UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	**ENFORCEMENT COUNSEL'S BRIEF ADDRESSING THE COMPLETENESS OF THE FACTUAL RECORD ON RESPONDENTS' STATUTE-OF-LIMITATIONS DEFENSE**
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,	
Respondents.	

ENFORCEMENT COUNSEL'S BRIEF ADDRESSING THE COMPLETENESS OF THE FACTUAL RECORD ON RESPONDENTS' STATUTE-OF-LIMITATIONS DEFENSE

Respondents propose a significant reopening of the record in search of evidence to support their statute-of-limitations affirmative defense. They ask Enforcement Counsel and the ALJ to engage in federal-litigation-like discovery—including subpoenas for documents and testimony, waves of document productions, and even prehearing depositions—that would range well beyond what is permitted under the rules governing this administrative proceeding. And even if they would limit their requests to those permitted under the rules, Respondents still could make no showing that what they seek is warranted or relevant under controlling law.

No further "discovery" on Respondents' statute-of-limitations defense is warranted here for four reasons. First, Enforcement Counsel has already produced or stipulated to all the documents and material facts Respondents need to advance their limitations defense, so further fact-finding efforts would not produce relevant information. Second, Respondents have failed to show that reopening the record is necessary or that they were denied the ability to present their case during the prior proceeding. Third, Respondents have argued that legal developments between the initial proceedings and this remand hearing justify supplementation of the record, but the only change in law they cite does not address how to apply the CFPA's date-of-discovery statute and does not speak to facts needed to adjudicate limitations questions under the CFPA. Finally, Respondents' plan fails to acknowledge the rules and constraints that apply to proceedings in this forum, and if implemented would launch a process that contravenes the Bureau's Rules of Practice for Adjudication Proceedings ("Bureau's Rules").

I. Procedural Background

On August 14, 2019, Respondents filed a Motion to Open Record for a New Hearing.[1] At a telephonic scheduling conference on August 16, 2019, ALJ Christine L. Kirby granted Respondents' motion in part by reopening the record just on Respondents' statute-of-limitations defense.[2] The ALJ also bifurcated this matter to address Respondents' limitations defense before reaching the merits of this matter.[3] Finally, the ALJ at the scheduling conference ordered the parties to meet and confer regarding the current record, to propose stipulations of fact, and to file a joint statement presenting a plan for supplementing the record on this issue, if necessary.[4]

At the subsequent meet-and-confer, the parties disagreed regarding whether stipulations would suffice to complete the record. Respondents announced that they intended to seek additional fact development through subpoenas, and Enforcement Counsel indicated that it would seek to quash or modify any such subpoenas. In the Joint Statement filed on August 23, 2019, the parties stated that they were unable to agree on a procedure for supplementing the

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[1] Resp. Mot. [Dkt. 229].

[2] *See* Scheduling Order (Aug. 30, 2019) [Dkt. 233] at 3 (recounting ruling made during August 16 scheduling conference). The ALJ reopened the record based on the understanding that the parties agreed that "the record … did not contain sufficient factual development to enable [the ALJ] to decide" the statute-of-limitations issue. *Id.* at 1. To clarify, Enforcement Counsel did not intend to express agreement that the factual record is insufficient; rather, it agreed that further briefing on the statute-of-limitations defense—and thus further development of the "record" in that sense—was appropriate.

[3] *See id*. Although Enforcement Counsel is not opposed to resolving the statute-of-limitations issue before moving to the merits of the violations cited in the Bureau's Notice of Charges, it does not believe that it is necessary. Respondents' affirmative defense, like most statute-of-limitations affirmative defenses, does not raise any jurisdictional issue. *See United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632, 191 L. Ed. 2d 533 (2015). To have jurisdictional significance, a statute of limitations must have a clear statement, discernable through "traditional tools of statutory construction" that "plainly show[s] that Congress imbued [it] with jurisdictional significance." *Id.* Because 12 U.S.C. § 5564(g)(1) contains no such statement, it is not jurisdictional.

