UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Consumer Financial Protection Bureau,

Plaintiff,

vs.

TCF National Bank,

Defendant.

Case No. 17-cv-0166-RHK-KMM

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

The Consumer Financial Protection Bureau ("CFPB" or "Bureau") filed its original complaint on January 19, 2017 as part of a fusillade of suits filed days before the change in administration.[1] TCF moved to dismiss. Rather than defend its complaint, the CFPB filed an amended complaint changing certain alleged facts and adding a new claim in a transparent effort to salvage its clearly defective complaint. The First Amended Complaint ("FAC") fares no better and must be dismissed.

This case is about an overdraft service offered by TCF National Bank ("TCF"). If a customer enrolls, TCF pays the customer's ATM and non-recurring debit card transactions that would otherwise be rejected when the customer's

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[1] *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*.

account has insufficient funds ("Overdraft Services"). Enrolling is free and optional, but TCF charges a fee each time it extends this short-term, unsecured credit to customers when it results in an overdraft.

In 2009, the Federal Reserve issued a regulation—known as Regulation E—that prohibited banks from charging for these Overdraft Services unless the customer consented to participate after having received a written notice. This notice—developed by the Federal Reserve—informed the customer that Overdraft Services were voluntary, and told the customer what fee would be charged.

The CFPB does not allege that TCF enrolled any customer who did not receive the required written notice and then choose to enroll. Nor does it allege that TCF made any untruthful statements to customers about the Overdraft Services. The Bureau contends nonetheless that TCF used unlawful *methods* to obtain customers' consent:

- For New Customers (customers who opened accounts after July 1, 2010), the Bureau alleges that TCF acted deceptively and abusively by sequencing the account opening process to separate the written notice from the enrollment decision and by giving "cursory," "uninformative," and "one-sided" oral explanations. FAC ¶¶ 3, 105–18. It also advances, for the first time in the FAC, a claim that TCF's

new customer enrollment process violated Regulation E because of the allegedly deceptive and abusive practices. *Id.* ¶¶ 119–22.

- For Existing Customers (customers who had TCF accounts before July 1, 2010), the Bureau alleges that TCF violated Regulation E by asking customers an ice-breaker question that allegedly framed the decision in a way that converted Overdraft Services "into the default position." *Id.* ¶¶ 125–28.

The FAC contains a key change in the factual allegations. In the original complaint, prepared after a multi-year investigation, the Bureau faulted TCF's use of an ice-breaker question to start the discussion with Existing Customers, but admitted that TCF employees then recited a series of disclosures about overdraft fees and asked customers to confirm their decision to enroll in the Overdraft Services. Orig. Compl. ¶ 96. Realizing that this enrollment question was fatal to its claim that customers did not affirmatively consent, the Bureau now alleges—without explaining the change or providing any factual support—that asking the enrollment question "did not always happen." FAC ¶ 96. This baseless change cannot salvage the Bureau's claims.

The FAC still reflects the Bureau's continued refusal to address the clear written disclosures TCF provided to its customers. If the Bureau had sued a rental car company challenging its oral presentations at the rental counter, but essentially

pretended the written rental agreement did not exist, this Court would not countenance the effort to elide this crucial aspect of the story. Yet that is exactly what the Bureau did originally, and then doubled down in the FAC.

Because the Bureau has not alleged that TCF employees made *any* statements that contradicted any written disclosure, or that TCF's written disclosure failed to contain all material information about TCF's Overdraft Services, the counts alleging deceptive and abusive conduct must fail. Any alleged deficiency in the oral summary of terms and conditions already provided in unambiguous written disclosures is not deceptive or abusive conduct. Moreover, the Bureau cannot sue for alleged deceptive and abusive practices that predate the July 21, 2011 effective date of the CFPA because those claims are impermissibly retroactive.

The Bureau's Regulation E claims also fail. Regulation E imposed clear, discrete requirements relating to written disclosures and the need to obtain affirmative consent before charging fees. The FAC does not allege that TCF failed to provide the required written disclosure, nor does it provide any factual basis to support its conclusory allegation that, despite customers actually opting in, TCF failed to obtain affirmative consent.

This enforcement action is an attempt to retroactively impose upon TCF 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 interact, then it should give financial institutions advance notice and address those concerns through *prospective* rule-making, not by concocting novel interpretations of a regulation and then enforcing them *retroactively*. It is not fair to change the rules after the game, and then penalize TCF for allegedly falling short. 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 recently-deceased corporate officer), the CFPB brought this meritless lawsuit against a consumer-oriented bank that has served 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 widespread retail presence—over 360 branches across seven states. FAC ¶ 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.*, such as no-minimum-balance checking. This business model—geared "primarily for personal, family, or household purposes," *id.* ¶ 15—focuses on convenience for the working people who are its customers.

