

UNITED STATES OF AMERICA  
Before the  
CONSUMER FINANCIAL PROTECTION BUREAU

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ADMINISTRATIVE PROCEEDING	)	
File No. 2015-CFPB-0029	)	
	)	
In the matter of	)	<b>RESPONDENTS’ MOTION</b>
	)	<b>TO STAY APPEAL AND</b>
	)	<b>REMAND TO HEARING OFFICER</b>
INTEGRITY ADVANCE, LLC and	)	
JAMES R. CARNES	)	
_____	)	

**RESPONDENTS’ MOTION TO STAY APPEAL  
AND REMAND TO HEARING OFFICER**

Respondents Integrity Advance, LLC and James R. Carnes (together, “Respondents”), through undersigned counsel, hereby submit this Motion to Stay Appeal and Remand to Hearing Officer based on an intervening change in controlling law affecting the hearing officer’s September 27, 2016 Recommended Decision, Dkt. 176 (“Recommended Decision”).

Respondents respectfully request an expedited review and decision on this matter, given the parties’ briefing schedules on appeal and impending deadline for Opening Briefs, which are due on October 28, 2016.<sup>1</sup>

**INTRODUCTION**

Throughout this proceeding, the hearing officer deferred to the Director’s previous ruling in *In re PHH Corp., et al.*, 2014-CFPB-0002 (June 4, 2015) on a core threshold matter—whether the Bureau’s claims are time-barred under the various applicable statutes of limitation. In

<sup>1</sup> Pursuant to 12 C.F.R. § 1081.205(f), Respondents met and conferred with Enforcement Counsel regarding this issue via teleconference on October 18, 2016. Respondents respectfully request that Enforcement Counsel respond by October 19, 2016 and that the Director issue a decision by October 21, 2016.

particular, the hearing officer expressly relied upon the Director's decision in *PHH* in reaching his Recommended Decision and denying Respondents' Motion to Dismiss. *See* Recommended Decision, Dkt. 176 at 29.

On October 11, 2016, the United States Court of Appeals for the District of Columbia Circuit issued its decision on the appeal of the *PHH* decision, *PHH Corp. v. CFPB*, Case No. 15-1177, 2016 WL 5898801 (D.C. Cir. Oct. 11, 2016). As is relevant here, the D.C. Circuit broadly held that the "Dodd-Frank Act incorporates the statutes of limitations in the underlying statutes enforced by the CFPB in administrative proceedings." *See id.* at \*5; *see also id.* at \*37-\*41. In other words, the statutes of limitation articulated in the consumer protection laws that Congress empowered the Bureau to enforce – including TILA, EFTA and the CFPA itself – control in the administrative forum, just as they would in district court. *See id.* at \*38. As discussed below, the D.C. Circuit's decision reverses the Decision of the Director in *In re PHH Corp., et al.*, 2014-CFPB-0002 (June 4, 2015).

The hearing officer's Recommended Decision directly contradicts the D.C. Circuit's decision in *PHH*, and cannot stand in light of the substantial, intervening change in controlling law. Thus, Respondents respectfully request that the Director stay the ongoing appeal and remand the Recommended Decision to the hearing officer for reconsideration. The remand order should provide for additional briefing and discovery to fully develop the administrative record on the statute of limitations issue.

### **BACKGROUND**

On November 18, 2015, the Bureau filed its Notice of Charges. Respondents moved to dismiss on the grounds that the Bureau's claims were time-barred. On April 22, 2016, the hearing officer denied Respondents' Motion to Dismiss, rejected Respondents' argument that the

statutes of limitation in the individual consumer protection laws apply in CFPB administrative proceedings, and allowed the Bureau to proceed. Order Denying Motion to Dismiss, Dkt. 75 at 19-29. On May 27, 2016, the hearing officer denied Respondents' Motion to Stay the administrative proceeding pending the D.C. Circuit's resolution of the *PHH* appeal. As he did so, the hearing officer acknowledged that he perceived the Decision of the Director in *PHH* as to the applicable statutes of limitation to be binding on him and relied upon that decision to deny Respondents' Motion to Dismiss. Order Denying Respondents' Motion to Stay, Dkt. 97 at 1. On July 1, 2016, the hearing officer denied Respondents' Motion for Summary Disposition, including Respondents' renewed argument that statutes of limitation apply in CFPB administrative proceedings. Respondents' Motion for Summary Disposition, Dkt. 89 at 7, n.1; Order Granting in Part and Denying in Part Bureau's Motion for Summary Disposition and Denying Respondents' Motion for Summary Disposition, Dkt. 111 at 11.

On September 27, 2016, following trial and post-trial briefing, the hearing officer filed the Recommended Decision. Dkt. 176. On September 30, 2016, Respondents filed a Notice of Appeal, appealing and taking exception to the Recommended Decision, the Order Denying Motion to Dismiss, and the Order Granting in Part and Denying in Part Bureau's Motion for Summary Disposition and Denying Respondents' Motion for Summary Disposition. Dkt. 177. On October 11, 2016, the D.C. Circuit issued its decision in *PHH*. On October 12, 2016, Enforcement Counsel also filed a Notice of Appeal of the Recommended Decision. Dkt. 178.

