UNITED STATES OF AMERICA
Before the
BUREAU OF CONSUMER FINANCIAL PROTECTION

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:	**RESPONDENTS' BRIEF IN SUPPORT OF FURTHER DISCOVERY ON THE STATUTE OF LIMITATIONS ISSUE**
INTEGRITY ADVANCE, LLC and JAMES R. CARNES,	
Respondents.	

RESPONDENTS' BRIEF IN SUPPORT OF FURTHER DISCOVERY ON THE STATUTE OF LIMITATIONS ISSUE

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I. INTRODUCTION AND SUMMARY

On August 16, 2019, Administrative Law Judge ("ALJ") Christine L. Kirby ordered that the record be reopened to permit further factual development on the threshold issue of whether any or all of the Consumer Financial Protection Bureau's ("CFPB") claims against Respondents Integrity Advance, LLC and James R. Carnes ("Respondents") are time barred by the relevant statutes of limitations. Despite Enforcement Counsel's attempts to seek reconsideration of that decision and unreasonably restrict Respondents' ability to present this threshold issue, the ALJ should uphold her decision to allow Respondents to further develop the record as to when Enforcement Counsel knew, or should have known, of its claims against Respondents. As the ALJ previously recognized, the statute of limitations issue is potentially dispositive and cannot be decided on the current record; supplementation of the record is necessary and appropriate.

Enforcement Counsel primarily contends that the current record is sufficient because it asserts it already has produced or has stipulated to what it claims to be all of the critical facts regarding when the CFPB "discovered" the alleged violations for purposes of the statute of limitations in the Consumer Financial Protection Act ("CFPA"). This contention is incorrect, both factually and legally. Enforcement Counsel has not produced documents, and has refused to provide information to Respondents, about events that are highly relevant to determining when the CFPB discovered the alleged violations. Although Enforcement Counsel produced documents showing that the CFPB knew of dozens of consumer complaints about Integrity Advance as early as March 2012, Enforcement Counsel refused to produce documents or answer such relevant fact questions as: when someone at the CFPB first viewed a copy of the loan agreement, when someone at the CFPB first viewed a consumer complaint, when the CFPB opened a research matter, and when the CFPB opened an investigative matter. Whether or not any single one of these events is ultimately ruled to be dispositive, they are highly relevant to the

inquiry into when the CFPB knew or should have known of the alleged violations. Respondents should not be denied the opportunity to develop these facts, and the ALJ should not be compelled to decide the statute of limitations issue without a fully-developed record.

Enforcement Counsel also makes the extraordinary claim, without any legal support, that the general discovery rule for statutes of limitations (which is triggered when the party bringing the claims "knew or should have known" of the alleged violations) does not apply to the CFPB. While the ALJ need not rule on Enforcement Counsel's argument for purposes of reaffirming her decision to open the factual record, that argument is clearly wrong. It is well settled that "discovery" is triggered when the party bringing the action "knew or should have known" of the violations. This long-established rule has been applied to CFPB actions enforcing the CFPA, and is consistent with the overarching goal of repose that statutes of limitations are intended to achieve. It is not, and cannot be, the law that the CFPB can hold the statute of limitations in suspense until it unilaterally decides to begin issuing formal investigative demands.

Enforcement Counsel also contends that Respondents are seeking "waves" of "federal-litigation-like discovery" and that the CFPB's Rules of Practice for Adjudication Proceedings ("the CFPB Rules" or "the Rules") do not contemplate discovery beyond what the CFPB already has produced in this matter pursuant to its affirmative obligation under Rules 206 and 207. *See* C.F.R. §§ 1081.206 and 207. This contention is not supported by the Rules or the CFPB's own commentary to the Rules. Respondents' request for further discovery, as well Respondents' proposed schedule for that discovery, is limited in both temporal and substantive scope. Respondents' narrowly tailored requests are well within, and indeed, contemplated by, the CFPB Rules. *See* C.F.R. §§ 1081.208 and 209.