Part of this convenience is Overdraft Services. As noted above, TCF extends short-term, unsecured credit to enrolled customers by honoring transactions that would otherwise be declined because they would overdraw the customers' accounts. It also provides the additional benefit of "swipe negative/settle positive" protection.[2] "Swipe negative" means that when the customer swipes his card to authorize his transaction his account does not have sufficient funds; "settle positive" means sufficient funds are deposited into the account before TCF pays, or "settles," the transaction a day or two later. TCF does

[2] The Federal Reserve considered the incidence of swipe negative/settle positive transactions when finalizing the rule. 74 Fed. Reg. at 59,034.

not charge a fee in this situation.[3] Many customers have never incurred an overdraft fee but nevertheless have enjoyed the benefit of this "swipe negative/settle positive" policy, which was available after the rule change *only if* the customer enrolled in Overdraft Services.

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. 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…*unless the consumer affirmatively consents, or opts in*, to the institution's payment of overdrafts for these transactions."[4]

As a result, financial institutions cannot charge a fee for debit card overdrafts unless they have:

1) Provided the customer a written notice containing federally prescribed content;

2) Provided a reasonable opportunity for the customer to consent;

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[3] For example, if a customer plans to make a deposit at lunch, but stops to get gas on the way to work, TCF will not authorize the transaction if the account lacks sufficient funds unless the customer has enrolled in Overdraft Services. The customer will not pay an overdraft fee if he makes a deposit later that day.

[4] Electronic Fund Transfers, 74 Fed. Reg. 59,033, 59,033 (Nov. 17, 2009) (emphasis added). The Federal Reserve excluded from this rule overdrafts caused by checks and ACH transactions. *Id.* at 59,034.

3) Actually obtained the customer's consent; and

4) Provided the customer written confirmation of the decision, including a statement that the customer can revoke consent at any time.

See 12 C.F.R. § 205.17(b)(1)(i)–(iv).

The default under Regulation E is to opt out of Overdraft Services. After July 2010, a customer who wanted Overdraft Services had to enroll. *Id.* § 205.17(c). Customers who preferred to avoid overdraft fees could simply do nothing and they would default out of Overdraft Services.

III. Opt-In Rates Vary Significantly.

The FAC suggests that TCF engaged in improper conduct because its 66% opt-in rate is higher than that of other banks. FAC ¶ 4–5. The FAC carefully avoids mentioning TCF's enrollment rate for customers who opted in *online*—and who therefore did not hear any allegedly defective oral presentations—which is not materially different from the enrollment rate for TCF's entire customer population. In any event, there is no "proper" or "legal" enrollment rate. Indeed, the CFPB has acknowledged elsewhere[5] that "opt in rates vary widely,"[6] and that its comparison

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[5] The Court may take judicial notice of the Bureau's public statements. *See, e.g.*, *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.").

[6] CFPB Fall 2015 Rulemaking Agenda, Nov. 20, 2015, at 2 (Declaration of Brian J. Hurd in Support of Defendant's Motion to Dismiss First Amended Complaint ("Hurd Decl.") at Ex. 1). *CFPB Study of Overdraft Programs* at 31–32 (June 2013) (Hurd Decl. Ex. 2) (new-account opt-in rates at one bank were up to eight

data "come from a small number of large banks" and "cannot be considered fully representative of the checking account market as a whole."[7] As a result, a "high" opt-in rate does not suggest misconduct.

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

A. TCF Provided All Customers with the Required Notice Before the Enrollment Decision.

As part of the 2009 amendment to Regulation E, the Federal Reserve developed a model notice, Form A-9, entitled, "*What You Need to Know About Overdrafts and Overdraft Fees*." Hurd Decl. Ex. 4. As the Bureau acknowledges, FAC ¶ 54, the required contents of this notice include: (1) a description of the overdraft service; (2) a disclosure of any fee imposed; (3) a disclosure of any limits on any fee 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* 12 C.F.R. § 205.17(d)(1)–(5), pt. 205 app. A. The "first step" in TCF's account opening process was to give customers "a copy of TCF's version of the Notice." FAC ¶ 59.

