

June 13, 2017

VIA ECF

Mark Langer  
Clerk of the Court  
U.S. Court of Appeals  
for the D.C. Circuit  
333 Constitution Ave., N.W.  
Room 5205  
Washington, D.C. 20001

Re: *PHH Corp. v. CFPB*, No. 15-1177  
(oral argument en banc held May 24, 2017)

Dear Mr. Langer:

In *Kokesh v. SEC*, No. 16-529 (June 5, 2017), the Supreme Court held that the five-year limitations period under 28 U.S.C. § 2462 “applies when the SEC seeks disgorgement.” Slip op. 9. In its June 7, 2017 letter, the CFPB argues that Section 2462 provides the limitations period for CFPB disgorgement awards, too. But Section 2462 supplies a catch-all limitations period “[e]xcept as otherwise provided” by Congress. As the panel correctly held, Congress “otherwise provided” here: a *three*-year limitations period governs “[a]ny action” under RESPA’s Section 8. 12 U.S.C. § 2614; Panel Op. 90-100; PHH Br. 45-46; PHH Reply 18-20.

Unlike the one-year limitations period in the first part of Section 2614 for actions brought by private plaintiffs, in the “second part of Section 2614, the term ‘actions’ is not limited to actions brought in court.” Panel Op. 94-95. Indeed, Dodd-Frank “repeatedly uses the term ‘action’ to encompass court actions *and* administrative proceedings.” *Id.* at 95-96 (citing examples). The CFPB cannot explain why—despite Section 2614’s plain text and structure—Congress would have allowed the CFPB to “circumvent the three-year statute of limitations

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simply by bringing the enforcement action administratively rather than in court.” *Id.* at 98. The CFPB’s anomalous reading would destroy the certainty that Section 2614 was intended to provide. *Kokesh*, slip op. 5.

Moreover, the Director unambiguously concluded that “no statute of limitations applies” here. JA11 (emphasis added). The CFPB’s eleventh-hour embrace of Section 2462 suggests that it now recognizes the absurdity of the Director’s position. But the CFPB cannot defend the decision below on grounds not relied upon by the Director. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). And it certainly cannot do so now: the CFPB never sought rehearing of the panel’s statute-of-limitations holding, and suggested at argument that it might evade even Section 2462 simply by ordering “consumer redress.” Tr. 69.

Notably, at the same time the CFPB argued in this Court that Section 2462 governs disgorgement, the Acting Solicitor General argued in *Kokesh* that it does not. The CFPB’s freelancing merely underscores that the Director answers to no one but himself.

Respectfully submitted,

/s/ Theodore B. Olson  
Theodore B. Olson

**CERTIFICATE OF SERVICE**

I hereby certify that, on June 13, 2017, an electronic copy of the foregoing letter was filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system and was served electronically by the Notice of Docket Activity upon the following counsel for respondent Consumer Financial Protection Bureau, who is a registered CM/ECF user:

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