UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB-0002

In the Matter of: **PHH CORPORATION,** **PHH MORTGAGE CORPORATION,** **PHH HOME LOANS LLC,** **ATRIUM INSURANCE CORPORATION,** **and ATRIUM REINSURANCE CORPORATION**	**ENFORCEMENT COUNSEL'S REPLY BRIEF IN SUPPORT OF ITS APPEAL**

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Table of Abbreviations

Throughout this brief, Enforcement cites prior filings in this proceeding as follows:

Filing	Docket No.	Abbreviation
Notice of Charges	1	NoC
Expert Report of Mark Crawshaw	55	Crawshaw Rep.
Enforcement Counsel's Motion for Summary Disposition as to Liability	102	EC MSD
Rebuttal Expert Report by Michael Cascio	106	Cascio Rebuttal Rep.
Rebuttal Expert Report of Mark Crawshaw	108	Crawshaw Rebuttal Rep.
Enforcement Counsel's Opposition to Respondents' Renewed Motion to Dismiss	123	EC Opp. to 2nd MTD
Order on Dispositive Motions	152	May Order
Enforcement's Post-Hearing Brief	177	EC Br.
Enforcement's Post-Hearing Response Brief	184	EC Resp. Br.
Recommended Decision	205	RD
Enforcement's Opening Appeal Brief	212	EC App. Br.
[Respondents'] Brief in Opposition to Enforcement Counsel's Appeal	217	PHH Ans. Br.
Enforcement Counsel's Answering Brief in Opposition to Respondents' Appeal	218	EC Ans. Br.

Enforcement also uses the following other abbreviations:

Title	Abbreviation
Administrative Law Judge	ALJ
CFPB Amicus Brief in *Edwards v. First American Corp.*, No. 13-55542, (9th Cir., filed 10/30/2013)	CFPB *Edwards* Br.
Letter from Retsinas, Assistant Secretary of H.U.D., to Samuels, Countrywide Funding Corp., August 6, 1997 (**ECX 0194**, Att. A.)	HUD Letter
Mortgage insurance companies	MIs
Respondents	PHH

Introduction

In its answering brief, PHH fails to respond to the substance of most of the arguments made in support of Enforcement's appeal. For the unrebutted reasons shown in Enforcement's opening brief and prior papers, Enforcement's appeal should be granted.

Argument

I. Time bars

a. PHH fails to rebut Enforcement's argument that it engaged in a continuing violation of law

Rather than address the substance of Enforcement's multiple arguments for application of the continuing violation doctrine based on case law, the plain language of RESPA's Regulation X, and sound public policy considerations, *see* EC App. Br. at 2-8, PHH asserts that the continuation of its captive reinsurance scheme, including through monthly ceding payments, is but a "continuing effect[]" of a violation with "no present legal consequences." PHH Ans. Br. at 7 (quotations omitted). But Enforcement has been clear that it is not the repeated monthly ceding payments on a given loan that form the crux of PHH's continuing violation of Section 8(a). It is the enduring agreement to refer business, shown through systemic control and repeated referrals of thousands (if not millions) of consumers to captive MIs in exchange for a cycle of kickbacks, that demonstrates a continuing violation. As laid out in detail in Enforcement's post-hearing brief, EC Br. at 16-67, the evidence of this conduct spanned nearly two decades, displaying a pattern-and-practice that clearly distinguishes this case from *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007). *See* EC App. Br. at 8 n.11. *See, e.g., Osborn v. Home Depot U.S.A., Inc.,* 518 F. Supp. 2d 377, 388-89 (D. Ct. 2007) (finding that *Ledbetter* did not bar claims where a company is alleged to adopt and intentionally

perpetuate a discriminatory policy that continued into the limitations period).[1]

PHH's attempt to distinguish the *Mandel* case turns on the latter's assertion that "all acts which constitute the claim" have taken place at or by the closing of a given loan, and that "the borrower's payment … to the MI was … simply the contractual obligation of the borrower." PHH Ans. Br. at 9 n.5 (citing *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 165-66 (3d Cir. 2013)). This again misses the point: the "acts" in question are not the borrower's MI payments, but PHH's pattern and practice of demanding captive reinsurance agreements, concessions, and payments in exchange for access to its dialer and preferred provider list, as seen in PHH's quid pro quo dealings with each of the MIs over time, including, undisputedly, after July 21, 2008. *See* EC Br. at 43-67.[2]

PHH also discusses two district court cases at length, but neither mentions nor makes any effort to address Enforcement's pattern-and-practice arguments, which make clear that both cases are inapposite. PHH Ans. Br. at 7-9 (citing *Mullinax v. Radian Guar. Inc.*, 199 F. Supp. 2d 311 (M.D.N.C. 2002) and *Menichino v Citibank, N.A.*, No. Civ.A. 12-0058, 2013 WL 3802451 (W.D. Pa. Jul. 19, 2003)); *see* EC App. Br. at 6-7, 10 n.16. In fact, as *Menichino* admits, "a series of discrete events over time whose cumulative effect comprises a discriminatory practice" constitutes a continuing violation. 2013 WL 3802451, at *12 (quotations omitted). This is precisely the form of pattern-and-practice proof of an agreement to refer that is expressly contemplated by Regulation X, and shown by the facts of this case, that is, PHH's discrimination in steering referrals for kickbacks.

