1007 (8th Cir. 2003) (Interstate Commerce Commission Termination Act would have retroactive effect if a private right of action lay for leases executed prior to its effective date); *Gross v. Weber*, 186 F.3d 1089, 1091 (8th Cir. 1999) (Violence Against Women Act would have retroactive effect if its cause of action extended to pre-enactment conduct, even if the conduct would have been illegal under other law).

There is no indication in the CFPA that Congress intended that draconian result. Sections 1031 and 1036 accordingly cannot be applied to any conduct occurring prior to their effective date of July 21, 2011.

That is the right result not only as a matter of law, but of policy. Stability in the law also promotes economic development and social welfare. *See Landgraf*, 511 U.S. at 265-66 ("In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions."). This Court should therefore reject any attempt by the Bureau to apply the CFPA to conduct or transactions that preceded its enactment. Permitting the Bureau to overreach in this manner would upset the expectations of the regulated community; set a harmful precedent that will inhibit growth in the consumer financial services industry and constrict consumer choice; and open up another avenue by which

the Bureau can expansively assert authority beyond the limits contemplated by Congress when it enacted the CFPA.

III. The Bureau's Regulation E Claim Is Barred To The Extent It Relates To Acts Earlier Than EFTA's One-Year Statute Of Limitations.

Counts III and IV of the Amended Complaint, which allege violations of Regulation E, must also be dismissed to the extent they relate to consumers who occurred an overdraft fee outside the EFTA's one-year statute of limitations—*i.e.*, before March 6, 2014. *See* 15 U.S.C. § 1693m(g).

The Bureau might argue, as it has in other cases outside of this Circuit, that *no* statute of limitations applies to suits by the Bureau to enforce EFTA because EFTA's statute of limitations refers to suits by consumers. But that argument has already been rejected by several courts. *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, 2015 WL 1013508, at *33 (S.D. Ind. Mar. 6, 2015) (applying one-year statute of limitations to claim arising under another enumerated consumer law, the Truth in Lending Act, despite Bureau's argument that no statute of limitations applied); *Consumer Fin. Prot. Bureau v. Frederick J. Hanna & Assocs., P.C.*, 114 F. Supp. 3d 1342, 1376 (N.D. Ga. 2015) ("[T]he Court rejects the Bureau's position that Congress intended to impose no time limitations on the Bureau when it comes to bringing [Fair Debt Collection Practices Act] claims.").

Indeed, as Chief Justice Marshall once observed, allowing cases to

> be brought at any distance of time . . . would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.

Adams v. Woods, 6 U.S. (2 Cranch) 336, 342 (1805). The Bureau should not be afforded an unlimited time in which to bring suit.

Alternatively, the Bureau might argue that the applicable statute of limitations is the three-year statute of limitations for enforcement actions under the CFPA. *See* 12 U.S.C. § 5564(g)(1). But that statute of limitations expressly does not apply to "claims arising solely under enumerated consumer laws" listed in the CFPA (*id.* § 5564(g)(2)(A))—one of which is EFTA (*id.* § 5481(12)(C)). Thus, the relevant statute of limitations is EFTA's, not the statute of limitations in the CFPA. *See PHH*, 839 F.3d at 52 n.28 ("[F]or actions the CFPB brings *in court* under any of the 18 pre-existing consumer protection statutes, the CFPB may only 'commence, defend, or intervene in the action in accordance with the requirements of that provision of law, as applicable.'" (quoting 12 U.S.C. § 5564(g)(2)(B))).[8]

The Bureau's unjustified claim that it can apply the CFPA's longer statute of limitations in enforcement actions under other financial statutes such as

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[8] The Bureau's allegation that the alleged EFTA violations also violate Section 1036 of the CFPA (12 U.S.C. § 5536) does not change this analysis. These claims arise solely under EFTA, given that they are wholly derivative of alleged violations of EFTA. A contrary reading would eviscerate the effect of 12 U.S.C. § 5564(g)(2)(A) since every violation of Federal consumer financial law can be recast as a violation of Section 1036(a)(1)(A).

EFTA is yet another threat to regulatory certainty. Statutes of limitations promote regulatory clarity by "bring[ing] finality to an issue and . . . prevent[ing] stale claims." *McCuskey v. Cent. Trailer Servs., Ltd.*, 37 F.3d 1329, 1333 (8th Cir. 1994). Allowing the Bureau to apply a longer statute of limitations to EFTA claims would "directly contradict" that purpose. *Id.* It would also upset the settled expectations of participants in the financial markets—who had no reason to believe that the CFPA altered the longstanding statute of limitations that applied to EFTA claims. And once again, it would enable the Bureau to overstep its statutory bounds and regulate transactions that are properly outside its authority.

Counts III and IV should therefore be dismissed to the extent they relate to customers who incurred an overdraft fee outside EFTA's one-year statute of limitations.

CONCLUSION

The Court should grant defendant's motion to dismiss.

Dated: March 27, 2017

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Consumer Financial Protection Bureau

Plaintiff(s)

v.

TCF National Bank

Defendant(s)

LR 7.1(f) & LR 72.2(d)
CERTIFICATE OF COMPLIANCE

Case Number: 17-cv-00166-RHK-KMM

I, Laura R. Hammargren *[name of filer]*, certify that the

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Objection or Response to the Magistrate Judge's Ruling complies with Local Rule 72.2(d).

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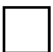 Counted the words in the document.

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