### **ARGUMENT**

The D.C. Circuit's decision in *PHH* reverses the Decision of the Director as to the applicability of statutes of limitation in CFPB administrative proceedings. It therefore constitutes intervening controlling law warranting a stay of the ongoing appeal and remand to the

hearing officer for reconsideration and further development of the administrative record on the statute of limitations issue.

**A. The *PHH* Decision Constitutes An Intervening Change in Controlling Law**

In denying Respondents' Motion to Dismiss and in reaching his conclusions in the Recommended Decision, the hearing officer expressly relied on the Decision of the Director in *PHH* concerning Respondents' arguments that statutes of limitation apply in CFPB administrative proceedings. Order Denying Motion to Dismiss, Dkt. 75 at 20; Recommended Decision, Dkt. 176 at 29. Specifically, the hearing officer stated in his Recommended Decision:

Relying on the Decision of the Director, *In the Matter of PHH Corp., et al.*, File No. 2014-CFPB-0002 (Jun. 4, 2015), I also determined that the statutes of limitations contained in 12 U.S.C. § 5564(g)(1), 15 U.S.C. § 1640(e), and 15 U.S.C. § 1693m(g) did not apply to this administrative proceeding.

Recommended Decision, Dkt. 176 at 29. The hearing officer previously concluded that he was “bound to apply the Director’s interpretation, which was clearly set out in *PHH*.” Order Denying Motion to Dismiss, Dkt. 75 at 29. Importantly, the hearing officer acknowledged that the “[*PHH*] decision remains the official interpretation of the Bureau and is binding in these proceedings *unless and until it is overruled by the Court of Appeals or the United States Supreme Court.*” *Id.* at 20, n.3 (emphasis added). Thus, the hearing officer unequivocally recognized that an intervening appellate decision would affect his determination that statutes of limitation do not apply in CFPB administrative proceedings.

The D.C. Circuit’s holding in *PHH* that statutes of limitation *do* apply to CFPB administrative proceedings directly affects the hearing officer’s decision in several ways. First, the statutes of limitation of the Truth In Lending Act (“TILA”), 15 U.S.C. § 1640(e), and of the Electronic Funds Transfer Act (“EFTA”), 15 U.S.C. § 1693m(g), under which Respondents have

been charged, are one year from the date of the occurrence of the violation.<sup>2</sup> The D.C. Circuit's *PHH* decision makes clear that these statutes of limitation apply in CFPB administrative proceedings as well. Indeed, the D.C. Circuit specifically cited the Bureau's Opposition to Respondents' Motion to Dismiss *in this matter* to show that the "CFPB's argument that it is not bound by any statute of limitations in administrative proceedings would extend to all 19 of the consumer protection laws that Congress empowered the CFPB to enforce." *PHH*, 2016 WL 5898801 at \*38. "By its terms . . . Section 5563 ties the CFPB's administrative adjudications to the statutes of limitations of the various federal consumer protection laws it is charged with enforcing." *Id.*<sup>3</sup>

As the record below makes clear, the Bureau's claims arise from loans originated between May 2008 and December 2012. Recommended Decision, Dkt. 176 at 14. But Enforcement Counsel did not file its Notice of Charges until November 18, 2015, nearly three years after Integrity Advance originated its final loan. Respondents therefore maintain that the statutes of limitation had run and that the Bureau did not timely file its Notice of Charges as to its TILA and EFTA claims.

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<sup>2</sup> The TILA statute of limitations provides, in relevant part, that "any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation . . . ." 15 U.S.C. § 1640(e). Similarly, the EFTA statute of limitations provides "[w]ithout regard to the amount in controversy, any action under this section may be brought in any United States district court, or any other court of competent jurisdiction, within one year from the date of the occurrence of the violation." 15 U.S.C. § 1693m(g).

<sup>3</sup> In *CFPB v. ITT Educ. Servs., Inc.*, No. 1:14-cv-00292-SEB-TAB, 2015 WL 1013508, at \*33 (S.D. Ind. Mar. 6, 2015), the court held that the language in TILA mandating a one-year statute of limitations applies to the Bureau's cases brought in federal court. As the D.C. Circuit noted in *PHH*, applying a different standard to the CFPB's administrative enforcement actions would allow the agency to "always circumvent the three-year statute of limitations simply by bringing the enforcement action administratively rather than in court." *PHH*, 2016 WL 5898801 at \*40.

Second, the statute of limitations under the CFPA as to UDAAP claims, 12 U.S.C. § 5564(g)(1), is three years from the “date of discovery” of the alleged conduct. Under this limitation period, the agency must bring an action within three years of when it discovers, or by reasonable diligence could have discovered, the basis of the action. Brief in Support of Respondents’ Motion to Dismiss the Notice of Charges, Dkt. 28-A at 16–19. Respondents maintain that, at a minimum, the statute of limitations for the Bureau’s UDAAP claims as to Mr. Carnes had run when it filed its Notice of Charges. *See id.*

In reaching his Recommended Decision, the hearing officer expressly “did not reach the question of whether, even if the statute of limitations did apply, the Bureau timely filed its Notice of Charges.” Recommended Decision, Dkt. 176 at 29, n.2. Indeed, in his ruling on Respondents’ Motion to Dismiss, the hearing officer stated:

I am bound to apply the Director's interpretation, which was clearly set out in *PHH*. Ultimate authority for issuing a Decision and Order in this case rests with the Director. I decline to adopt a position contrary to his.