Finally, applying the continuing violation doctrine to this case would not impair PHH's

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[1] *Coulibaly v. J. P. Morgan Chase Bank, N.A.* "rejected" the analysis of the discovery rule, not the continuing violation doctrine, in *Miller v. Countrywide Bank, N.A.*, 571 F. Supp. 2d 251 (D. Mass. 2008). No. Civ.A. dkc 10-3517, 2011 WL 3476994, at *8 (D. Md. Aug. 8, 2011).

[2] PHH also states that Enforcement has conceded that ceding payments are not continuing violations by asserting that the payments were "contractual obligations of the MIs." PHH Ans. Br. at 9 (quotation omitted). Each time PHH accepted a kickback through its captive scheme, it continued to violate RESPA, contract or no. Moreover, the willingness of PHH and the MIs to amend or terminate their agreements in exchange for referrals is proof of the continuing violation.

rights, constitute a "new" rule of law, or require rulemaking. The Bureau has the authority to apply the doctrine to the statute in light of these facts, even if the issue has never been raised before in an adjudicated case. A party that breaks the law in a manner so brazen and far-reaching that it lacks directly-applicable precedent is not entitled to benefit from his creativity. Applying the plain terms of RESPA, PHH engaged in an illegal continuing violation of Section 8(a).

b. PHH has no response to the fact that RESPA's plain language precludes application of the *Snow* ruling

In responding to Enforcement's argument that the Bureau cannot apply the holding in *Snow v. First American Title Insurance Co.*, 332 F.3d 356 (5th Cir. 2003), PHH has nothing to say about the statute itself. PHH does not contest any of Enforcement's arguments based on the statute's plain meaning. PHH supplies no reason that the Bureau should not "give effect to the clear meaning of [the statute] as written," *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992).[3]

PHH's entire argument in defense of *Snow* is that the ruling exists and has been followed by other courts.[4] But that does not make it correct. Courts have misinterpreted statutes in the past.[5] The Bureau must apply RESPA's plain meaning, and is not bound by any court's failure to do so. Indeed, a federal agency is never bound by a Circuit or district court decision in a case to which the agency was not a party. As the Fifth Circuit itself has held, "[a]n agency … is not bound by the shackles of *stare decisis* to follow blindly the interpretations that … the courts of appeals … have

[3] Nor does *Snow*, or any other case, address Enforcement's arguments based on the statutory text.
[4] PHH reiterates some of *Snow*'s policy arguments, including that plaintiffs must not be allowed to "sue and hope that discovery turns up a recent payment that restarts the limitations period." PHH Ans. Br. at 10 (quoting *Snow*, 332 F.3d at 361). But the limitations period would not be "restarted," because each payment has its own limitations period. *See* EC App. Br. at 11. Moreover, there is a simple way to avoid this "problem" – the defendant can stop giving or accepting kickback payments.
[5] *See*, *e.g.*, *F. D. Rich Co., Inc., v. U. S. for Use of Indus. Lumber, Inc.,* 417 U.S. 116, 127 (1974) ("[T]he Court of Appeals erred in its construction of the statute."); *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1727-30 (2011) (reversing Federal Circuit's holding as contrary to plain text of rule, noting that court "was wrong to allow its precedent to suppress the statute's aims" reflected in text).

adopted in the past."[6] *Texas v. United States*, 866 F.2d 1546, 1556-57 (5th Cir. 1989). This is especially true where, as here, the statute unambiguously mandates the agency's interpretation.

But even in cases where the statutory language is ambiguous, federal agencies are authorized to interpret statutes they are charged with administering. Indeed, a Circuit Court must defer to an agency's reasonable interpretation – even if it conflicts with the court's *own* prior decision. Applying *Chevron* deference, the Supreme Court has held that allowing the reviewing Circuit Court's prior decision "to foreclose an agency from interpreting an ambiguous statute … would allow a court's interpretation to override an agency's" and "lead to the ossification of large portions of our statutory law … by precluding agencies from revising unwise judicial constructions of ambiguous statutes." *Nat'l Cable & Telecomms. Assoc. v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005) (internal citations/quotations omitted). And contrary to PHH's contention that Enforcement seeks to "reverse … settled jurisprudence," PHH Ans. Br. at 10, the Supreme Court, in *National Cable,* instructs that a reviewing court's "precedent has not been 'reversed' by the agency, any more than a federal court's interpretation of a State's law can be said to have been 'reversed' by a state court that adopts a conflicting (yet authoritative) interpretation of state law" because "a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is *not authoritative*" and "the agency remains the authoritative interpreter." 545 U.S. at 983-84 (emphasis added).