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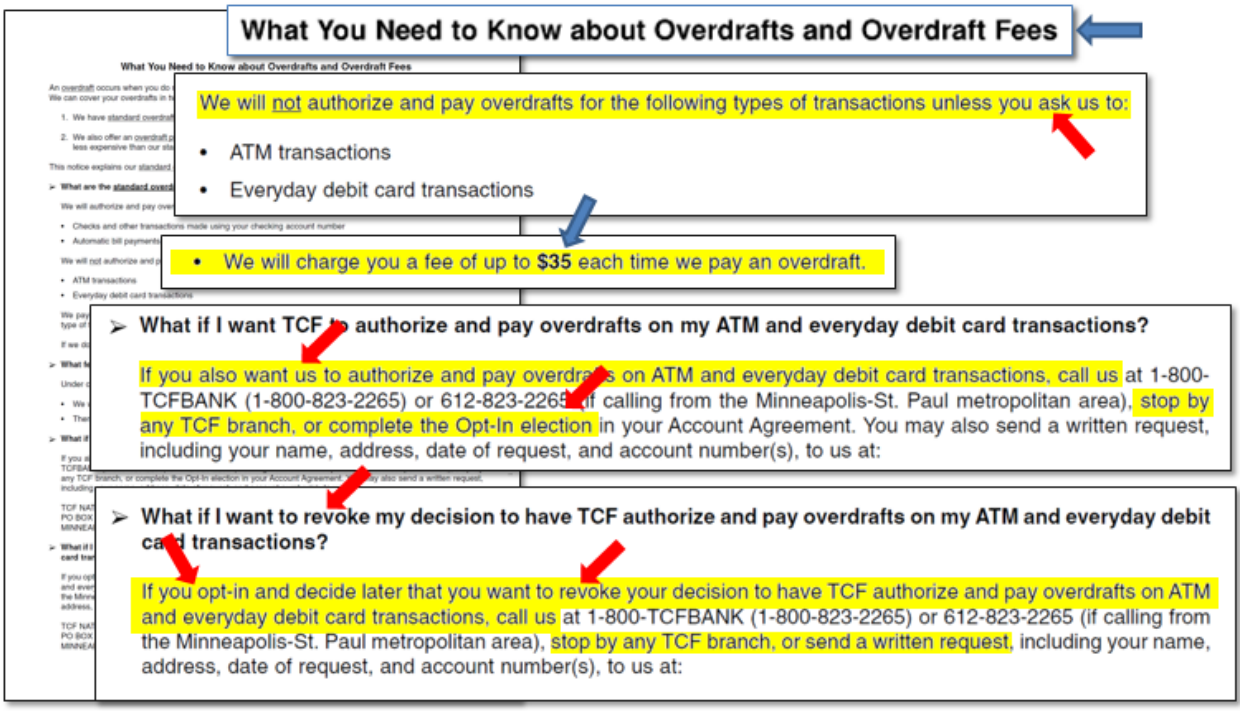
times higher than others, and opt-in rates at some study banks "surpassed 50% in 2012.").

[7] *CFPB Data Point: Checking Account Overdraft* at 7 (July 2014) (Hurd Decl. Ex. 3).

TCF's version of the notice ("Notice") explains that customers have a choice whether to enroll in Overdraft Services (red arrows), and details (in **bold**) the fee TCF charges for an overdraft transaction (blue arrows). Hurd Decl. Ex. 5.



The Bureau does not contend that the Notice failed to comply with Regulation E.

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 FAC recognizes that TCF complied with this requirement too. FAC ¶ 63.

Regulation E required TCF to provide the Notice to all customers, 12 C.F.R. § 205.17(d). The CFPB alleges that TCF gave New Customers the Notice and informed them "in substance: 'This is the federally-prescribed notice describing