[4] *See* Scheduling Order [Dkt. 233] at 1-2.

record and that they would present their positions and proposed schedules separately.[5] In its portion of the Joint Statement, Enforcement Counsel explained why any development of the record beyond stipulations of fact was inappropriate and proposed a schedule for resolving the imminent subpoena dispute.[6]

In the August 30, 2019 Scheduling Order, the ALJ treated Enforcement Counsel's explanation of its position as a motion for reconsideration of the order granting in part Respondent's motion to reopen the record.[7] The ALJ then established a process for determining whether to allow further development of the record, including setting a schedule for briefing the issue of whether the record should be supplemented if the parties could not otherwise reach a resolution.[8] The parties filed a Joint Update with the ALJ on September 11, 2019, that informed the ALJ that the parties' positions on the sufficiency of the current record relating to Respondents' limitations defense had not changed, and that the parties would therefore submit briefs on the schedule the ALJ ordered. This brief is the first submission in that process.

II. Argument

Supplementation of the record regarding Respondents' limitations defense is unwarranted for four reasons: (1) Enforcement Counsel has already produced all documents and stipulated to the material facts necessary to resolve Respondents' defense; (2) Respondents cannot show, as the D.C. Circuit has required in similar circumstances, why it is necessary to reopen the record and take further evidence on this issue; (3) the legal developments between the initial

[5] Joint Statement [Dkt. 231] at 1.

[6] *See id.* at 4-9.

[7] *See* Scheduling Order [Dkt. 233] at 3.

[8] *See id.* at 4, ¶¶ 3-5.

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

A. Enforcement Counsel has already produced all of the documents obtained by the Office of Enforcement and stipulated to the material facts necessary to resolve Respondents' limitations defense.

Respondents seek to establish that the Bureau's claims are time-barred under § 1054(g) of the CFPA, which bars certain claims from being brought "more than 3 years after the date of discovery of the violation."[9] Enforcement Counsel has already produced all documents relating to this investigation that the Office of Enforcement received before filing the Notice of Charges. The production demonstrates that the Bureau did not discover the alleged violations before November 18, 2012, which is three years before the Notice of Charges was filed.[10] Enforcement Counsel's broad affirmative disclosure of this information obviates the need for Respondents to seek further information to determine "the date of discovery" of the violations alleged here.

As required under Rule 206, Enforcement Counsel produced to Respondents all documents relating to this investigation that the Office of Enforcement obtained from non-Bureau employees before these proceedings were instituted.[11] Among other documents, Enforcement Counsel produced: (1) each CID that it served in the investigation; (2) responses to each CID served; (3) transcripts of testimony taken in June 2014 from Integrity Advance's CEO,

[9] 12 U.S.C. § 5564(g)(1).

[10] Enforcement Counsel does not concede that 12 U.S.C. § 5564(g)(1) applies to administrative proceedings it brings under 12 U.S.C. § 5563 and 12 C.F.R. Part 1081, and reserves argument on this point for any briefing on dispositive motions.

[11] *See* 12 C.F.R. § 1081.206.

Respondent James Carnes, and Integrity Advance's Chief Operating Officer, Edward Foster; and (4) consumer complaints obtained by the Office of Enforcement. Thus, as intended by Rule 206, Enforcement Counsel has produced the very documents and information that contain "the material facts underlying [its] decision to recommend the commencement of enforcement proceedings."[12] If Enforcement Counsel had other information it was required to disclose under Rule 206, it would have done so.

Enforcement Counsel and Respondents also recently stipulated to facts about this investigation including when the Bureau issued its CID to Integrity Advance in this case, when it received documents in response to that CID, when the Bureau conducted investigational hearings of James Carnes and Edward Foster, when the Bureau issued a Notice and Opportunity to Respond and Advise to Respondents, and when Respondents answered that Notice.[13] There already exists a true and factual record available to Respondents for use in any dispositive motion asserting their limitations defense. No additional evidence is relevant to that defense.