The Supreme Court recognized a narrow exception: the reviewing Circuit Court may adhere to its own precedent "only if the prior court decision holds that its construction follows from the

[6] Many district courts have blindly followed *Snow*, failing to analyze the issue themselves. And while PHH claims that a 12-year-old decision is "settled jurisprudence" regarding a statute that is more than 40 years old, there remains confusion and inconsistency among courts on this issue, even in cases that have purported to follow *Snow*. *See*, *e.g.*, *Husk v. Deutsche Bank Nat'l Trust Co.*, No. CIV.A. H-12-1630, 2013 WL 960679, at *4 (S.D. Tex. Mar. 12, 2013) (citing *Snow* as holding that "[a] cause of action brought under [Section 8] begins to accrue *when the alleged 'kickback' is paid*") (emphasis added), *Findley v. Am. Home Mortg. Corp.*, No. CIV. S-10-2885 FCD, 2010 WL 5169046, at *3 (E.D. Cal. Dec. 14, 2010) ("Because plaintiffs do not allege the dates of the alleged illegal conduct, plaintiffs have failed to establish that their claims were brought within the statute of limitations.").

unambiguous terms of the statute and thus leaves no room for agency discretion."[7] *Id.* at 982.[8] Unless the prior decision contains such an express statement, the Circuit Court *must* defer to the agency's interpretation. *Id.* at 980, 984. Should PHH choose to seek judicial review of this matter, the *National Cable* exception will be unavailable, because PHH cannot file an appeal in the Fifth Circuit,[9] and, in any event, *Snow* did not purport to be based on the unambiguous terms of Section 16. *Snow* stated only that "the statutory text and structure better support [its] reading." *Snow*, 332 F.3d at 359. In *National Cable*, the Circuit Court's prior decision too stated that its interpretation was "the best reading" of the statute, but this was insufficient, because it was not a holding that its interpretation was "the only permissible reading of the statute." *Nat'l Cable*, 545 U.S. at 985.

Thus, even the Fifth Circuit would be prohibited from applying *Snow* over a contrary interpretation by the Bureau – assuming hypothetically that RESPA were ambiguous, and PHH could appeal to the Fifth Circuit.[10] In a Third Circuit or D.C. Circuit appeal, the avenues open to PHH if it seeks review, the Bureau's interpretation must also prevail over *Snow* because: (1) the statute unambiguously supports Enforcement's position; (2) Circuit Courts are not bound by the

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[7] This is not truly an exception, but a recognition that if a court has previously held a statute to be unambiguous, that court has already held that all other interpretations fail the first step of the *Chevron* analysis, and the court may therefore choose to adhere to its precedent on that issue.

[8] This rule of judicial review applies only to the reviewing court, not the agency, whose task is to interpret the statute. The reviewing court must then decide whether its precedent requires it to reject the agency's interpretation.

[9] The Bureau's decision may be appealed only to the Third Circuit or the D.C. Circuit. *See* 12 U.S.C. § 5563(b)(4); **ECX 0653**, Ex. F ¶ 5 (PHH's principal place of business is in New Jersey).

[10] The rule of lenity would not alter the result in this hypothetical. "The simple existence of some statutory ambiguity … is not sufficient …. To invoke the rule, we must conclude that there is a grievous ambiguity or uncertainty in the statute." *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998) (quotations/citations omitted). Even if there were some ambiguity in the relevant RESPA provisions (there is not), none could conceivably be deemed "grievous" and incapable of resolution using other canons of construction.

decisions of other Circuit Courts, even absent a contrary Bureau interpretation;[11] and (3) the narrow *National Cable* exception cannot apply because there is no Third Circuit or D.C. Circuit decision interpreting the RESPA statute of limitation to accrue solely at closing (much less that such an interpretation is the only permissible reading).[12] The Bureau should reject *Snow* and adopt the rule set forth by the plain language of RESPA: any kickback payment is a separate violation.[13]

II. Monetary relief

a. PHH fails to challenge Enforcement's arguments regarding the unavailability of any offset to the disgorgement award

PHH makes various assertions about the amount or calculation of payments to the MIs, but none are responsive to Enforcement's two main arguments regarding disgorgement in its appeal brief: (1) at minimum, PHH must disgorge the funds Atrium withdrew from the trust accounts on or after July 21, 2008, and no offset is appropriate because this amount is *already* offset by payments to the MIs; and (2) no offset should be allowed for payments to co-conspirators. As to the first point, PHH does not dispute that the withdrawal amount is already offset by payments to the MIs,

[11] The Third Circuit or D.C. Circuit could not in any event allow *Snow* to trump a reasonable Bureau interpretation for the additional reason that the Fifth Circuit stated that the statute's terms merely "better support" its reading, not that they unambiguously require it. *Snow*, 332 F.3d at 359.