Order Denying Motion to Dismiss, Dkt. 75 at 29. Therefore, in light of the D.C. Circuit’s holding that statutes of limitation do apply to CFPB administrative proceedings, the administrative record is not complete on this issue and the question is not ripe for review by the Director. While Respondents maintain that the Bureau did not timely file its Notice of Charges, at a minimum the D.C. Circuit’s *PHH* decision opens the door to the factual question of whether the Bureau’s filing was timely. Resolution of this issue warrants further development of the administrative record, including additional briefing and discovery.

Respondents have repeatedly argued throughout this proceeding that the *PHH* decision will have a significant impact on the statute of limitations issues presented here. Accordingly,

the hearing officer's decisions must be reexamined and developed further now that the D.C. Circuit has issued its decision.

**B. A Stay of Appeal and Remand to the Hearing Officer Is Necessary and Appropriate**

Based on this intervening change in controlling law, the Director should grant a stay of the ongoing appeal and remand the matter to the hearing officer for several reasons. Such a stay should be granted promptly as the parties' Opening Briefs are due to be filed on October 28, 2016.

First, the hearing officer is best situated to develop the administrative record. *See* 5 U.S.C. § 557 (providing that the hearing officer should "initially decide the case"); 12 U.S.C. § 5563.<sup>4</sup> As noted above, because the hearing officer denied Respondents' Motion to Dismiss, the parties did not have an opportunity to develop the administrative record surrounding the timeliness of the Bureau's Notice of Charges. Specifically, the D.C. Circuit's decision that a statute of limitations applies to CFPA claims brought in administrative adjudications will require further development of the facts as to the issue of the "date of discovery," namely when the Bureau knew or had reason to know of the alleged conduct. On remand, the hearing officer must have the authority to order additional briefing and allow for the necessary discovery to address Respondents' arguments.

Second, the Director should stay the appeal and remand the case to the hearing officer in the interests of economy and efficiency. *See, e.g., Bryant v. N.J. Dep't of Trans.*, 998 F. Supp. 438, 442 (D.N.J. 1998) ("reconsideration of my order of dismissal...also conserves judicial resources and promotes justice."). Allowing the hearing officer the opportunity to reconsider his

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<sup>4</sup> Moreover, the hearing officer "serves as the ultimate guarantee of fair and meaningful proceedings in our constitutional regime." *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980).

decisions in light of the *PHH* decision will ensure the record is fully developed before consideration by the Director. Remand to the hearing officer of this important question is consistent with the general approach taken by the Bureau in its Rules of Practice for Adjudication Proceedings, which the CFPB “believes . . . best balances the need for expeditious decision-making with the parties’ right to ultimate consideration of a matter by the Director.” Rules of Practice for Adjudication Proceedings, 77 Fed. Reg. 39,058.<sup>5</sup>

### CONCLUSION

The D.C. Circuit’s decision in *PHH* is binding authority on the exact issue presented repeatedly throughout this administrative proceeding. Indeed, the hearing officer repeatedly acknowledged as much in his decisions relating to the statute of limitations issue. It would be manifestly unfair for Respondents to be denied an opportunity to fully develop the record on a key threshold issue. Therefore, Respondents respectfully request that the Director stay the ongoing appeal and remand this case to the hearing officer. Such a stay should be granted expeditiously as the parties’ Opening Briefs on appeal are due to be filed in ten days, on October 28, 2016.

Respectfully submitted,

Dated: October 18, 2016

By: /s/ Allyson B. Baker  
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<sup>5</sup> Further, the Bureau is a party to the *PHH* case and, as such, may be considering the filing of a request for rehearing *en banc* or a petition for a writ of certiorari to the United States Supreme Court. A stay of this appeal and remand to the hearing officer will serve to preserve scarce agency resources by affording the Director additional time before he is required to consider the legal consequences of the D.C. Circuit’s appeal in this case.



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**CERTIFICATION OF SERVICE**

I hereby certify that on the 18th day of October, 2016, I caused a copy of the foregoing Respondents' Motion to Stay Appeal and Remand to Hearing Officer to be filed by electronic transmission (e-mail) with the CFPB's Office of Administrative Adjudication ([CFPB\\_Electronic\\_Filings@cfpb.gov](mailto:CFPB_Electronic_Filings@cfpb.gov)), U.S. Coast Guard Hearing Docket Clerk ([aljdocketcenter@uscg.mil](mailto:aljdocketcenter@uscg.mil)), Heather L. MacClintock ([Heather.L.MacClintock@uscg.mil](mailto:Heather.L.MacClintock@uscg.mil)), and Administrative Law Judge Parlen L. McKenna ([cindy.j.melendres@uscg.mil](mailto:cindy.j.melendres@uscg.mil)), and served by electronic mail on the following parties who have consented to electronic service:

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