Respondents seek to reopen the record principally to obtain the Bureau's internal communications, reports, memos, notes, and analyses relating to Respondents.[14] But such

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[12] *See* CFPB Rules of Practice for Adjudication Proceedings (Final Rule), 77 Fed. Reg. 39058, 39073 (June 29, 2012).

[13] *See* Joint Update on Fact Development Regarding Statute of Limitations Issue (Sept. 11, 2019) [not yet docketed] at 3-4. The loan agreement upon which Enforcement Counsel's claims rest was first received by Enforcement Counsel when it was produced in response to the Bureau's CID, and Enforcement Counsel learned about Respondent Carnes' awareness of Integrity Advance's consumer lending activities and his involvement in and authority to control those activities when it conducted investigational hearings of Mr. Carnes and Mr. Foster.

[14] Respondents also seek all consumer complaints and all correspondence between Bureau officials and people outside the Bureau. Pursuant to Enforcement Counsel's affirmative disclosure obligations under 12 C.F.R. § 1081.206, Enforcement Counsel has already produced all consumer complaints and all communications that the Office of Enforcement received from outside parties before these proceedings were initiated.

internal information does not bear on when the Bureau "discover[ed]" the violations. When "discovery" occurs turns on when the Bureau obtained information—and it has already produced or stipulated to all the facts bearing on when the Office of Enforcement obtained information related to the charges here. Perhaps Respondents seek such internal records to determine when Enforcement Counsel "should have" discovered, or constructively discovered, the violations. Even assuming that the statute of limitations in § 1054(g) begins to run when the Bureau *should have* discovered a violation—something that Enforcement Counsel does not concede, and which it disputes below—the internal communications and analyses that Respondents seek would not bear on that. As the Supreme Court held in *Merck & Co. v. Reynolds*, even where a statute of limitations runs from when a plaintiff "should have discovered" a violation, the question is when the hypothetical "reasonably diligent plaintiff would have discovered" the violation.[15] That can be determined based on facts already produced. The additional internal documents that Respondents seek might bear on what steps the Bureau actually took to investigate possible violations by Respondents. But what steps the Bureau actually took are irrelevant under the Supreme Court's decision in *Merck*, which established that it is irrelevant for statute-of-limitations purposes "whether the actual plaintiff undertook a reasonably diligent investigation."[16]

For these reasons, the ALJ does not need to reach the issue of whether a constructive discovery standard applies in this matter to determine whether the record needs to be reopened. But if the ALJ were to find that the question must be resolved to decide whether the record should be further supplemented, Enforcement Counsel contends that when the Bureau "should

[15] 559 U.S. 633, 653 (2010).

[16] *Id*.

have" discovered the violations is not relevant under the limitations provision that Respondents invoke. Section 1054(g) states that the Bureau is time-barred from bringing an action three years after it discovered the violations, not after it "should have" discovered them.[17] And there are ample reasons to think that no such standard should be read into the text of the CFPA's limitations provision. First, Respondents rely on *Merck*, where the Supreme Court held that a statute of limitations that, by its terms, runs from the "discovery" of a violation implicitly incorporates a "constructive discovery" standard—such that the limitations period begins to run when a reasonably diligent plaintiff should have discovered the violation.[18] But the Supreme Court 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.[19] There is no similar history and precedent suggesting that Congress intended to adopt a constructive discovery standard when it enacted a statute of limitations for government actions. Second, the Supreme Court has held that, as a general rule, statutes of limitation must be strictly construed in favor of the government.[20] Third, a constructive discovery standard provides particular difficulties in the context of affirmative litigation brought by federal agencies. As the D.C. Circuit has recognized, "[c]onducting administrative or judicial hearings to determine whether an