[12] As Enforcement explained in a brief cited in footnote 15 of its appeal brief, the Third Circuit mentioned *Snow* in a discussion of the contours of a class settlement. *In re Cmty. Bank of N. Va.,* 622 F.3d 275, 281-82 (3d Cir. 2010). But given the settlement posture, the parties did not litigate *Snow*'s validity, and the Third Circuit did not decide it, merely noting the issue as one bearing on the reasonableness of the proposed settlement. Thus, the Third Circuit did not "adopt" *Snow*, as PHH contends. *See Sikirica v. Nationwide Ins. Co.*, 416 F.3d 214, 224 (3d Cir. 2005) (noting that another Third Circuit decision "did not adopt the holdings of [other Circuit Courts]; it merely cited the rule in [those] jurisdictions," which are "informative, but certainly not binding").

[13] Two other Circuit Court cases cited by PHH are not informative, and are possibly in tension with *Snow*. In *Haase v. Countrywide Home Loans, Inc.*, the Fifth Circuit held that Section 6 "claims accrued when the alleged violations occurred" in 2006, 2007 and 2008, even though the loan closed in 2006. 748 F.3d 624, 629-30 (5th Cir. 2014); *Haase* Compl. (attached as **Exh. A**) ¶ 21; *see also Haase* Memo. & Rec. (attached as **Exh. B**) at 11 (district court held that Section 6 claims accrued in 2006, 2007 and 2008). And in *Clemmons v. MERS*, because "the closing never occurred," the Tenth Circuit could not apply the *Snow* rule, which requires a closing; it applied a different rule: the RESPA claims accrued "when [the closing agent] allegedly failed to ensure that Plaintiffs' new mortgage was properly closed." No. 13-3204, 2014 U.S. App. LEXIS 21589, at *3, 12 (10th Cir. Nov. 12, 2014).

and as to the second, it fails to address the authority cited by Enforcement.[14] Both of Enforcement's arguments remain valid regardless of the amount or calculation of payments to the MIs.

b. PHH does not address Enforcement's arguments regarding the imposition of civil money penalties against PHH

Contrary to PHH's assertion, PHH Ans. Br. at 16, Enforcement has argued for the imposition of CMPs solely to address violations of law occurring on or after July 21, 2011. *See, e.g.,* EC Br. at 209-18. PHH fails to engage Enforcement's argument that "it continued to violate RESPA by accepting kickbacks and unearned fees through June 2013," EC App. Br. at 20, and that the RD misapplied the *Snow* case in declining to award penalties, *id.*, preferring instead to focus on "referrals" supposedly occurring before that date that are not the subject of Enforcement's CMP argument, PHH Ans. Br. at 16-17. Nor does PHH address the RD's findings of scienter that support the CMP levels for which Enforcement contends. *See* EC App. Br. at 22-23. For the reasons specified in Enforcement's prior briefing, CMPs are available and ought to be imposed.[15]

III. PHH's Section 8(c)(2) affirmative defense

a. Section 8(c)(2) does not permit compensation for referrals

PHH contends that a Section 8(c)(2) defense is available to it even though Enforcement has proved that PHH accepted payments as consideration for referrals. But PHH misconstrues the relevant statutory provisions, mischaracterizes applicable agency interpretation, and dismisses the Bureau's own interpretation of Section 8(c)(2) as inconsequential while simultaneously relying heavily on (PHH's misreading of) an earlier agency interpretation of the same provision.

i. Section 8(c)(2) does not overlap with Section 8(a)

PHH argues that Enforcement manufactures a false distinction between the payments

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[14] Courts have denied an offset for payments to co-conspirators in at least three cases. EC Br. at 194 (citing two cases); EC. App. Br. at 20 (citing one case). PHH cites no contrary authority.
[15] Since Enforcement seeks CMPs exclusively for post-July 21, 2011 conduct, PHH's due process argument based on conduct before that date is irrelevant.

