UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of: **INTEGRITY ADVANCE, LLC and JAMES R. CARNES,** **Respondents.**	**JOINT STATEMENT ON FACT DEVELOPMENT REGARDING STATUTE OF LIMITATIONS DEFENSE**

JOINT STATEMENT ON FACT DEVELOPMENT
REGARDING STATUTE OF LIMITATIONS DEFENSE

On August 16, 2019, Administrative Law Judge (ALJ) Christine L. Kirby conducted a telephonic Scheduling Conference. The ALJ ordered that the proceedings be bifurcated to first address Respondents' statute of limitations defense. The ALJ further directed the parties to confer and submit stipulations and/or a plan for supplementing the record on this issue by August 23, 2019.

The parties conferred on August 20, 2019, and attempted to draft a joint statement with an agreed upon procedure for supplementing the record, but were unable to do so. Instead, the parties' positions and proposed schedules are stated separately below.

Respondents' Position and Proposed Schedule

Judge Kirby directed the parties to confer and attempt to come to an agreement regarding supplementation of the record to address the applicability of the statute of limitations. During

the telephone conference with the Court, Enforcement Counsel asked to submit briefing on whether it was appropriate to even allow supplementation of the record on this issue. Judge Kirby advised that such briefing was not necessary and directed the parties to confer regarding a discovery schedule. Earlier today, Enforcement Counsel provided its "edits" to a proposed schedule prepared by the Respondents. Enforcement Counsel's "edits" are mostly comprised of a more than four-page brief arguing that supplementing the record is not appropriate and that there are sufficient facts in the record already. It is Respondents' view that the inclusion of this material is not appropriate for this filing as the Court already rejected Enforcement Counsel's request to brief this issue. Respondent received Enforcement Counsel's briefing today – which is the date the Court ordered the parties to file the Proposed Schedule – and Respondents do not have sufficient time to respond to the brief. In the event the Court intends to reconsider its decision to allow discovery on this issue, Respondents request that they be permitted adequate time to respond to Enforcement Counsel's brief.

Respondents' position is that, consistent with Judge Kirby's August 16th ruling that the record requires fact development related to the statute of limitations and that no further briefing is warranted on the necessity of that fact development, Respondents are entitled to fact discovery on the issue of when the Consumer Financial Protection Bureau ("CFPB") "discovered" the alleged violations of the Consumer Financial Protection Act ("CFPA") by Respondents. *See* 12 U.S.C. § 5564(g)(1) (CFPA claims to be brought within three years of the "date of discovery of the violation."). Therefore, Respondents seek (1) documents responsive to the subpoena for

records requested on this date[1] and (2) testimony of CFPB Enforcement Attorney Kara Miller[2] and other potential witnesses who may be identified based on a review of the documents responsive to the subpoena for records.

Respondents propose the following schedule:

1. On this date, **August 23, 2019**, Respondents submit their request for the issuance of a subpoena for records.

2. By **September 3, 2019**, the CFPB will submit any objection to the subpoena for records or any motion to quash or modify. By **September 9, 2019**, Respondents will file any response.

3. By **September 23, 2019**, the CFPB will provide all records responsive to the subpoena for records, consistent with the ALJ's ruling on any objection.

a. To the extent that the CFPB contends that certain responsive documents are protected by an applicable privilege, by **September 23, 2019**, the CFPB will provide a log of all documents withheld or redacted on the basis of any such privilege that identifies: the document, date, parties, subject matter, and the basis for redacting or withholding the document.

4. By **October 14, 2019**, Respondents will identify any individuals, in addition to Ms. Miller, from whom testimony is sought. Respondents also will submit any request for the issuance of subpoenas for those individuals' testimony, unless the parties agree to a deposition schedule in lieu of hearing testimony.

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[1] Respondents have limited their subpoena to the time period from July 21, 2011 (the date CFPB became operational) to November 18, 2012 (three years before the filing of the Notice of Charges). Respondents believe that communications or other records that evidence whether the CFPB already was aware or should have been aware of alleged violations by Respondents prior to November 18, 2012 are highly relevant to the question of when the CFPB "discovered" the alleged violations. *See, e.g., See Merck & Co. v. Reynolds*, 559 U.S. 633, 646 (2010) (the discovery rule allows "a claim to accrue when the litigant first knows or with due diligence should know facts that will form the basis for an action.").

[2] Ms. Miller is an enforcement attorney for the CFPB who conducted a search on March 29, 2012 for complaints regarding Integrity Advance. *See* Exhibit A (46 pages of Consumer Sentinel Network Complaints Search Results for Integrity Advance). Respondents seek testimony from Ms. Miller regarding what she and others at the CFPB already knew or should have known when she conducted the search, and the steps Ms. Miller and others took in response to the search. Again, Respondents believe that such testimony is highly relevant, and narrowly tailored, to the date of "discovery."