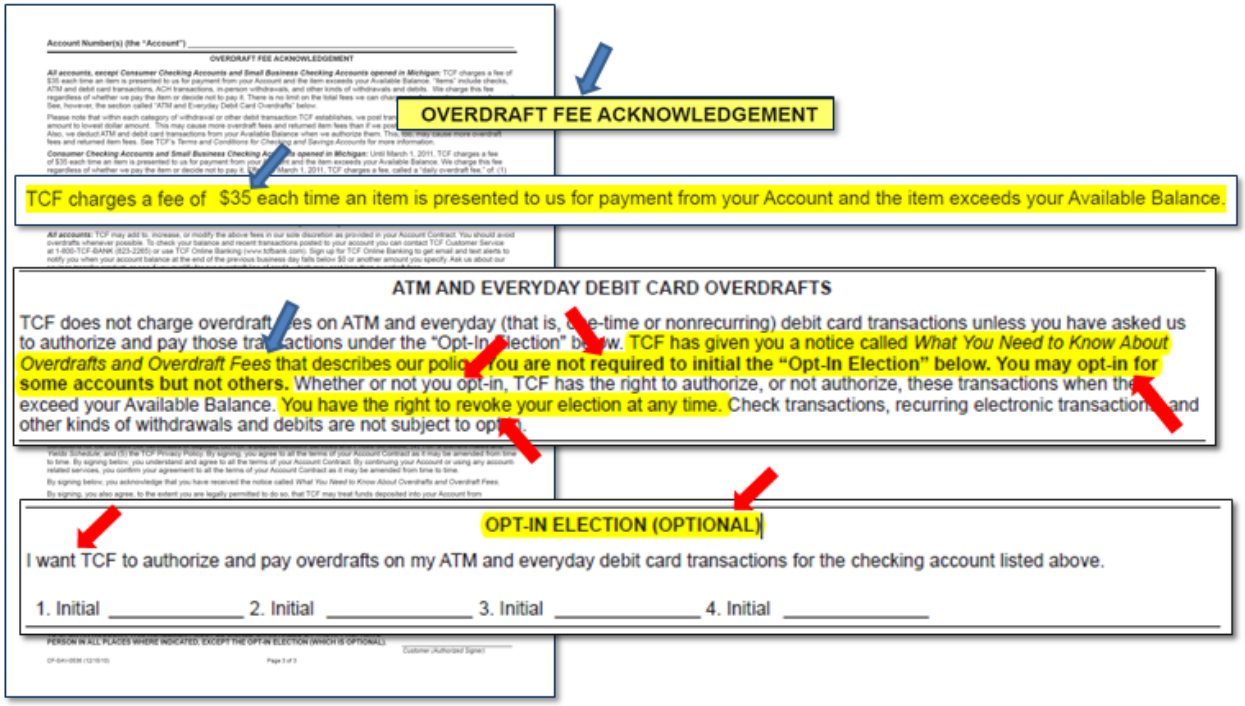
our overdraft service.'" FAC ¶ 59. The CFPB does not allege that TCF failed to send the Notice to Existing Customers before they were asked to enroll.

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 ("Agreement") and placed it in front of the consumer." *Id.* ¶ 63. The FAC 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. 6.

The three-page Agreement included an "Overdraft Fee Acknowledgement" that explained TCF's overdraft fee policy, including the amount TCF charged for overdrafts. FAC ¶ 65; *see also* Hurd Decl. Ex. 6 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. 6 at 3. It then stated, in bold, "**You are not required to initial the 'Opt-in Election' below.**"[8] *Id*.

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



Even though the FAC acknowledges that the Agreement contained these written disclosures, it makes the astonishing allegation that "consumers rarely read these disclosures." FAC ¶ 76. Written disclosures are integral to consumer financial regulation, and consumers are presumed to read and understand documents provided as part of banking transactions—particularly where, as here, there are no allegations that the documents themselves were confusing or misleading. In fact, Regulation E focuses exclusively upon written disclosures.

There are no allegations that TCF employees told customers not to read the Notice or the Agreement or prevented customers from reading them.

Importantly, neither the original complaint nor the FAC alleges that TCF employees made any untruthful statements. According to the FAC, TCF employees presented the New Customer enrollment 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.

In a feat of clairvoyance, 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,**" and the oral explanation stated that this section of the Agreement covered "the *Opt-In/Not Opt-In Election*" (emphasis added) and that the customer was making a "decision" and "allowing" TCF to authorize and pay overdrafts if he initialed this section.

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 there actually is no cost for enrolling in the service (as opposed to incurring an overdraft), and the immediately preceding section of the

Agreement, *which customers were required to acknowledge in writing*, explained that TCF charges fees for overdrafts.

C. TCF Used Truthful Scripts To Communicate with Existing Customers About Their Opt-in Choices.

After TCF mailed Existing Customers the Notice, TCF employees used scripts to guide phone calls to certain customers.[9] The FAC quotes and references these scripts on several occasions. FAC ¶¶ 88–89, 92–94. It does not allege that the scripts included any misstatements.

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,[10] *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?" Hurd Decl. Ex. 7; *see also* FAC. ¶ 96.

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

[10] 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. 7.

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," FAC ¶ 90, and that asking the question in this way "changed the election from an Opt-In to an Opt-Out," *id.* ¶ 126. The CFPB cites no facts to support its assertion that the ice-breaker question somehow changed the default or undermined the customer's consent to Overdraft Services after the other disclosures were provided and the enrollment question was asked.

In the original complaint, prepared after a multi-year factual investigation, the Bureau expressly acknowledged that, "[a]fter reading the disclosures, the TCF employee would ask the consumer to confirm his or her decision to Opt In." But now, in a transparent attempt to avoid dismissal, the Bureau amended its complaint

to allege that "[t]his did not always happen." *Compare* Orig. Compl. ¶ 96 *with* FAC ¶ 96. The FAC does not provide any explanation for this belated change, nor does it make any allegation about why or how frequently TCF employees supposedly departed from required elements of the script. The Bureau still acknowledges that each existing customer script clearly "directed" the enrollment question to be asked, FAC ¶ 96, and those scripts provided that customers were not enrolled unless they answered "yes" to *that* question, Hurd Decl. Ex. 7.