prohibited by Section 8(a) and those permitted by Section 8(c)(2). But the distinction is not only real, it is the essential purpose of Section 8(c)(2). *See* CFPB *Edwards* Br. at 15-16 (discussing Senate Report limitation to "legitimate payments" that do not violate the Section 8(a) ban).[16] The HUD Letter reflects this distinction, providing that only payments that are "solely" for reinsurance fall within the Section 8(c)(2) safe harbor. **ECX 0194**, Att. A (HUD Letter) at 1. PHH interprets Section 8(c)(2) as overlapping with Section 8(a) by reading "bona fide" – i.e., "solely" for actual goods or services – out of the statute. PHH Ans. Br. at 18 (omitting "bona fide" from its quotation of Section 8(c)(2)). But the "bona fide" requirement is essential to understanding the relationship between Section 8(c)(2) and Section 8(a) because "[a] kickback by its very nature is not a bona fide payment," May Order at 4.[17] And because no other provision of Section 8(c) contains that requirement, PHH's arguments based on other provisions must be rejected. PHH Ans. Br. at 20-21.[18]

ii. HUD's Interpretative Guidance prohibits compensation for referrals

Contrary to PHH's mischaracterization, *id.* at 21-22, the HUD Interpretative Rule

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[16] A payment may be legitimate even if a referral is made by the payee to the payor, as long as the payment is not made for the purpose of procuring the referral. For example, if a borrower were to select an MI before applying for a loan, and the MI were to refer the borrower to a lender, the lender's subsequent purchase of mortgage insurance from the MI (which was previously selected by the borrower) would fall within the Section 8(c)(2) safe harbor because the payment by the lender to the MI is solely for the legitimate purchase of mortgage insurance. PHH's reliance on *Glover v. Std. Fed. Bank*, 283 F.3d 953 (8th Cir. 2002), is therefore misplaced. PHH Ans. Br. at 19 (quoting *Glover* that Section 8(c) permits legitimate payments "even when done in connection with the referral of a particular loan to a particular lender").

[17] While PHH refers to "bona fide" as "two modest Latin words," PHH Ans. Br. at 20, those words are incompatible with kickbacks, as courts have routinely held in many contexts. *See, e.g.*, *United States v. Woodbury*, 359 F.2d 370, 379 (9th Cir. 1966) (holding that "agreement was not a … 'kickback deal' but a bona fide subcontract); *Reed v. Davis*, 399 P.2d 338, 342 (Wash. 1965) (plaintiff "failed to meet the burden of proving there was no such genuine issue on the question of whether the $2,500 payment was a bona fide loan or a 'kickback.'"); Black's Law Dictionary, 199 (9th ed. 2009) (defining "bona fide" as "1) made in good faith; without fraud or deceit. 2) sincere; genuine").

[18] Therefore, Enforcement's interpretation does not affect those other provisions. In any event, the two examples that PHH puts forth do not involve payments *for* referrals, but rather payments between parties who also happen to make referrals to one another and which payments, when made for service actually performed, are expressly contemplated by Regulation X. *See* 12 C.F.R. § 1024.14(g)(1)(ii), (g)(1)(iii).

concerning Home Warranty Companies (HW Rule) very clearly prohibits compensation for referrals. The HW Rule states: "RESPA prohibits a real estate broker or agent from receiving a fee for such a referral, as a referral is not a compensable service." 75 Fed. Reg. 36,271 (June 25, 2010); *see also id.* ("A referral is not a compensable service for which a broker may receive compensation."). The HW Rule also admonishes that "Section 8(c) of RESPA and HUD's regulations allow payment of bona fide compensation for services actually performed," and repeatedly notes that only "compensable services," which exclude referrals,[19] fall within the scope of Section 8(c)(2). *Id.* at 36,272. The part of the HW Rule quoted in PHH's brief is not to the contrary; it states that payments are permissible if they are "for *only* compensable services." *Id.* (emphasis added). Because "a referral is not a compensable service," this can only be read as prohibiting payment for referrals.[20]

The HW Rule is consistent with other HUD interpretive guidance. In 2001, HUD issued a Statement of Policy clarifying a 1999 Statement of Policy (1999 SOP) as it related to compensation to mortgage brokers through yield spread premiums. Statement of Policy 2001-1, 66 Fed. Reg. 53,052, 53,054 (Oct. 18, 2001) (2001 SOP). HUD reiterated a two-part test articulated in the 1999 SOP. The first part requires that "the total compensation to a mortgage broker . . . must be for goods or facilities provided or services performed." 2001 SOP at 53,055. The 2001 SOP notes, consistent with the HW Rule and Regulation X, that "[c]ompensable services for the first part of the test do not include referrals …." *Id.* Thus, where, as here, compensation has in fact been accepted or

[19] A referral is a "service," s*ee id* at 36,272 ("Services – other than referrals ..."), but not a "compensable service," *see* 12 C.F.R. § 1024.14(b) ("Any referral of a settlement service is not a compensable service, except as set forth in § 1024.14(g)(1)").