The ALJ also should reject Enforcement Counsel's attempted use of overbroad privilege assertions as a means of holding itself immune from Respondents' subpoena request. Of course, there is no such immunity, nor any legitimate basis for Enforcement Counsel to use privilege to object to the issuance of a subpoena or refuse to determine whether responsive documents exist. To the extent that any documents sought by the subpoena are legitimately privileged, Enforcement Counsel is protected. Enforcement Counsel can identify those documents on a privilege log, as contemplated by the CFPB Rules as well as standard litigation practice, and withhold or redact those documents, subject to review by the ALJ as needed. The dates of the creation, and extent, of privileged documents is relevant to determining the date that the CFPB knew or should have known of the alleged violations.

Finally, reopening the record is appropriate under *Intercollegiate*, to the extent that that case applies here. As the ALJ has recognized, Respondents were denied the opportunity to develop the factual record on the statute of limitations issue. This was due to the now overruled decisions by the former CFPB Director and the former ALJ that statutes of limitations do not apply in administrative proceedings. This is therefore not a "do over" as Enforcement Counsel suggests; it is a renewal of a request now that the law is clear that the CFPB is subject to statutes of limitations regardless of the forum in which it chooses to bring suit.

The ALJ should affirm her previous decision to reopen the record and allow further discovery on the potentially dispositive statute of limitations issue.

II. PROCEDURAL BACKGROUND

On May 29, 2019, Director Kathleen L. Kraninger remanded this matter to ALJ Kirby for a "new hearing and recommended decision in accordance with the Bureau's Rules of Practice for Adjudication Proceedings." Dkt. 216 at 2, 9. In part due to significant legal developments in the time since the prior proceedings occurred, Respondents thereafter filed a Motion to Open Record

for a New Hearing in which Respondents argued, *inter alia*, that further discovery was needed on the statute of limitations issue. *See* Dkt. 229A at 7-8. Following a teleconference on August 16, 2019, ALJ Kirby granted Respondents' Motion and reopened the record on the statute of limitations issue "based upon the parties' verbal agreement that the previously created record did not contain sufficient factual development of the issue." Dkt. 233 at 3. Consistent with that ruling, Respondents filed a Request for Issuance of Subpoena to the CFPB on August 23, 2019, seeking four categories of narrowly tailored discovery on the statute of limitations issue. *See* Dkt. 232. Respondents also filed a proposed discovery schedule, setting a timeline for the subpoena response and a hearing for testimony restricted to "facts relevant to the statute of limitations." *See* Dkt. 231.

At some point after the August 16 teleconference, Enforcement Counsel took the position that further discovery on the statute of limitations is not warranted. *See* Dkt. 231 at 4-9. Though Enforcement Counsel chose to advance this position in the context of what was supposed to be a joint statement, the ALJ construed Enforcement Counsel's argument as a motion for reconsideration of her August 16 ruling reopening the record. *See id.* at 3. The ALJ further directed the parties to submit briefing on the appropriateness of supplementing the record in the event they were unable to agree on the sufficiency of the current record. The parties informed the ALJ of their inability to agree in a joint status report dated September 11, 2019, and, on September 18, Enforcement Counsel filed a brief setting forth its position.

III. ARGUMENT

The CFPA contains a statute of limitations providing 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). Based on the numerous, detailed consumer complaints that the CFPB possessed by at least March 2012, Respondents have good reason to believe that the

CFPA claims against Respondents are time barred and are seeking narrowly-tailored discovery that goes to the heart of when the statute of limitations period began running in this matter.[1] The ALJ should affirm her previous decision to reopen the record, grant Respondents' request to issue a subpoena to the CFPB, and issue a Scheduling Order consistent with Respondents' proposed schedule in the August 23rd Joint Statement.

A. The discovery Respondents seek is highly relevant to determining a potentially dispositive threshold issue.

More than 200 years ago, Chief Justice Marshall "emphasiz[ed] the importance of time limits on penalty actions, stating that it 'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'" *Gabelli v. SEC*, 568 U.S. 442, 452 (2013) (citing *Adams v. Woods*, 6 U.S. 336 (1805)); *see also Artis v. District of Columbia*, 138 S. Ct. 594, 608 (2018) (citing *Bd. of Regents v. Tomanio*, 446 U.S. 478, 487 (1980) ("Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system.")).