[17] In Respondents' request to the ALJ for the issuance of a subpoena for documents from the CFPB, Respondents cite to the unpublished decision in *CFPB v. NDG Fin. Corp.*, No. 15-CV-5211 (CM), 2016 WL 7188792, at *19 (S.D.N.Y. Dec. 2, 2016), among other cases, to support their assertion that the Bureau may "discover" a violation within the meaning of § 1054(g)(1) through constructive or inquiry notice. *See* Resp. Request for Subpoena (Aug. 23, 2019) [Dkt. 232] at 1-2. While the district court in *NDG* suggested that a constructive discovery rule applies to claims brought by the Bureau under the CFPA, the court's opinion on that point contains no analysis and cites only to a Second Circuit case involving private plaintiffs and a different statute.

[18] 559 U.S. at 638, 648.

[19] *See id*.

[20] *See Badaracco v. Comm'r*, 464 U.S. 386, 391-392 (1984).

agency's enforcement branch adequately lived up to its responsibilities" is "not a workable or sensible method of administering any statute of limitations."[21] This is especially true because, as the Supreme Court has observed, it is "unclear whether and how courts should consider agency priorities and resource constraints in applying [the constructive discovery] test to Government enforcement actions."[22] And fourth, if it wishes to impose such a rule on the federal government despite these articulated difficulties, Congress knows how to do so explicitly but did not do so here. For example, the statute of limitations in the False Claims Act provides that the federal government may bring a claim within three years of "the date when facts material to the right of action *are known or reasonably should have been known* by the official of the United States charged with responsibility to act in the circumstances."[23] The CFPA's statute of limitations contains no similar language.

Enforcement Counsel has already produced all evidence bearing on Respondents' statute of limitation defense, however § 1054(g)(1) may be construed. The ALJ should not allow Respondents to seek information beyond what Enforcement Counsel has already provided.

B. Respondents cannot show that it is necessary to reopen the record or that they were denied an opportunity to develop their case.

Respondents had a full and fair opportunity to seek additional pre-hearing evidence on their limitations defenses in the prior proceeding, but they failed to do so. The ALJ should only permit Respondents a new chance to seek additional evidence now if they can both (1) provide a "specific reason why it is necessary to reopen the record and take further evidence," and

[21] *3M Co. v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994).

[22] *Gabelli v. SEC*, 568 U.S. 442, 452-453 (2013).

[23] 31 U.S.C. § 3731(b)(1) (emphasis added).

(2) explain how they were denied an "opportunity to present [their] case."[24] But Respondents cannot do either. As discussed, given Enforcement Counsel's Rule 206 production and the stipulated facts, Respondents cannot show that it is necessary to reopen the record. Further, Respondents cannot make a showing that they were denied an opportunity to develop their case. Indeed, they had a full opportunity to seek pre-hearing evidence on their statute-of-limitations defenses, and they failed to do so.

A chronological review of this proceedings' history demonstrates that Respondents had ample opportunity to attempt to develop the evidence they now seek:

- On December 14, 2015, Respondents filed their Answer and Affirmative Defenses to the Notice of Charges. There, they asserted two affirmative defenses based on various statutes of limitation, including the CFPA's date-of-discovery limitations provision.[25]

- On December 18, 2015, ALJ McKenna issued an order directing Respondents to file a motion to dismiss by December 21, 2015, setting timelines for expert discovery and ordering the "[c]ompletion of discovery, including any responses to subpoenas issued pursuant to 12 C.F.R. § 1081.208," by March 31, 2016.[26]

- On December 21, 2015, Respondents moved to dismiss Enforcement Counsel's Notice of Charges.[27] In support of this motion, Respondents argued that the Bureau's claims should be dismissed because they are time barred,[28] and explicitly argued that a "knew or should have known" standard applied to the CFPA's date-of-discovery limitations provision.[29]

- Between December 18, 2015, and March 31, 2016 (the date by which ALJ McKenna ordered discovery be completed), Respondents did not seek from the ALJ any subpoenas under 12 C.F.R. § 1081.208 or otherwise seek information in support of their statute-of-limitations affirmative defenses through mechanisms permitted by 12 C.F.R. Part 1081.