[20] PHH attempts to conjure a contradictory interpretation by reading the permissive clause (allowing payments "for only compensable services") as part of the final prohibitive clause (prohibiting payments based on "number of transactions referred") – suggesting that the permissive clause, rather than contrasting with the unlawful conduct described in the prohibitive clause, instead encompasses, and thereby permits, that conduct. PHH Ans. Br. at 21-22. This interpretation is completely incompatible with the plain meaning of the HW Rule.

given for referrals, such compensation fails the first part of the test and Section 8(c)(2) does not apply.[21] HUD interpretive rules and statements therefore support Enforcement's position.

iii. Section 8(c)(2) overlaps with Section 8(b)

PHH next argues that Section 8(b) contains a provision identical to Section 8(c)(2), making Section 8(c)(2) applicable only to Section 8(a) claims. PHH Ans. Br. at 22. But the Section 8(b) provision in question is narrower than Section 8(c)(2) because it applies only to settlement services provided to the borrower for which multiple settlement service providers split the fee. May Order at 18-20; *see* EC MSD at 19-22. Thus, Section 8(c)(2) can apply to fee splits prohibited by Section 8(b) where a legitimate service is performed by one settlement service provider to another (and is therefore not a "settlement service" eligible for exemption under Section 8(b)). This is consistent with the view that Section 8(c)(2) permits only "legitimate payments," which excludes all payments prohibited by Section 8(a) but not all fee splits prohibited by Section 8(b).

iv. The rule of lenity does not affect the meaning of Section 8(c)(2)

Finally, PHH invokes the rule of lenity for a favorable construction of the scope of Section 8(c)(2). Setting aside whether it could apply to RESPA (which Enforcement does not concede),[22] that rule is available only in limited circumstances not present here. "'[T]he rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or

[21] The 2001 SOP went on to explain that, if the first part of the test was satisfied, then "[t]he second part of HUD's test requires that total compensation to the mortgage broker be reasonably related to the total set of goods or facilities actually furnished or services performed." *Id.* HUD explained that "'[i]f the payment or a portion thereof bears no reasonable relationship to the market value of the goods, facilities or services provided, the excess over the market rate may be used as evidence of a compensated referral or an unearned fee in violation of Section 8(a) or (b) of RESPA.'" *Id.* (quoting 1999 SOP at 10,086). Thus, HUD was of the view that even in the absence of evidence that compensation was for referrals, excessive payments for compensable services could nevertheless substitute for such evidence and form the basis of a violation of Section 8(a).

[22] *See* EC Resp. Br. at 12 n.7. The ALJ noted that the rule of lenity has been applied to some hybrid/civil statutes, *see* RD at 76 (citing *Maracich v. Spears*, 133 S. Ct. 2191, 2222 (2013) (Ginsburg, J., dissenting)), but did not hold that the rule trumps the deference owed to agency interpretations, and rejected PHH's argument that it is relevant to any provision of RESPA at issue here, *id.* at 75-76.

uncertainty in the statute such that the Court must simply guess as to what Congress intended.'" *Maracich*, 133 S. Ct. at 2209 (quoting *Barber v. Thomas,* 560 U.S. 474, 488 (2010)). As discussed above, there is no ambiguity in RESPA or the relevant interpretive guidance about the scope of Section 8(c)(2), but even if there were, any such ambiguity would be dispelled by consideration of the *Maracich* factors, and there is certainly no ambiguity that could conceivably be regarded as so "grievous" as to require one to "simply guess as to what Congress intended."

Maracich is particularly instructive here. In that case, defendants in a civil action claimed that, although their conduct fell within the general prohibition of the statute at issue, it was protected by an enumerated exemption. 133 S. Ct. at 2199, 2207. The Supreme Court deemed the exemption in question to be "susceptible to a broad interpretation" which could "include the [conduct at issue]." *Id.* at 2200. But the Court nonetheless found the exemption to be "best read" more narrowly, *id.* at 2203, because "[a]n exception to a general statement of policy is usually read . . . narrowly in order to preserve the primary operation of the provision" and "ought not operate to the farthest reach of [its] linguistic possibilities if that result would contravene the statutory design" or "undermine in a substantial way the [statute]'s purpose," *id.* at 2200, and because "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions," *id.* at 2204. The rule of lenity did not require the Court to disregard these principles in favor of an interpretation more favorable to the defendants. *Id.* at 2209. Likewise, even if RESPA Section 8(c)(2) could plausibly be read to permit compensation for referrals (it cannot), there would be no ambiguity so grievous that it compels a reading that significantly impairs the operation of Section 8(a). Congress expressed its specific concern that consumers be "protected from unnecessarily high settlement charges caused by certain abusive practices," 12 U.S.C. § 2601(a), including "kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services," 12 U.S.C. § 2601(b)(2), which Congress specifically addressed through the Section 8(a) prohibition against

referral fees. Any interpretation of Section 8(c)(2) must respect the design and purpose of this "comprehensive scheme" that Congress enacted to combat kickback arrangements.