In accordance with this principle, the ALJ must have a sufficient factual record to determine whether the CFPA claims are time barred. This is a threshold issue that may be considered jurisdictional in nature. *See Alexander v. United States*, 44 F.3d 328, 330-31 (5th Cir. 1995) (treating a since-repealed Internal Revenue Code provision using the similar phrase "no action may be brought . . ." as jurisdictional). Alternatively, it is an affirmative defense that Respondents must be allowed to factually develop and assert. *See, e.g.*, *Consumer Fin. Prot. Bureau v. Think Fin., LLC*, No. CV-17-127, 2018 U.S. Dist. LEXIS 130898, at *23-25 (D. Mont.

[1] The CFPB's claims under the Truth in Lending Act ("TILA"), the Electronic Funds Transfer Act ("EFTA"), and the derivative CFPA claims are also time barred. However, those statutes of limitations are not at issue here because they run from the date of "violation" rather than the date of "discovery." *See* 15 U.S.C. § 1640(e); 15 U.S.C. § 1693m(g); 12 U.S.C. § 5564(g)(2).

Aug. 3, 2018) (rejecting statute of limitations argument because defendants "failed even to attempt to establish when CFPB discovered the Subsidiaries' alleged violations").

Enforcement Counsel contends that the statute of limitations issue can be resolved on the current record because it "has already produced [or stipulated to] all evidence bearing on" the issue.[2] Dkt. 235 at 4-8. Enforcement Counsel also contends that the statute could not have begun running prior to November 18, 2012 (three years before the filing of the Notice of Charges). *See* Dkt. 235 at 4. Both arguments ignore the obvious holes in the record, as well as the fact that there already is ample reason to believe that the statute may have begun running well before November 2012.

In January 2012, for instance, then-Director Cordray publicly declared that the CFPB had "launched [its] examination program" and would be "giving payday lenders much more attention." Remarks by Richard Cordray at the Payday Loan Field Hearing in Birmingham, AL (Jan. 19, 2012).[3] Additionally, the CFPB's publicly-available policies and procedures provide further reason to believe that the CFPB began looking into Integrity Advance months prior to November 2012. *See* Office of Enforcement Policies and Procedures Manual (May 5, 2017) ("Enforcement Manual").[4] According to the Enforcement Manual, before a formal

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[2] Enforcement Counsel also suggests in passing that the CFPA's statute of limitations does not apply at all in an administrative proceeding. *See* Dkt. 235 at 4 n.10 ("reserv[ing] argument" on the issue until dispositive motions briefing). That suggestion is surprising given, as the ALJ herself has recognized, the D.C. Circuit held that statutes of limitations apply to CFPB actions in both administrative proceedings and civil actions. See Dkt. 230 at 2 n.1 (noting that "Director Cordray's statute of limitation's ruling in *PHH* was reversed by the United States Court of Appeals for the D.C. Circuit which held that statutes of limitations do, in fact, apply to CFPB administrative proceedings") (citing *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016)) (reinstated on statute of limitation grounds and reversed on other grounds by *en banc* panel, 881 F.3d 75 (D.C. Cir. 2018). The D.C. Circuit even expressly referenced the present matter in so holding. *See PHH Corp*., 839 F.3d at 51.

[3] Available at https://www.consumerfinance.gov/about-us/newsroom/remarks-by-richard-cordray-at-the-payday-loan-field-hearing-in-birmingham-al/.

[4] Available at https://files.consumerfinance.gov/f/documents/201710_cfpb_enforcement-policies-and-procedures-memo_version-3.0.pdf

"investigation" is launched, employees are directed to conduct a "research matter" for purposes of "gather[ing] basic information and preliminarily evaluat[ing] the potential for successful enforcement of suspected violations of federal consumer financial law . . . ." Enforcement Manual at 34. As stated in the Manual, "[t]he primary purpose of a research matter is to collect and analyze easily obtainable information in order to . . . [d]etermine whether the relevant conduct likely violates federal consumer financial law and the Bureau likely has jurisdiction." *Id.* at 35. Among other things, employees are directed to gather evidence through "non-identifiable internet searching, review of consumer complaints, media sources, legal research, and contact with other law enforcement agencies and consumers." *Id.* at 37. The "research" phase typically lasts for two months. *Id.* at 36. When the employee's "initial research" reveals, among other things, "a plausible set of facts that, if proven, would amount to a violation of one or more federal consumer financial laws," the matter then proceeds to the "investigation" phase. *Id.* at 37.