5. By **October 24, 2019**, the CFPB will submit any objection to the subpoenas for testimony or any motion to quash or modify. By **October 29, 2019**, Respondents will file any response.

6. By **November __, 2019,** a hearing will be conducted for the purpose of taking testimony from Ms. Miller and potentially others on facts relevant to the statute of limitations, consistent with the ALJ's ruling on any objection, unless the parties agree to a deposition schedule in lieu of hearing testimony.

7. Within **30 days** of the hearing, Respondents will file any motion to dismiss on the basis of statute of limitations.[3] The CFPB's response and the Respondents' reply will be filed within the time periods identified in 12 CFR 1081.212.

Enforcement Counsel's Position and Proposed Schedule

Respondents are pursuing a significant reopening of the record that is at odds with the Bureau's Rules of Practice for Adjudication Proceedings, the status of this remand hearing, and the governing law. To the extent that it is necessary, the record should be supplemented by stipulation. Respondents' plan for additional fact finding beyond this is unreasonable and excessive in scope, and if implemented would be oppressive and unduly burdensome.

Any supplementation of the record regarding Respondents' statute of limitations defense should be circumscribed for four reasons: (1) Enforcement Counsel has already produced documents relevant to Respondents' defense, and already has or is willing to stipulate to additional material facts; (2) Respondents have failed to meet the high bar set by the D.C. Circuit for reopening the record in remand hearings such as this one; (3) the legal developments between the initial proceedings and this remand hearing do not justify supplementation of the record; and (4) Respondents' plan fails to acknowledge the rules and constraints that apply to proceedings in

[3] Consistent with the ALJ's ruling that the matter be bifurcated to first address the statute of limitations, Respondents will reserve any other grounds for a motion to dismiss to be filed later at the appropriate point in the proceedings, should the matter move forward against one or both of the Respondents.

this forum, and if implemented would launch a process that does not comport with the Bureau's Rules of Practice for Adjudication Proceedings.

First, Enforcement Counsel has already produced information that shows that the Bureau did not discover the violations before November 18, 2012 (three years before the Notice of Charges was filed). In particular, as required under Rule 206, Enforcement Counsel has already produced to Respondents all documents relating to this investigation that the Office of Enforcement obtained from non-Bureau employees before these proceedings were instituted. *See* 12 C.F.R. § 1081.206; CFPB Rules of Practice for Adjudication Proceedings (Final Rule), 77 Fed. Reg. 39058, 39073 (June 29, 2012) (commentary on Rule 206 stating that rule is designed to give respondents "the material facts underlying enforcement counsel's decision to recommend the commencement of enforcement proceedings"). Thus, at this point, Enforcement Counsel has produced the very documents and information through which it discovered the violations pleaded in the Notice of Charges. Enforcement Counsel also has previously stipulated to, or has informed Respondents that it is willing to stipulate to, other facts about this investigation (about which Respondents are in any event well aware): when the Bureau issued its Civil Investigative Demand to Integrity Advance in this case, when it received documents in response to that Demand (including the loan agreement upon which Enforcement Counsel's claims rest), when the Bureau conducted an investigational hearing of Mr. Carnes, when the Bureau issued a Notice and Opportunity to Respond and Advise to Respondents, and when Respondents answered that Notice. Between these stipulated facts and the Rule 206 production, there already exists a true and factual record that Your Honor could use to decide a motion for summary disposition regarding Respondents' statute of limitations defense.

Nor can Respondents claim they need to obtain discovery to establish when the Bureau "should have" discovered the violations. When the Bureau "should have" discovered the violations is not relevant under the statute of limitations provision that Respondents invoke. Section 1054(g) of the CFPA states that "no action may be brought under this title more than 3 years after the date of discovery of the violation to which an action relates." 12 U.S.C. § 5564(g)(1). It does not state that the Bureau is time-barred from bringing an action three years after it "should have" discovered the violations. To be sure, the Supreme Court held in *Merck & Co. v. Reynolds* that a statute of limitations that, by its terms, runs from the "discovery" of a violation begins to run when a reasonably diligent plaintiff should have discovered it. 559 U.S. 633, 638, 648 (2010). But it based that conclusion on "history and precedent surrounding the use of the word 'discovery'" in the context of statutes of limitations that apply to *private* plaintiffs. *See id.* at 648. No similar history and precedent suggests that Congress likewise intended to adopt a "should have discovered" standard when it enacted a statute of limitations that applies to a government agency—and there are ample reasons to think that no such standard applies to the CFPA's limitations provision.