b. PHH does not dispute that economic reality controls the Section 8(c)(2) analysis, and does not claim that Atrium assumed any real risk of economic loss

PHH does not respond to Enforcement's legal argument that Section 8(c)(2) turns on the substance of an arrangement, not its form. And on the factual issue of whether the Atrium arrangements, as a matter of substance, transferred risk to Atrium, PHH has virtually nothing to say. PHH does not contend that Atrium ever faced any *actual* risk of incurring an economic loss. Rather, PHH attempts only to undermine the evidence cited by the ALJ for his conclusion that the arrangements harmed MIs by substantially reducing their available funds during housing downturns, thus increasing their risk. PHH Ans. Br. at 2.[23] But that conclusion follows necessarily from two findings that PHH does not dispute: (1) the arrangements were established to transfer a portion of the MIs' funds to PHH, RD at 82; and (2) it was "a virtual certainty" that PHH would retain "much of the reinsurance premiums," *id.* at 100 – which would otherwise have provided protection to the MIs. In addition to Mark Crawshaw's expert reports and the evidence cited in the RD, the following are a few examples of the evidence, or lack thereof, that supports those findings:

- A Milliman article from the 1990s states: "Lenders, who essentially produce the business for the [MIs], have been seeking ways to share in [the MI industry's] profits." **ECX 0682**.

[23] PHH argues that the 1998 MI industry presentation to the Arizona Department of Insurance is not relevant because the MIs requested that captive arrangements be limited "to a 25% cede – which are the only structures at issue" here. *Id.* But requesting such a limit does not mean that *any* structure with a 25% rate is permissible. In fact, Atrium's 25% structures were even worse for the MIs than the 40% structures because Atrium's risk band was severely narrowed, causing Atrium's already enormous profit margin to increase. EC Resp. Br. at 100-01 & n.64, 111. PHH also attempts to dismiss the testimony of MGIC's CEO, Curt Culver, but his conclusion that, notwithstanding Milliman's finding of risk transfer for individual book years, deep cede captive arrangements were "not a wise use of capital," **Tr. 338, 342** (3/25), is clearly relevant to the Bureau's evaluation of the substance of Atrium's arrangements.

- As Radian explained, the objective of captive arrangements was to "provide significant earnings" to the lender "with no additional operational steps" required of the captive reinsurer (not to provide reinsurance protection to the MI). **ECX 0580** at RGI 02743.

- There is no contemporaneous evidence that the MIs entered into the captive arrangements because they wanted risk protection from Atrium.[24]

- There is no evidence that PHH or the MIs ever intended to limit their referral arrangements to just one year or that they viewed the arrangements as anything other than a continuous scheme meant to operate for as long as it remained lucrative. PHH's expert believes that "it would be very difficult to ever show risk transfer as the number of [book] years being considered increases." **Cascio Rebuttal Rep.** at 3.[25]

- Even though the CMG and Radian arrangements should have resulted in devastating losses to Atrium given their commencement so close to the financial crisis, *see* **Crawshaw Rep.** at 52, **Crawshaw Rebuttal Rep.** at 13, in fact "CMG and Radian likely did not experience 'positive benefits' from their captive arrangements," RD at 93.

IV. Various baseless assertions irrelevant to Enforcement's appeal

PHH makes a number of assertions that are not responsive to any issue in Enforcement's appeal brief. Although these should be disregarded on that basis alone, Enforcement nonetheless addresses two such assertions below.

a. PHH had unfettered opportunity to defend pre-July 21, 2008 conduct

PHH wrongly asserts that the RD contains no findings regarding pre-July 21, 2008 violations because the May Order eliminated PHH's need and ability to defend pre-July 21, 2008 conduct. PHH Ans. Br. at 1. First, the RD contains numerous findings regarding pre-July 21, 2008 violations. RD at 7-25, 71-73. Second, PHH had every opportunity to defend pre-July 21, 2008 conduct in its opposition to Enforcement's summary disposition motion, which put that conduct squarely at issue.