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[24] *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 126 (D.C. Cir. 2015).

[25] Answer [Dkt. 21] at 14.

[26] Order Following Sched. Conf. [Dkt. 27] at 4.

[27] Resp. MTD [Dkt. 28].

[28] Resp. Memo in Supp. of MTD [Dkt. 28-A] at 16-22.

[29] *Id*. at 17.

- On April 22, 2016, ALJ McKenna denied Respondents' motion to dismiss and held that the statutes of limitations from the Truth in Lending Act, the Electronic Funds Transfer Act, and the CFPA do not apply to administrative proceedings initiated by Enforcement Counsel.[30]

As this timeline makes clear, Respondents were given nearly fifteen weeks to request any additional evidence that they believed was necessary for the pre-hearing record. During this time, the initial ALJ did nothing to prevent Respondents from requesting further information relevant to their limitations defenses. It was not until April 22, 2016—weeks after the close of discovery—that ALJ McKenna first issued a ruling rejecting Respondents' pleaded limitations affirmative defenses.

Although Respondents are entitled to a new opportunity to assert their statute-of-limitations defenses, they are not entitled to a fresh opportunity to develop evidence they could have sought the first time around.[31] Respondents should be able to present arguments and evidence in support of their statute-of-limitations defenses during this rehearing, but not to seek new evidence through pre-hearing procedures. As the D.C. Circuit has recognized, Respondents should receive a second bite of the apple only in limited circumstances that they have not and cannot establish here.[32]

[30] MTD Order [Dkt. 75] at 20-29.

[31] *Cf. Intercollegiate Broad.*, 796 F.3d at 122 ("There is no Appointments Clause problem in limiting [a company] to the evidence that it decided, on its own volition, to submit to the previous Board.").

[32] *Intercollegiate Broad.*, 796 F.3d at 126.

C. The legal developments between the initial proceedings and this remand hearing do not justify supplementation of the record.

The only argument Respondents offer to reopen the record regarding their limitations defense is that "intervening case law has reinforced and, in some instances, expanded the need to further develop the factual record through additional discovery."[33] But Respondents fail to explain how any change in the law actually justifies additional factual development in this matter.

Respondents cite a single case, *PHH Corp. v. CFPB*,[34] to support their contention that intervening case law justifies reopening the record here. Respondents cite *PHH* to support their view that the three-years-from-discovery limitations period in § 1054(g) applies to Enforcement Counsel's claims in this forum. Although it did reverse the Bureau Director's opinion, *PHH* concerned a different statute of limitations that is not at issue in this proceeding and that did not run from the "date of discovery."[35] The *PHH* decision says nothing about what constitutes "date of discovery," or what elements parties asserting a statute-of-limitations defense must prove. Respondents do not even attempt to explain how *PHH* clarified what facts they must establish to support their defense, or otherwise explain how the case justifies granting them a second opportunity to build a statute-of-limitations defense.

Instead, Respondents argue that because the prior ALJ's denial of their motion to dismiss on statute-of-limitations grounds relied on a decision by the Bureau's Director involving a

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[33] Resp. Memo. in Support of Mot. (Aug. 14, 2019) [Dkt. 229A] at 6.

[34] 839 F.3d 1 (D.C. Cir. 2016), *vacated, reinstated in part, and remanded by*, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

[35] *See* 839 F.3d at 50-55 (applying 12 U.S.C. § 2614, a statute of limitations running from "the date of the occurrence of the violation").

statute-of-limitations defense, and because that decision was later overturned on appeal in *PHH*, any request Respondents might have made for additional factual development relating to the date of discovery in this matter was "rendered . . . moot."[36] As discussed above in Section II.B., however, Respondents independently decided not to seek additional information regarding an affirmative defense during the period for fact development. Their attempt to reopen the record now is not a "renewal" of their discovery requests on this issue, as they contend in their motion,[37] it is a request for a "do-over" from the ALJ that would allow Respondents to seek evidence they never requested in the initial hearing.