Here, the parties have stipulated that a high-level CFPB employee ran a search for "Integrity Advance" in a consumer complaint database on March 29, 2012. Thus, as of that date, the CFPB already had knowledge of Integrity Advance, leading it to conduct the search. It is therefore reasonable to believe that the CFPB already opened a "research matter" at that point and may have already opened an "investigative matter." But critical questions remain unanswered, such as the nature and extent of the CFPB's knowledge that led to the March 29, 2012 search, when that knowledge was acquired, and what and when additional knowledge was acquired afterward.

Enforcement Counsel has refused to answer basic questions on these points. Therefore, the factual record is incomplete regarding when the CFPB first reviewed complaints about

Respondents, when someone from the CFPB first viewed the loan agreement, when the CFPB learned that James Carnes was the CEO of Integrity Advance, when the CFPB opened the research matter, when the CFPB opened the investigative matter, and when the Investigative Memo was drafted. Enforcement Counsel does not contend that it has produced or stipulated to any information relating to these fact questions—it only asserts the information is not "relevant." But the information sought is clearly "relevant" according to the basic definition of the term:

> Relevant material for the purpose of discovery will encompass any matter that may bear upon, or reasonably could lead to other matters that could bear upon, any issue that is or likely may be raised in the case. In other words, a request for discovery should be considered to be seeking relevant information if there is ***any*** possibility that the information sought may be relevant to the claim or defense of any party in the action.

Consumer Fin. Prot. Bureau v. Borders & Borders, PLC, No. 3:13-CV-1047, 2015 U.S. Dist. LEXIS 189661, at *14 (W.D. Ky. Apr. 28, 2015) (citation omitted) (emphasis in original). There is no provision in the CFPB's Rules that defines relevance in the circumscribed way in which Enforcement Counsel proposes. In essence, what Enforcement Counsel seeks to do is deny Respondents critical information about the CFPB's investigation by "essentially ma[king] relevance determinations on [Respondents'] behalf." *Consumer Fin. Prot. Bureau v. Navient Corp.*, No. 3:17-CV-101, 2018 U.S. Dist. LEXIS 215146, at *9 (M.D. Pa. Dec. 21, 2018). The ALJ should reject that attempt.

B. The CFPA's three-year statute of limitations begins running from the date that the CFPB knew or should have known of the alleged violations.

Enforcement Counsel asserts that the phrase "date of discovery" in the CFPA's statute of limitations means the date on which the CFPB "actually discovered" the alleged violation and nothing else. *See* Dkt. 235 at 7-8. That interpretation of the statute is wrong. Just like other

statutes using similar language, the CFPA's three-year statute of limitations runs from the date that the CFPB knew ***or should have known*** of the alleged violations.[5]

As the Supreme Court of the United States discussed in *Merck & Co. v. Reynolds*, 559 U.S. 633 (2010), the word "discovery" in a statute of limitations is a "term of art" that generally means the date on which a plaintiff "first knows ***or with due diligence should know*** facts that will form the basis for an action." *Id.* at 644-46 (citation and internal quotation marks omitted) (emphasis in original). The Supreme Court based that conclusion, in part, on "the history and precedent surrounding the use of the word 'discovery' in the limitations context ***generally***" and did not draw any distinctions between a private plaintiff and a government agency plaintiff in doing so. *Id.* at 648 (emphasis added). In keeping with that well-established general rule, the Supreme Court held in *Merck* that a statute using similar language[6] "encompasse[d] not only those facts the plaintiff actually knew, but also those facts a reasonably diligent plaintiff would have known." *Merck*, 559 U.S. at 648.