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[24] The total absence of such evidence is highlighted by PHH's citation of MGIC's press release on its settlement with the Bureau regarding the Bureau's allegations that MGIC's captive arrangements did not provide real reinsurance. PHH Ans. Br. at 2 n.2. This is not contemporaneous evidence, and is obviously not reliable evidence, given its purpose. The fact that this is the only document PHH could find that purports to show that MIs entered into captive arrangements to obtain catastrophe protection makes clear that PHH is grasping at straws.

[25] Contrary to PHH's characterization, the statement in the HUD Letter that there was an "increased diversification of risk" in the mortgage market, PHH Ans. Br. at 4, was an observation about the proliferation of captive arrangements that purported to transfer risk, not a determination that those arrangements actually transferred risk.

PHH has only itself to blame for failing to oppose that motion with declarations and documentary evidence relevant to pre-July 21, 2008 conduct.[26] Based on that motion, the ALJ found "powerful evidence of the existence of referral agreements prior to July 21, 2008," May Order at 16, and PHH does not get another bite at the apple simply because he *also* limited the available relief.[27] Third, pre-July 21, 2008 conduct remained relevant when PHH put on its case because, as the ALJ explained over PHH's objection, "what happened before [July 21, 2008] is relevant in evaluating the course of conduct" of PHH and the MIs. **Tr. 2021** (6/3).[28] PHH received repeated notice that Enforcement would use such pre-July 21, 2008 "pattern and practice" and "course of conduct" evidence to establish violations even after July 21, 2008. NoC ¶ 94; EC Opp. to 2nd MTD at 34; *see also* May Order at 16 (noting that Enforcement could establish a referral agreement "by a practice, pattern, or course of conduct"). PHH should not get a third bite at the apple.

b. Enforcement proved its allegations against PHH

Contrary to PHH's claim in its brief, Enforcement proved virtually all of the allegations in the NoC (as the RD amply reflects), including those selected by PHH.[29] *See* EC Br. at 18 (evidence that PHH controlled MI selection, NoC ¶ 13); *id.* at 140-41 (evidence that Atrium conducted no underwriting to price risks, NoC ¶ 22); *id.* at 52, 180 (evidence that PHH's steering of business to

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[26] *See* May Order at 21 ("I explicitly authorized both sides to move for 'whatever dispositive relief' they desired …. both sides could have relied on their hearing exhibits to the fullest extent without further foundation; Enforcement has done so, but Respondents, for whatever reason, have not.").

[27] *Ervin v. Sprint Commc'ns Co. LP*, 364 F. App'x 114, 116 (5th Cir. 2010) ("failure to respond to the summary judgment motion effectively waives his opportunity to offer evidence or legal argument in opposition to summary judgment"); *SEC v. Wolfson*, 249 F. App'x 701, 704 (10th Cir. 2007) (no due process violation because defendant "had notice and adequate opportunity to submit evidence in opposition to the SEC's motion for summary judgment").

[28] *See, e.g.*, *United States v. Libutti*, No. CRIM. A. 92-611(JBS), 1994 WL 774644, at *17 (D.N.J. Sept. 6, 1994) *aff'd*, 72 F.3d 124 (3d Cir. 1995) ("[T]he defendant's conduct … before the October 19, 1986 statute of limitations cutoff date was relevant and admissible for the purpose of proving a continuous course of conduct into the relevant period, as determined also in the pretrial ruling ….").

[29] Enforcement proved far more than just "the essential allegations of [a] complaint" that plaintiffs are required to prove. *Louisiana Wildlife Fed'n, Inc. v. York*, 761 F.2d 1044, 1054 (5th Cir. 1985). *See also United States v. Wellington*, 754 F.2d 1457, 1462 (9th Cir. 1985) ("It is well settled that the government need not prove every allegation of fraudulent activity in an indictment.").

captive MIs increased consumer prices, NoC ¶ 85); *id.* at 224 (evidence that PHH required more MI coverage than necessary to collect captive premiums, NoC ¶ 87); *id.* at 56 & n.19 (evidence that PHH harmed borrowers by impeding access to the best providers and dictating referrals according to kickbacks over quality, NoC ¶¶ 87, 90); *id.* at 26-27 (evidence that correspondent loans that were not restricted to PHH's "preferred providers" were "repriced" with 75 basis point increase, NoC ¶ 88). These facts show that captive reinsurance impaired competition on true market factors, NoC ¶ 90, and that such market failures presumptively harmed consumers, as RESPA assumes.

Conclusion

For all the reasons stated above, PHH fails to address or rebut Enforcement's appeal points. Enforcement's appeal should be granted.

DATED: February 20, 2015

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 20th day of February 2015, I caused a copy of the foregoing "Enforcement Counsel's Reply Brief in Support of its Appeal" to be filed with the Office of Administrative Adjudication and served by electronic mail on the following persons who have consented to electronic service:

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