D. TCF Provided Written Confirmation After the Enrollment Decision.

Regulation E required TCF to provide customers written confirmation of their enrollment decision, including a statement notifying them of their right to revoke their consent. 12 C.F.R. § 205.17(b)(1)(iv). The CFPB does not dispute that TCF provided written confirmation to every customer who enrolled in its Overdraft Services.

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 failed to attach them to the FAC, even after TCF pointed out this shortcoming in its original motion to dismiss. These documents are incorporated by reference and should be considered in their entirety for completeness. *See Dylla v. Aetna Life Ins.*, No. 07-3203 (RHK/JSM), 2007 WL 4118929, at *2 (D. Minn. Nov. 16, 2007) ("[T]he Court may consider materials that are outside the pleadings if such materials are necessarily embraced by them." (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.

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.

A deception claim requires the Bureau to 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).[11] 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. FAC ¶¶ 116–17. The FAC provides no factual basis to support this conclusory allegation; indeed, TCF's disclosures rebut it.

- The Notice, which was handed to customers as the "first step" in the account opening process, specifically told customers that TCF "will

[11] 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).

not authorize and pay overdrafts for [certain] transactions unless you ask us to[.]" Hurd Decl. Ex. 5.

- The Agreement stated that enrollment was "**OPTIONAL**." It expressly referred customers 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. 6 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 who opted in and used the service. FAC ¶¶ 114–15. TCF's disclosures also flatly contradict this contention.

- The Notice detailed (in **bold**) the fee TCF charged for an overdraft transaction. Hurd Decl. Ex. 5. In fact, there was *no fee for enrolling in overdraft service*, only for incurring overdrafts.
- The Agreement required customers to acknowledge TCF's overdraft fee policy under the heading, "**OVERDRAFT FEE ACKNOWLEDGEMENT**." Hurd Decl. Ex. 6 at 3.

The deception claim cannot withstand these unambiguous disclosures. The law does not require that material terms found in a written disclosure be repeated orally at contract signing. Yet that is apparently the standard the CFPB wants to impose on TCF. FAC ¶ 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").

Although the CFPB contends that bank customers "rarely read these disclosures," FAC ¶ 76, this questionable assertion is legally irrelevant. 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."). 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 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).

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… is expected to read and be familiar with the terms of a document she signs.").[12] Unsurprisingly, numerous courts—including this one—have upheld other terms of

[12] 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)).

the Agreement against challenges from consumers who claimed not to have read them.[13]

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 instructive. There, a customer brought a class action under the Illinois Consumer Fraud and Deceptive Business Practices Act ("CFA"),[14] alleging that Home Depot deceived him into believing that an optional "damage waiver" for tool rentals was in fact mandatory. Like the CFPB, the customer alleged that employees failed to make sufficient oral disclosures about the damage waiver. The court rejected the claim 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.

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[13] *See Pellett v. TCF Bank, N.A.*, No. 10 C 3943, Order at 10 (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"); *Williams v. TCF Nat'l Bank*, No. 12 C 05115, 2013 WL 708123, at *1, *4 (N.D. Ill. Feb. 26, 2013) (arbitration agreement enforceable).

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

While written disclosures may not always cure otherwise deceptive practices—such as when there are misrepresentations,[15] or where the written disclosure is buried in a lengthy document[16] or located in an unusual place one would not think to look[17]—the FAC contains absolutely no allegations of that kind. Whether the Bureau's misleading omission claims—variously characterized as "uninformative," "cursory," or "one-sided"—are judged against *Iqbal*'s plausibility standard or the heightened pleading requirements of Rule 9(b),[18] they fail to provide a non-conclusory basis for disregarding clear written disclosures that told customers the very information that the Bureau now contends TCF omitted. This apparently is part of a larger Bureau practice of filing complaints that "contain[]

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[15] *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).

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

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

[18] At least one district court has held that the Bureau must allege CFPA violations with the particularity required by Rule 9(b). *See CFPB v. Prime Marketing Holdings, LLC*, No. CV 16-07111, Order re: Defendant's Motion to Dismiss, at 13 (C.D. Cal. Nov. 15, 2016) ("Plaintiff's CFPA claim must also be pleaded in compliance with Rule 9(b)."). District courts in this circuit have similarly applied Rule 9(b) to, *inter alia*, claims under the Minnesota Uniform Deceptive Trade Practices Act, *City of Wyoming v. Procter & Gamble Co.*, No. CV 15-2101 (JRT/TNL), 2016 WL 5496321, at *6 (D. Minn. Sept. 28, 2016), and fraudulent representation by omission, *Guthrie v. Bank of Am., Nat. Ass'n*, No. CIV. 12-2472 ADM/LIB, 2012 WL 6552763, at *7 (D. Minn. Dec. 14, 2012).

mere conclusory statements without sufficient factual allegations to support" them, and therefore cannot survive a motion to dismiss. *Consumer Fin. Prot. Bureau v. Intercept Corp.*, No. 16-cv-00144-RRE-ARS, Order at 10 (D.N.D. Mar. 17, 2017). No TCF customer acting reasonably under the circumstances could have been deceived. 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 it has not plausibly alleged that TCF prevented New Customers from reading the disclosures, made oral statements that contradicted them, or otherwise interfered with customers' enrollment decisions.