Enforcement Counsel's attempt to carve out a different rule for itself should be rejected. Enforcement Counsel has not pointed to any case law, because it cannot, in support of its position that the phrase "date of discovery" in the CFPA should be interpreted as encompassing the CFPB's actual knowledge only. Instead, Enforcement Counsel relies heavily on a case in which the issue before the Court was whether to infer a discovery rule into a statute of limitation

[5] In reality, Enforcement Counsel argues for a standard that is even narrower than "actual knowledge," as it asserts that "discovery" occurs "when the Bureau obtained information" and goes on to argue that the only information relevant to this inquiry is that obtained from third parties and discoverable under Rules 206 and 207. *See* Dkt. 235 at 4-6. That, of course, excludes information that the CFPB gathered on its own or in consultation with other government agencies (as it must have done, per the requirements of the Enforcement Manual and multiple then-existing Memorandums of Understanding with other agencies). Enforcement Counsel provides no legal support for this unprecedented, restrictive view of "discovery" that deems even evidence of when the CFPB actually knew of the alleged violations to be "irrelevant."

[6] *See* 28 U.S.C. § 1658 (barring certain actions brought more than "2 years after the discovery of the facts constituting the violation").

keyed to the date of ***occurrence*** of a violation. *See* Dkt. 235 at 7 (citing *Gabelli*, 568 U.S. at 452). That case is inapposite because the CFPA's statute of limitations is expressly tied to the date of discovery.

Enforcement Counsel's statutory interpretation argument also fails. *See* Dkt. 235 at 8. Like Enforcement Counsel here, the plaintiff in *Merck* argued that when a plaintiff "should have" known of a violation was irrelevant because Congress did not explicitly include those words in the statute. *See Merck*, 559 U.S. at 646-67. The Supreme Court rejected that argument, noting that an explicit provision is not required because "the term 'discovery' in respect to statutes of limitations for fraud has long been understood to include discoveries a reasonably diligent plaintiff would make." *Id.* at 647. In light of that long-established rule, and the presumption that "when Congress enacts statutes, it is aware of relevant judicial precedent," it is plain that if Congress had intended on tying the discovery date in the CFPA to the CFPB's actual knowledge only, it would have stated that explicitly in the statute. *See id.* (citing 29 U.S.C. § 1113(2), "Congress provided that an action be brought 'three years after the earliest date on which the plaintiff had ***actual knowledge*** of the breach or violation'") (emphasis in original). But Congress did not do so here. It used the phrase "date of discovery of the violation," which, as discussed above, has long been understood to encompass not only facts a particular plaintiff knows, but also facts that a reasonably diligent plaintiff would know. *See id.* at 644-48.

Consistent with the foregoing, at least two courts have explicitly held the CFPB to the "knew or should have known" standard. *See Consumer Fin. Prot. Bureau v. Nationwide Biweekly Admin., Inc.*, No. 15-cv-02106, 2017 U.S. Dist. LEXIS 145923 (N.D. Cal. Sep. 8, 2017) ("[T]he statute did not begin to run until CFPB 'thereafter discover[ed] ***or a reasonably diligent plaintiff would have discovered*** 'the facts constituting the violation.**"**) (emphasis

added); *Consumer Fin. Prot. Bureau v. NDG Fin. Corp.*, No. 15-cv-5211, 2016 U.S. Dist. LEXIS 177756, at *58 (S.D.N.Y. Dec. 2, 2016) ("The date of discovery is the date when the plaintiff 'obtains actual knowledge of the facts giving rise to the action ***or notice of the facts, which in the exercise of reasonable diligence, would have led to actual knowledge***.") (emphasis added). Particularly given the investigative tools and potential remedies available to Enforcement Counsel, which are not available to private plaintiffs, such a rule is required to protect against the unfairness of bringing stale enforcement claims.

Put simply, while the ALJ need not decide the scope of the discovery rule for purposes of the present decision to open the record, the ALJ should nonetheless reject Enforcement Counsel's invitation to consider it immune from the obligation to exercise reasonable diligence in investigating potential claims. Enforcement Counsel has cited no authority to support such an extraordinary proposition, and such a rule would flout the fundamental role that statutes of limitation play in the American legal system. *See Gabelli*, 568 U.S. at 452; *Artis*, 138 S. Ct. at 608; *see also Phillips Petroleum Co. v Lujan,* 4 F.3d 858, 863 (10th Cir. 1993) ("Clearly, the government should not be able to postpone litigation due to a lack of efficiency or diligence on its part.").