D. Respondents' plan fails to acknowledge the rules and constraints that apply to proceedings in this forum, and if implemented would launch a process that does not comport with the Bureau's Rules.

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 differs from what any other respondent would receive. If the ALJ were to permit Respondents to seek additional information, Respondents' efforts should be consistent with the limits and procedures imposed by the Bureau's Rules. But what Respondents propose is the type of federal-litigation-like discovery that those rules were specifically designed to avoid.[38] The Bureau's Rules, which are modeled in part on the Rules of Practice adopted by the Securities and Exchange Commission,[39] establish an affirmative disclosure approach designed "to ensure that respondents have prompt access to the non-

[36] Resp. Memo. [Dkt. 299A] at 7.

[37] *See id.* at 8.

[38] *See* 77 Fed. Reg. 39058, 39058-83 (June 29, 2012) (commentary on Rules).

[39] *See id.* at 39058.

privileged documents underlying enforcement counsel's decision to commence enforcement proceedings, while eliminating much of the expense and delay often associated with pre-trial discovery in civil matters."[40] While the Rules do "not provide for certain other traditional forms of pre-trial discovery, such as interrogatories and discovery depositions," they are designed to "promote the fair and speedy resolution of claims while ensuring that parties have access to the information necessary to prepare a defense."[41]

Allowing Respondents to engage in the type of fact development they now seek would effectively jettison the Bureau's Rules in this matter. In connection with just this one defense, Respondents envision waves of document requests and testimony from multiple fact witnesses, something that the Bureau's Rules were designed to avoid. Among other flaws that would make it unreasonable, oppressive, and unduly burdensome, Respondents' proposed subpoena[42] would seek documents that are expressly excluded from disclosure by Rule 206.[43] Respondents also contemplate taking pre-hearing depositions, something that the rules only permit where the witnesses will be unavailable for the hearing,[44] and even plan to take live testimony from Bureau attorneys who have been assigned to this matter, something that is strongly disfavored in similar

[40] *Id.* at 39059.

[41] *Id*.

[42] Dkt. 232A.

[43] *See* 12 C.F.R. § 1081.206(b)(1)(i), (ii).

[44] *See* 12 C.F.R. § 1081.209(a)(1).

administrative proceedings and even under the Federal Rules of Civil Procedure.[45] At the least, Respondents should not be permitted to subvert the Rules of the administrative adjudication forum in these ways.

III. Conclusion

For the reasons described above, Respondents should not be allowed to pursue any further factual development relating to their statute-of-limitations defense in this matter.

[45] Due to the nature of the inquiries Respondents seek to pursue, any attempt to take the testimony of Bureau counsel would effectively serve as a deposition of opposing counsel in this matter—a practice that is disfavored, and which requires Respondents to satisfy a heavy burden. *See Clean Energy Capital, LLC*, SEC Release No. 1653, 2014 WL 11115572 (July 25, 2014) (explaining that SEC Enforcement Division meets its burden of demonstrating that a subpoena for testimony is unreasonable, oppressive, or unduly burdensome by showing that the request "concerns its attorneys"); *Shelton v. Am. Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986) (opposing counsel's deposition may only be taken on showing that "(1) no other means exist to obtain the information than to depose opposing counsel … ; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case"); *Guantanamera Cigar Co. v. Corporacion Habanos, S.A.*, 263 F.R.D. 1, 8 (D.D.C. 2009).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of September 2019, I caused a copy of the foregoing Enforcement Counsel's Brief Addressing the Completeness of the Factual Record on Respondents' 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 Respondents' counsel at the following addresses:

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