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." 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. FAC ¶ 110. These allegations fall into three general categories, all of which fail as a matter of law.

First, the Bureau 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. That allegation ignores the fact that Regulation E required the Notice be "segregated" from the Agreement. 12 C.F.R. § 205.17(b)(1)(i). At the time of the Opt-In decision, the Agreement also referred customers back to the Notice, stating, "TCF has given you a notice called *What You Need to Know About Overdrafts and Overdraft Fees* that describes our policy." Hurd Decl. Ex. 6.

The CFPB's newly-minted timing criticism also upends years of guidance from the Federal Reserve, which permitted banks to provide the Notice "*prior to* or at account-opening" and included no reminder requirement other than the written confirmation of enrollment provided afterwards. *See* 74 Fed. Reg. at 59,055 (Official Staff Interpretations Comment 17(b)-5) (emphasis added).

The CFPB should not be allowed to impose liability based on an 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. 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) (due process prevented the CFPB from retroactively applying different rules than predecessor regulator without fair notice).[19]

Second, the CFPB contends that TCF materially interfered with New Customers' ability to understand their enrollment decisions by giving "uninformative" or "cursory" oral explanations and using "one-sided" hypotheticals. FAC ¶¶ 3, 110. These generic allegations lack plausibility in light of the unambiguous written disclosures provided to New Customers before and at the time they made their enrollment decision.

At any rate, it cannot be that "uninformative" or "cursory" oral explanations (whatever those conclusory allegations mean) materially interfere with a customer's decision where the law requires *no* oral explanation and unambiguous written disclosures were provided.[20] The FAC does not allege that TCF employees told customers to ignore the Notice, or even told them to read it later while insisting on a decision at the time. Likewise, "one-sided hypotheticals" do not

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[19] *En banc* review was granted, which has the effect of vacating the panel reversal of the district court judgment but does not vacate the opinion, D.C. Cir. R. 35(d), which remains persuasive.

[20] Financial institutions throughout America enroll millions of customers *online*. If allegedly cursory oral summaries are not detailed enough, then online enrollment must be *per se* abusive because those customers receive *no* oral summary. 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").

interfere with a customer's ability to understand that he has a choice about whether to enroll and that there is a fee when an overdraft is incurred.

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

The FAC does not allege that TCF prevented New Customers from reading TCF's clear, unambiguous disclosures, or explain how TCF undermined customers' understanding that Overdraft Services were optional and a fee would be charged if the customer incurred an overdraft. By providing customers with unchallenged 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 Services by incentivizing employees to reach unreasonably aggressive enrollment targets. FAC ¶ 110. The FAC fails to connect employee incentives with facts suggesting either material interference or resulting harm. Unlike other cases where the CFPB has alleged that improper conduct *actually*

resulted from incentives,[21] there are (still) no allegations that *any* TCF employee engaged in any improper behavior, let alone improper behavior driven by incentives. *Id.* ¶¶ 35–48.

The absence of any plausible or particularized explanation for how customers supposedly were misled is glaring. No matter how "uninformative" the Bureau contends TCF's scripts were, it has not pleaded facts sufficient to withstand dismissal of its abusiveness claim in light of the uncontradicted written disclosures. *See Intercept*, Order at 9 ("The complaint lacks factual allegations that would support a finding that Intercept interfered with consumers' ability to understand the terms of their dealings with Intercept's clients….").

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). In its zeal to punish TCF's overdraft practices, the CFPB ignores this "deeply rooted" principle by asking the Court to retroactively impose liability on TCF. The Court should reject this effort.

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[21] *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).

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 take effect 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 Bureau cannot use these provisions to challenge conduct that occurred *before that date*.

Nor can the Bureau argue that the CFPA should be given retroactive effect. 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 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 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 but others effective at a future date, it necessarily follows that Congress intended the new provisions of the CFPA to apply only prospectively.