C. The discovery Respondents seek is narrowly tailored and appropriate under CFPB rules.

Enforcement Counsel also objects to reopening the record because it asserts that Respondents are seeking "waves" of discovery in contravention of the CFPB's Rules. Dkt. 235 at 13. Not so. The discovery that Respondents seek is reasonable, highly relevant, and limited in both substantive and temporal scope. It is well within the scope of the CFPB's Rules.

Respondents' subpoena requests four categories of discovery related to consumer complaints, external correspondence, internal correspondence, and internal reports, limited to the

time period prior to November 18, 2012, all of which are narrowly tailored to the issue of when the CFPB "discover[ed] or a reasonably diligent plaintiff would have discovered 'the facts constituting the [alleged] violation.'" *See* Dkt. 232. Respondent's proposal for the issuance of a subpoena for live testimony at an evidentiary hearing is similarly limited in scope, and Respondents' proposed discovery schedule is efficient. *See* Dkt. 231. Enforcement Counsel may disagree with the "discovery rule" standard, which it can contest in its briefing on the merits of the issue, but it should not be permitted to withhold highly relevant factual information that may show it actually knew or should have known of the alleged violations much earlier than November 2012.

It also is clear that Respondents' subpoena is authorized and contemplated by the very Rules that Enforcement Counsel accuse Respondents of seeking to "jettison." Dkt. 235 at 13. The CFPB's Rules explicitly provide that "[n]othing in paragraph (a) of this section [relating to affirmative disclosures the CFPB must make] . . . shall limit the right of a respondent to seek access to or production pursuant to subpoena of any other document, or shall limit the authority of the hearing officer to order the production of any document pursuant to subpoena." 12 C.F.R. § 1081.206(a)(3). That is consistent with the commentary to the Rules, which further recognizes not only that a party may seek additional relevant documents through subpoena, but that a respondent may seek such documents from the CFPB. *See* 77 Fed. Reg. 39058, 39071, ("Pursuant to § 1081.208, a respondent may seek production of other documents pursuant to subpoena. Paragraph (a)(3) is intended to make clear that the affirmative disclosure obligation set forth in paragraphs (a)(1) and (a)(2) does not preclude the availability of subpoenas as separately provided by § 1081.208."); *id.* at 39073 ("Section 1081.208 permits a respondent to seek other documents from the Bureau through subpoena. Such a subpoena would presumably

not be necessary if the documents sought by the respondent were included in the affirmative disclosure production, but the existence of that process does not negate a respondent's right to request a subpoena for other relevant documents in the possession of the Bureau."). And, the commentary further recognizes that the discovery process is intended to "ensure that respondents have a ***complete understanding*** of the basis for the Bureau's action, and can assess their defenses accordingly." *Id.* at 39072 (emphasis added). That is precisely what Respondents are seeking to accomplish through their subpoena request.

The ALJ should not be persuaded by Enforcement Counsel's invocation of privilege. *See* Dkt. 235 at 13; Dkt. 231 at 8 n.4. Respondents understand that some documents responsive to the subpoena could be privileged. But the proper remedy in such a situation is for the CFPB to provide a privilege log, not refuse to search for and provide any information full stop. *See* 12 C.F.R. § 1081.206(c) (providing that the ALJ "may require the Office of Enforcement to produce a list of documents or categories of documents withheld . . . ."). Enforcement Counsel has not cited any authority for the proposition that it can use a blanket assertion of privilege as an immunity defense to a subpoena. And, of course, there is no such immunity. *See* 77 Fed. Reg. 39058, 39073 (recognizing that "a respondent [may] seek other documents from the Bureau through subpoena"). Enforcement Counsel must produce the factual information underlying its decision to investigate Respondents and cannot use a blanket assertion of privilege to avoid its obligations. *See* 12 C.F.R. § 1081.206(a)(3); 77 Fed. Reg. 39058, 39072; *see also Consumer Fin. Prot. Bureau v. Universal Debt Sols., LLC*, No. 1:15-CV-859, 2017 U.S. Dist. LEXIS 146222, at *19-24 (N.D. Ga. Aug. 25, 2017) (granting motion for sanctions and dismissing claims where "the CFPB improperly relied on privilege and work product objections to prevent [a testifying] witness from answering questions about the factual bases of the CFPB's claims").