Second, if Respondents believe that the record should be reopened and supplemented beyond the stipulations identified above, they must provide specific grounds and justification for doing so. Under *Intercollegiate Broadcasting*, it would be reasonable here for Your Honor to rely on the pre-hearing record and stipulations unless Respondents are able to (1) provide a "specific reason why it is necessary to reopen the record and take further evidence," and (2) explain how they were denied an "opportunity to present [their] case." *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 126 (D.C. Cir. 2015). Respondents cannot make these showings because they were not denied an opportunity before

the hearing to develop evidence related to any statute of limitations defense. Respondents argued in their motion to dismiss that the Bureau failed to bring its claims within three years of the date of discovering the violations. The ALJ ultimately denied that motion on the ground that the three-years-from-discovery limitations period did not apply to the claims—but it did not issue that ruling until the pre-hearing record had already been closed. Hence, there were no rulings by the initial ALJ that prevented Respondents from requesting documents relevant to the discovery of Respondents' violations during the time period allotted by the ALJ for developing the pre-hearing record.

Third, Respondents have asserted that the record should be supplemented because of "recent developments in the law on issues such as the statute of limitations," but Respondents cite recent case law only to support their view that that the three-years-from-discovery limitations period in 12 U.S.C. § 5564(g) applies to the Bureau's claims here (which Respondents have argued all along). None of the intervening law touches on what constitutes "date of discovery" or alters the elements that parties asserting a statute of limitations defense must prove—so they cannot claim that the recent developments have clarified what facts they must establish to support their statute of limitations defense. While the legal developments in between the initial proceedings and this remand hearing might justify giving Respondents an opportunity to file a new dispositive motion regarding any statute of limitations defense, they do

not justify a time-consuming, unreasonable, and unduly burdensome re-development of the already established, material facts relating to that defense.[4]

Finally, while the remand proceedings must ensure that Respondents receive a fair re-hearing from a constitutionally appointed hearing officer, no authority requires that Respondents be afforded an administrative proceeding that is different than what any other respondent in such a proceeding would be permitted. Respondents are proposing the type of federal court discovery that is not permitted under the Bureau's Rules of Practice for Adjudication Proceedings, and which the Rules were specifically designed to avoid. *See* 77 Fed. Reg. 39058, 39058-83 (June 29, 2012) (commentary on Rules). In connection with just this one defense, Respondents envision "waves" of document requests and testimony from multiple fact witnesses. Respondents even contemplate taking pre-hearing depositions, something that the rules only permit where the witnesses will be unavailable for the hearing. *See* 12 C.F.R. § 1081.209(a)(1). If Respondents are to be permitted additional fact finding, they should be required to do so within the bounds that constrain all respondents in such proceedings. Further development of the

[4] Should Your Honor need to assess the reasonableness, scope, and degree of burden of Respondents' proposed plan, a significant factor will be that the majority of what Respondents are seeking through a reopening of the record is internal Bureau communications and work product that is protected by a combination of the attorney-client privilege, the work product doctrine, the deliberative process privilege, and the law enforcement privilege. As the Bureau's Rules of Practice for Adjudication Proceedings suggest, the disclosure of such materials is disfavored. *See* 12 C.F.R. § 1081.206(b) (identifying documents that may be withheld from Rule 206 productions of documents by the Bureau, including documents that are privileged and documents that are internal memoranda, notes, or writings prepared by a person employed by the Bureau or another government agency or that otherwise would be subject to the work product doctrine); 12 C.F.R. § 1081.211(c)(1) (identifying the limited grounds on which a interlocutory appeal may be certified, including any ruling or order that "would compel testimony of Bureau officers or employees . . . or the production of documentary evidence in the custody of the Bureau").

record, if any, should comply with the administrative rules and be narrow, reasonable, and expeditious.

Enforcement Counsel proposes the following schedule:

1. On this date, **August 23, 2019**, Respondents will submit their request for the issuance of a subpoena for documentary material pursuant to 12 C.F.R. § 1081.208(b).

2. If Judge Kirby issues the subpoena, any motion to quash or modify by Enforcement Counsel will comply with the procedures for such motions described in 12 C.F.R. § 1081.208, including the time within which such a motion must be filed.

3. If Judge Kirby's ruling on any motion to quash or modify compels the production of documentary evidence in the custody of the Bureau or another governmental agency, or the testimony of Bureau officers or employees, or those from another government agency, any motion to certify a matter for interlocutory appeal by Enforcement Counsel will comply with the procedures for such motions described in 12 C.F.R. § 1081.211, including the time within which such a motion must be filed.

4. The parties will meet and confer and submit a joint proposed timeline for production of documents within ten days of either (a) service of the subpoena, if Enforcement Counsel does not intend to file a motion to quash or modify the subpoena, or (b) the resolution of any motion to quash or modify and/or motion for interlocutory appeal that compels the production of documents.

5. After receiving the parties' joint proposed timeline, Judge Kirby will issue a Scheduling Order for (a) the production of documents, (b) briefing of Respondents' motion for summary disposition on its statute of limitations defense pursuant to 12 C.F.R. § 1081.212(c), and (c) oral argument on Respondents' motion, if necessary.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of August 2019, I caused a copy of the foregoing Joint Statement on Fact Development regarding Statute of Limitations Defense to be filed by electronic transmission (email) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), and served by email on opposing counsel at the following addresses:

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