

UNITED STATES OF AMERICA
Before the
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2015-CFPB-0029

In the Matter of:)
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ENFORCEMENT
COUNSEL'S OBJECTION
TO WITHDRAWAL OF
THE NOTICE

INTEGRITY ADVANCE, LLC and)
JAMES R. CARNES,)
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Respondents.)
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ENFORCEMENT COUNSEL'S OBJECTION TO WITHDRAWAL OF THE NOTICE

The Director ordered the parties to address whether the notice provided pursuant to 12 C.F.R. § 1081.405(d) should be withdrawn given the grant of the petition for rehearing *en banc* in *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. Feb. 16, 2017). Enforcement Counsel hereby respectfully objects to the withdrawal of the notice, because resolution of the *PHH* matter will not determine the resolution of this proceeding and because any delay would be inefficient and would exacerbate the harm to affected consumers.

I. Resolution of the Statute of Limitations Question in *PHH* Will Not Resolve the Questions in this Proceeding

Any resolution of the statute of limitations issues raised by *PHH* will not resolve the questions in this proceeding for three reasons: (1) *PHH* involved the RESPA statute of limitations, which is not at issue here; (2) the applicability of § 5564(g)(1) to administrative proceedings, which is at issue here, was not at issue in *PHH*; and (3) even assuming *arguendo*

the limitations period of § 5564(g)(1) applies to this proceeding, Enforcement Counsel clearly filed its Notice of Charges within that limitations period.

The question of whether the statutes of limitations that Respondents have invoked here—15 U.S.C. § 1640 (TILA), 15 U.S.C. § 1693m (EFTA), or 12 U.S.C. § 5564(g)(1) (the three-year date of discovery for actions under the CFPA)—apply in Bureau administrative proceedings is not presented in *PHH*. The question in *PHH*, by contrast, is only whether the distinct RESPA statute of limitations, 12 U.S.C. § 2614, applies only to actions in court or also to Bureau administrative proceedings pursuant to 12 U.S.C. § 5563(a)(2). Even assuming *arguendo* that the RESPA statute of limitations applies to administrative proceedings, that legal analysis does not apply to any of the statutes of limitation at issue here.

The RESPA statute of limitations at issue in *PHH* expressly applies to the Bureau – the only question is whether it applies only in district court proceedings or also in administrative proceedings. In contrast, TILA and EFTA do not have statutes of limitations that apply to the provisions authorizing enforcement by the Bureau. The TILA and EFTA provisions that Respondents have invoked in this case differ significantly from the RESPA provision at issue in *PHH*, in that they, by their express terms, apply only to actions brought by private litigants. Accordingly, the analysis of those provisions here would be different from any analysis the *PHH* court might undertake.

Likewise, the *PHH* court will have no occasion to address the applicability of § 5564(g)(1) to administrative proceedings. That section applies to actions brought “under this title,” which expressly does not include “claims arising solely under enumerated consumer laws” such as RESPA. 12 U.S.C. § 5564(g)(2)(A). Given that only RESPA violations are at issue in

PHH, there is no reason for the D.C. Circuit to consider the applicability of § 5564(g)(1) to administrative proceedings.

Furthermore, the Director need not even reach the question of whether § 5564(g)(1) applies to the claims in this proceeding, because even assuming *arguendo* that it does, the evidence in the record does not support a finding that the Bureau “discovered” the violations in question more than three years prior to the filing of the Notice of Charges. As of three years before the initiation of this proceeding, Enforcement Counsel had not sent a CID to Respondents, had never seen the Integrity Advance loan agreement, and did not even know of Respondent Carnes’s existence. *See* EC Ans. Br. [dkt. 186] at 18-19. Indeed, Enforcement Counsel has already briefed at length the question of how the outcome of this case would not be affected even if § 5564(g)(1) did apply. *See e.g.*, Bureau Opp. to Resp. Mot. to Dismiss [dkt. 033] at 12 n.10; EC Ans. Br. [dkt. 186] at 13-19; EC Reply Br. [dkt. 191] at 10-11; EC Supp’l Br. [dkt. 202] at 7-12. The *en banc* decision in *PHH* will not provide additional clarification on this question.

II. Delaying Resolution of the ALJ Question Is Not Warranted

In a single paragraph, Respondents have contended that the Administrative Law Judge who presided over this matter was an ‘inferior officer’ who was not appointed in accordance with the Appointments Clause. *See* Resp. Opening App. Br. [dkt. 184] at 2. Respondents have pointed to no facts supporting this contention, and have undertaken no analysis of this issue.

Delaying resolution of this case pending resolution of the inferior Officer questions in *PHH* and *Lucia* (832 F.3d 277 (D.C. Cir. 2016)) is not warranted. *Lucia* will not resolve the ALJ issue that Respondents have cursorily raised here because there are material differences between the use of ALJs by the SEC and by the Bureau (and thus even if the court concludes that SEC ALJs are “inferior officers,” it would not necessarily follow that Bureau ALJs are as well). For

example, the court in *Lucia* wrestled with the fact that under the SEC’s process, the commission can decline to review an ALJ decision and that decision then becomes final. 832 F.3d at 286. The Bureau’s process is different. The Director cannot decline to review a timely appeal. *See* 12 C.F.R. § 1081.402. Further, the Bureau ALJ’s recommended decision does not become final simply because no party files a timely appeal; instead, the Director must issue a final decision adopting the recommended decision or can order briefing regarding any portion of the recommended decision. *Id.* § 1081.402(b). The Director further has the power to “raise and determine any other matters that he or she deems material,” *id.* § 1081.405(a), as he has done in this matter by, *inter alia*, ordering supplemental briefing. Finally, the Director’s final decision must include a statement of the reasons or bases for the decision and the findings of fact on which the decision is predicated. *Id.* § 1081.405(c). Therefore, the Director has full control of the proceeding, and respondents are entitled to, and receive, a plenary review of any recommended decision by the Director, who is a properly appointed Officer.

Further, it is unclear whether the court in *PHH* will even reach the Appointments Clause issue – or whether it will decide the case on other grounds. If the *en banc* court in *PHH* does not analyze this question, the delay will have provided no benefit to the resolution of this proceeding but will delay relief to consumers who were harmed.

III. Delaying This Matter Is Not an Efficient Result and Would Harm Consumers

Finally, if this matter is stayed, it could result in a considerable waste of resources and inordinately delay the provision of monetary relief to harmed consumers. Given that the *Lucia* and *PHH* appeals have not even been argued, it likely will be a significant length of time before either decision becomes final. The parties have invested considerable time and resources into this matter over the past 18 months. Likewise, the Director has committed time and resources to

understanding the factual and legal issues presented by this case. A significant delay likely would render much of this effort moot and would require significant further effort in order to resolve the matter. In the meantime, consumers harmed by Respondents' practices will continue waiting for relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of March 2017, I caused a copy of the foregoing Enforcement Counsel's Objection to Withdrawal of the Notice to be filed by electronic transmission (e-mail) with the Office of Administrative Adjudication (CFPB_electronic_filings@cfpb.gov), the U.S. Coast Guard Hearing Docket Clerk (aljdocketcenter@uscg.mil), Administrative Law Judge Parlen L. McKenna (cindy.j.melendres@uscg.mil), Heather L. MacClintock (Heather.L. MacClintock@uscg.mil), and served by email on the Respondents' counsel at the following addresses:

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