Further, the dates and scope of documents listed on a privilege log may show when the CFPB knew or should have known of the alleged violations.

The CFPB's Rules provide that an ALJ "***shall*** promptly issue any subpoena requested" unless the subpoena appears to be "unreasonable, oppressive, excessive in scope, or unduly burdensome." 12 C.F.R. § 1081.208(d) (emphasis added). Respondents' subpoena request is reasonable, seeks relevant information, and is limited in both substantive and temporal scope. It should therefore be issued.

D. Supplementing the record is appropriate under *Intercollegiate*.

Enforcement Counsel also asserts that the ALJ should decline to reopen the record because Respondents are improperly seeking a "second bite of the apple." Dkt. 235 at 10. Enforcement Counsel is wrong on both the facts and the law.

Factually, Enforcement Counsel glosses over that Respondents ***did*** previously request discovery on the statute of limitations issue. *See* Dkt. 192 at 12 n.11; Dkt. 203 at 11-12 ¶¶ 4-5. However, the former CFPB Director already had issued a decision on June 4, 2015, prior to the Notice of Charges being filed in this case, that statutes of limitations did not apply in CFPB administrative proceedings. *See* Dkt. 176 at 29. The former, improperly-appointed ALJ relied upon that decision to hold that no statutes of limitations applied in this case. *See* Dkt. 176 at 29; Dkt. 233 at 2 n.1. The Director's decision and, consequently, the former ALJ's decision have since been overruled. *See PHH Corp.*, 839 F.3d 1 (reinstated on statute of limitations grounds by *en banc* panel, 881 F.3d at 83).[7] In essence, Enforcement Counsel's argument boils down to a contention that Respondents should have requested the discovery sooner during the previous

[7] Enforcement Counsel chides Respondents for citing "a single case" (referring to the *PHH* decision) as the change of law that justifies the development of the fact record for a new examination of the statute of limitations. Dkt. 235 at 11. However, that "single case" expressly and directly changed the law of this case.

proceedings. But even if Respondents had made a request earlier, the result would have been the same. Then-Director Cordray already had held that the statute of limitations did not apply in an administrative proceeding. And, surely, Enforcement Counsel would have refused to produce the information, just as it has done now. Thus, it would have made no material difference had Respondents requested the discovery earlier in the previous proceedings.

Enforcement Counsel also is wrong on the law. The posture of this case is separate and apart from *Intercollegiate Broad. Sys. v. Copyright Royalty Bd. & Librarian of Cong.*, 796 F.3d 111 (2015), where that court simply directed that the matter be "vacated and remanded" but did not expressly order a "new hearing." *Id.* at 116. Here, the CFPB Director has ordered a new hearing to accord with the CFPB Rules.[8] In any event, reopening the record for discovery on the statute of limitations issue is appropriate under *Intercollegiate*. Respondents have provided a "specific reason" why it is necessary to reopen the record: the law has changed and the ALJ cannot now decide the statute of limitations issue until the factual record is fully developed. Respondents also have explained why the factual record could not be fully developed earlier, which the ALJ has recognized.[9]

IV. CONCLUSION

For the foregoing reasons, the ALJ should affirm her previous decision to reopen the record and allow further factual development on the statute of limitations issue.

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[8] Additionally, as Respondents have previously argued, the *Intercollegiate* court was evaluating the amount of process that was appropriate to ensure fairness in a matter in which a $500 minimum annual fee was at issue. *Id.* at 130. Here, the CFPB is seeking tens of millions of dollars in restitution and civil monetary penalties. Thus, the amount of due process that is appropriate to fairly adjudicate the claims here is necessarily much greater. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (the nature and degree of procedural due process that is required depends upon "the private interest that will be affected by official action," among other factors).

[9] As the ALJ noted, "Judge McKenna determined that he was bound by the Director's determination that the statute of limitations was inapplicable to administrative proceedings. Therefore, the dates of the alleged violations, discovery of the alleged violations, and actions related to investigating and charging the violations were irrelevant and never fully developed in the factual record before me." Dkt. 233 at 2 n.1.

Respectfully submitted,

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Dated: October 4, 2019

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of October 2019, I caused a copy of the foregoing Joint Update on Fact Development regarding Statute of Limitations Issue 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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