1700 G Street, NW
Washington, DC 20552

January 15, 2020

Via Electronic Filing

The Hon. Christine L. Kirby
Consumer Financial Protection Bureau
1700 G St., NW
Washington, DC 20552

Re: *In the Matter of Integrity Advance, LLC and James R. Carnes* (2015-CFPB-0029)

Dear ALJ Kirby:

Enforcement Counsel respectfully submits this letter in response to Respondents' January 9, 2020 letter. Nothing in Respondents' letter provides a reason to grant their motion to dismiss and/or for summary disposition or to reopen the factual record in this proceeding. The factual record with respect to the statute of limitations is complete, as the ALJ has already correctly determined, and even if Respondents were correct that § 1054(g)(1) of the Consumer Financial Protection Act ("CFPA") applies in this forum, it would not bar the Bureau's claims against Carnes because Enforcement Counsel filed the Notice of Charges within three years of discovering Carnes's violations.

Respondents' letter – essentially an unauthorized third brief in support of their motion – continues Respondents' practice of mischaracterizing Enforcement Counsel's arguments and the record in this matter. Enforcement Counsel did not argue in its opposition brief that the Bureau is immune from any statute of limitations in administrative proceedings, and made no such statement during the January 6, 2020 oral argument. Rather, Enforcement Counsel has consistently argued that Respondents have failed to demonstrate that § 1054(g)(1) applies here and that the question is not one that the ALJ even needs to decide.[1] As Enforcement Counsel explained in response to the ALJ's questioning during oral argument, § 1054(g)(1) applies to "actions" the Bureau may bring in court under § 1054 of the CFPA, but it does not apply to "proceedings" like this one that

[1] *See, e.g.*, Enforcement Counsel's Opposition to Respondents' Mot. to Dismiss and/or for Summary Disposition on Grounds Limited to Oct. 28, 2019 Order (Dec. 6, 2019) [Dkt. 242] at 1, 7, 10.

are authorized by § 1053 of the CFPA. Unlike § 1054(g)(1), however, 28 U.S.C. § 2462 explicitly can apply to both "actions" and "proceedings." Thus, in the absence of any other applicable statute of limitations, § 2462 provides a limitation in this forum on the civil penalties and disgorgement that Enforcement Counsel may seek.[2]

Respondents' assertion that Enforcement Counsel's answers to the ALJ's questions introduced a "new argument" or a "stark departure" is wrong. In briefing filed prior to the remand ordered by Director Kraninger, Enforcement Counsel acknowledged the applicability of § 2462 in the absence of an otherwise applicable statute of limitations.[3] And during the *PHH Corp*. appeal, the Bureau acknowledged that the five-year limitation on any "civil fine, penalty, or forfeiture" in 28 U.S.C. § 2462 can apply to both actions and proceedings.[4]

In their letter, Respondents also renew their effort to reopen the factual record with respect to their statute-of-limitations defenses, this time combining a disingenuous recasting of comments made by Enforcement Counsel at oral argument with a mistaken understanding of the constructive discovery standard articulated in *Merck & Co. v. Reynolds*, 559 U.S. 633 (2010). As Enforcement Counsel has explained, the constructive discovery standard addressed in *Merck* does not apply to § 1054(g)(1).[5] But even if it did, any information about whether the Bureau itself exercised appropriate diligence is irrelevant to whether any claims are time-barred. *Merck* makes clear that under the constructive discovery standard, a limitations period does not begin to run until the earlier of when (1) a plaintiff discovered the violation, or (2) a reasonably diligent plaintiff "would have discovered" the violation, "irrespective of whether the actual plaintiff undertook a reasonably diligent investigation."[6] Thus, assuming that a constructive discovery standard applies here, the proper question would be whether a reasonably diligent plaintiff would have discovered Mr. Carnes's violations before November 18, 2012. Whatever steps the Bureau in fact took or did not take are not relevant to that question. Moreover, Enforcement Counsel's statement of the obvious at oral argument – that the Bureau, like any government enforcement agency, has limited resources and investigates many matters simultaneously – provides no reason to reopen the record. The factual record in this matter is complete, as the ALJ has already correctly concluded. For these reasons, as well

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[2] Section 2462 does not apply when "otherwise provided by Act of Congress." So, if the ALJ concludes that § 1054(g)(1) does apply to this administrative adjudication proceeding, 28 U.S.C. § 2462 would not apply.

[3] *See, e.g.*, Enforcement Counsel's Answering Brief (Dec. 5, 2016) [Dkt. 186] at 16 n.9.

[4] *See* Br. on Rehr'g En Banc of Respondent Consumer Fin. Prot. Bureau, *PHH Corp. v. Consumer Fin. Prot. Bureau*, Case No. 15-1177, 2017 WL 1196119, at *41 (D.C. Cir. March 31, 2017).

[5] Dkt. 242 at 14-16.

[6] 559 U.S. at 653.

as the other reasons presented in Enforcement Counsel's previous briefing on this issue, there is no justification for reopening the record.

Respectfully submitted,

Stephen C. Jacques
On behalf of Enforcement Counsel

Cc: Richard J. Zack, Esq. (via email)
Michael Schwartz, Esq. (via email)
Christen Tuttle, Esq. (via email)
Saverio Romeo, Esq. (via email)