The Bureau fares no better under *Landgraf* step two (even if considered). 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 was not prohibited before the Effective Date would be a 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, although the FTC Act prohibited TCF from engaging in deceptive conduct before the Effective Date, Congress did not authorize the Bureau to enforce it. *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 CFPB

authority to enforce *regulations* related to unfair and deceptive acts promulgated under FTC Act, not authority to enforce violations of FTC Act itself). To allow the Bureau to punish allegedly deceptive conduct that occurred before the Effective Date—ostensibly under the CFPA, but bootstrapped by reference to the FTC Act—would let in the backdoor that which Congress 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 Bureau can now also seek—and has sought in this case—a civil money penalty 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.[22] 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. Counts I and II must be dismissed for conduct that pre-dates July 21, 2011.

II. TCF Did Not Violate Regulation E (Counts III & IV).

A fair-minded reader of the Federal Reserve's late 2009 announcement of and brief commentary on Regulation E would be surprised at the difference between what the Federal Reserve mandated (and why it created the simple, black-letter regulation) and the alleged conduct the Bureau now insists violates the rule. Counts III and IV must be dismissed because the FAC does not plausibly contend TCF failed to comply with Regulation E.

A. TCF's New Customers Affirmatively Consented to Overdraft Service.

New Count III is a transparent attempt to bootstrap the Bureau's deceptive and abusive claims into an EFTA claim for New Customers (and thereby avoid obvious retroactivity problems). This belated claim fails for two key reasons.

First, the FAC does not allege that TCF failed to 1) provide the Notice, 2) obtain consent on a separate signature line in the Agreement, or 3) provide

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

written confirmation of the enrollment decision. These are the *only* requirements Regulation E imposes on the account opening process, all of which focus on *written* disclosures and the content of forms used in the account opening process. The Federal Reserve focused on the content of written disclosures and carefully tested the federally-prescribed notice to achieve an appropriate balance of information. It decided what information should be included "so [consumers] can make an *informed* choice about whether or not to opt in...," and avoided including information that "could undermine the purpose of the form, which is to provide consumers with a choice about opting into the institution's overdraft service in a *clear and readily understandable* way." 74 Fed. Reg. at 59,047, 59,048 (emphasis added).

There is no plausible basis to argue that a consumer who received the Notice, subsequently initialed his choice to opt-in, and then received written enrollment confirmation somehow did not affirmatively consent. For purposes of Regulation E, completing each of these steps constitutes affirmative consent.

Second, Regulation E does not address the oral interaction between banks and customers about Opt-In. The Bureau's position appears to be that Regulation E—in addition to its clear procedural requirements—silently imposed a duty to provide balanced oral explanations. That interpretation exceeds the clear language of the rule, which only requires banks to take specific, objective steps before they

charge overdraft fees. Had the Federal Reserve intended to regulate oral statements, it would have said so. Had the Federal Reserve intended to include a prohibition on deceptive and abusive conduct in the requirement to obtain affirmative consent, it would have written the regulation differently—perhaps by using the well-known term "informed consent," which means "[a] person's full agreement to allow something to happen, *made with full knowledge of the risks involved and the alternatives*." *Black's Law Dictionary* at 368 (10th ed. 2014) (emphasis added)). Instead Regulation E only requires that consent be "affirmative"—i.e. positively asserted rather than implied. *See id.* at 71 ("The principle that plain and clear consent must be obtained before certain acts or events...").

The Court should not countenance the Bureau's new effort to evade clear limitations on its power to assert claims for deceptive or abusive acts prior to the Bureau's Effective Date by masquerading them as Regulation E claims.

B. TCF's Existing Customers Were Given a Reasonable Opportunity to Consent and Affirmatively Consented to Overdraft Service.

Unlike New Customers, Existing Customers were accustomed to Overdraft Services but were slated to default to opt-out status on August 15, 2010 if they did not enroll. The Bureau claims that TCF violated Regulation E when it asked some Existing Customers whether each wanted his card to "continue working as it does today." *Id.* ¶ 125. 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.* ¶¶ 126–27. This assertion lacks merit.

1. TCF Gave Existing 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 focused on the *means* and *method* of obtaining customer 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). The staff commentary for Regulation E makes clear that a "reasonable opportunity to consent" means that banks must provide "*reasonable methods*" to consent. *Id.* (emphasis added).

The CFPB does not allege that TCF failed to provide Existing Customers reasonable methods to consent. Indeed, the Bureau acknowledges that TCF gave customers the opportunity to enroll "through a number of [] communications channels[.]" FAC ¶ 103. Nothing in the text of the regulation or the staff commentary suggests that the "reasonable opportunity" requirement has anything

to do with the Bank's presentation or description of the customer's opt-in choice. But that is exactly the meaning the CFPB ascribes.

Changes to the meaning of "reasonable opportunity"—to require (or prohibit) oral disclosures, or to specify the content of such disclosures—must be done through prospective rulemaking (which, interestingly, the CFPB is in fact doing). A retroactive enforcement action seeking to impose new interpretations is improper. *Landgraf*, 511 U.S. at 280.

2. The FAC Fails To Allege Plausibly that Existing Customers Did Not Provide Affirmative Consent.

Count IV also fails because the CFPB does not plausibly allege that TCF failed to obtain "affirmative consent" from customers. Count IV asserts that TCF "changed the election from an Opt-In to an Opt-Out," FAC ¶ 126, by using scripts that asked Existing Customers "something like" whether they wanted 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).[23] There is no plausible allegation that TCF enrolled Existing Customers based solely on their response to the ice-breaker question; to the contrary, the scripts referenced

[23] The FAC adds that "employees would enroll customers into overdraft services," FAC. ¶ 90, but avoids alleging any causal connection between an answer to just the ice-breaker question and TCF enrolling customers into Overdraft Services.

in the FAC required additional confirmation. *See* Hurd Decl. Ex. 7; *Montero*, 2014 WL 562506, at *5.

After a customer responded to the ice-breaker question, TCF's scripts called for additional disclosures about overdraft service, including fees, *id*. ¶ 94, followed by a mandatory enrollment question asking whether the customer wanted to enroll in Overdraft Services. *Id*. ¶ 96; *see also* Hurd Decl. Ex. 7.

Although the original complaint unequivocally admitted that the final enrollment question was part of the calls with customers, the Bureau now alleges that it "did not always happen." FAC ¶ 96. This about-face does not salvage the Bureau's claim. The conclusory allegation that TCF employees read some required pieces of the script, but not others, should be rejected without some specific factual allegations in support. *See Iqbal*, 556 U.S. at 663 (court need not accept as true "threadbare recitals…supported by mere conclusory statements"). The Bureau provides none.

The inconsistency between the newly alleged facts and the unqualified allegation in the original complaint that TCF employees "would ask the consumer to confirm his or her decision to Opt In," Orig. Compl. ¶ 96, is, quite frankly, stunning.

Even though the FAC contains numerous purported quotes and paraphrased statements from former employees, it provides no such detail for this fundamental

alteration. The Court should discount this new allegation accordingly. *See Royal Primo Corp. v. Whitewater W. Indus., Ltd*, No. 15-CV-04391-JCS, 2016 WL 4080177, at *6 (N.D. Cal. July 29, 2016) ("At the very least, however, when evaluating an amended complaint, the court may also consider the prior allegations as part of its context-specific inquiry based on its judicial experience and common sense to assess whether an amended complaint plausibly suggests an entitlement to relief." (alteration and internal quotation marks omitted)); *cf. Stoebner v. Opportunity Fin., LLC*, 562 B.R. 368, 390 (D. Minn. 2016) (declining to provide opportunity to amend complaint because "any amendments would be futile, as they would contradict the facts already alleged").

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, FAC ¶ 89, and asked "whether they wanted their account to 'continue working as it does today,'" *id*. ¶ 125.

There is nothing inaccurate or misleading about these statements. At the time the calls were placed (i.e., before Regulation E became effective), Existing Customers were already enrolled in Overdraft Services; if they did nothing, they automatically would have been opted out of that service once Regulation E became effective. 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 customers with accurate information.

A customer who received the Notice, heard TCF's scripts, chose to say yes to the enrollment question, and then received confirmatory notice of that decision clearly gave affirmative consent to enrolling in Overdraft Services. Count IV should be dismissed.

C. The CFPB Cannot Seek Restitution for 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 fee before *March 6, 2014*.[24]

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.*

[24] 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. 8.

Bank of Am., N.A., No. 12 CV 10228, 2013 WL 6224641, at *5 (N.D. Ill. Nov. 27, 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 should govern this action. Where Congress wishes to provide a longer limitations period for government action than private action, it does 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 in the EFTA for actions by regulators, the one-year limitations period applies. *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 limitations period, "3 years after the date of discovery of the violation," 12 U.S.C. § 5564, apply. This general provision is subject to the carve-out that "any action arising solely under an enumerated consumer law" 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 EFTA is an "enumerated consumer law." *Id*. § 5481(12). Therefore, since the CFPA claims in Counts III and IV are based solely on an alleged violation of the EFTA, they are subject to the one-year limitations period established by that law. Even if the Court concludes they should not be dismissed in their entirety, Counts III and IV should be dismissed as time-barred for all 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.

A panel of the D.C. Circuit recently held that 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. 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).

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 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).

The proper remedy in this circumstance is dismissal 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)).

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

The FAC should be dismissed. Because the Bureau has already amended in response to a motion to dismiss and any further amendment would be futile, dismissal (except if the court rules solely on the constitutional argument) should be with prejudice.

Respectfully submitted,

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Dated: March 27, 2017

CERTIFICATE OF COMPLIANCE

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