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Discovering a Limit to Power: A Statute of Limitations Applied to the CFPB

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The substantial powers of the Consumer Financial Protection Bureau (CFPB) have recently received renewed attention following the U.S. Supreme Court's decision in *Seila Law LLC v. CFPB*.[1] That case held that the CFPB was unconstitutionally structured and that the director is removable at will by the President.[2] In making that determination, the Court discussed the CFPB's authority to use "the coercive power of the state to bear on millions of private citizens and businesses, imposing potentially billion-dollar penalties through administrative adjudications and civil actions."[3] That authority includes the enforcement of a broad prohibition on unfair, deceptive, or abusive acts or practices (UDAAP) in consumer finance transactions.[4] Although the Court reformed the President's removal authority, the CFPB retains that immense power over vast segments of the economy.

One check Congress placed on the CFPB is a statute of limitations on the CFPB's UDAAP authority.[5] That statute of limitations runs from three years "after the date of discovery of the violation to which an action relates"[6] (the CFPB SoL). The CFPB has repeatedly sought to limit this check on its power, including by arguing in court that statutes of limitations do not apply to administrative actions,[7] by narrowly interpreting the CFPB SoL in its own administrative decisions,[8] and by arguing for that narrow interpretation in federal court.[9]

This article focuses on the discovery rule in the CFPB SoL. It discusses issues that arise when applying the discovery rule to government actors, explores the potential discovery rule standards, reviews the CFPB's preferred standard, and concludes that the best reading of the CFPB SoL would apply an inquiry notice standard.

I. Concerns When Applying Discovery Rule to Government Agencies

Applying a statute of limitations and the discovery rule to the government raises statutory interpretation questions and policy concerns not generally present in private litigation. In *SEC v. Gabelli*, the Supreme Court recognized the challenge of determining when the government knew or should have known of a violation.[10] Questions that arise include (1) who is the relevant government actor when agencies have hundreds of employees, dozens of offices, and multiple layers of leadership; (2) is knowledge of one

agency or person attributed to the entire government; (3) what role do agency priorities and resource constraints play in determining when a reasonably diligent agency plaintiff would have discovered a violation; and (4) what discovery process should courts permit for defendants with government plaintiffs and what privileges belong to the government, including law enforcement and deliberative process privileges?[11]

Additionally, unlike an individual victim who relies on apparent injury to learn of a wrong—and does not "live in a state of constant investigation"—an enforcement agency's "very purpose is to root out" misconduct by regulated entities.[12] Enforcement agencies also have "many legal tools at hand to aid in that pursuit."[13] Moreover, government agencies seeking civil penalties pursue different relief than private plaintiffs who seek recompense.[14]

The Supreme Court's recent emphasis of the CFPB's exceptional coercive power demonstrates the significance of the CFPB's investigative and punitive authorities.[15] As a result, there is a strong argument that the CFPB SoL should apply relatively broadly. However, the Supreme Court has also, at times, strictly construed statutes of limitations in favor of the government, which introduces tension in the Supreme Court's jurisprudence on the application of statutes of limitations to government actions.[16]

These considerations serve as a framework for the remaining discussion of the various discovery rule standards and their application to government enforcement actions.

II. The Discovery Rule: Inquiry Notice and Actual or Constructive Notice Standards

"Discovery" has multiple potential meanings, and there are three discovery rule standards: actual knowledge, actual or constructive knowledge, and inquiry notice.

In ordinary usage, "discovery" refers only to actual knowledge and may, in unusual circumstances, refer to only actual knowledge in the context of statutes of limitations.[17] Historically, however, when used in the context of statutes of limitations in litigation between private parties, "discovery" refers to both actual and constructive knowledge.[18] For the actual or constructive knowledge standard, the limitations period begins when the plaintiff obtained actual knowledge or should have obtained knowledge of the facts underlying the claim, which may be sometime after an investigation into the existence of a potential claim begins.[19]

Under the inquiry notice standard, the statute of limitations runs from the date the litigant obtains actual knowledge of the facts giving rise to the action *or notice of facts*, which in the exercise of reasonable diligence, would have led to actual knowledge.[20] For this standard, notice of facts which ought to trigger an investigation are sufficient to trigger the limitations period, even if the facts underlying the claim are not discovered until some future time.

A. Inquiry Notice Standard

Prior to *Gabelli*, courts in some circuits applied the inquiry notice standard to enforcement actions for penalties for fraud. For example, in *SEC v. Koenig*, the Seventh

Circuit held that press releases—although not describing the particulars of the conduct giving rise to the claim—were sufficient to put the SEC on notice of the need for inquiry.[21] The court also noted that under some circumstances, a public announcement may not be needed to begin the running of the statute of limitations, such as if the information could already have been found by reasonable inquiry.[22]

SEC v. Fisher[23] also discussed the inquiry notice standard. In *Fisher*, the SEC filed a complaint on August 9, 2007, alleging violations of securities laws concerning false and misleading financial statements made to investors between 1999 and 2002 about a company's financial performance related to a performance-based rate plan.[24]

On July 18 and 19, 2002, the company issued a press release disclosing that allegations had been made concerning potential impropriety in connection with the company's accounting related to the performance-based rate plan.[25] That release indicated that there would be an independent internal investigation.[26] The company released additional information publicly throughout July.[27] On August 14, 2002, the company filed documents with the SEC indicating that prior filings from 2001 were not accurate. Multiple private plaintiffs filed class actions between July and October 2002, and in October the company issued a press release outlining the results of the independent investigation.[28]

The SEC argued that the statute of limitations did not begin to run until October 2002 when the company released the results of the internal investigation because, until then, the SEC did not know all of the facts necessary to file suit.

The court rejected that argument. The court discussed that, if applicable, the discovery rule applied based on when the SEC had learned enough facts to enable it, through further investigation, to sue within the limitations period. Under these facts, that date was July 19, 2002, because on July 18 and 19, 2002, the company issued press releases announcing sufficient facts to "put the Commission on notice that a violation may have occurred."[30]

The court reasoned that the discovery rule requires a plaintiff to engage in "further investigation" after receiving notice necessary to "incite the [plaintiff] to investigate" and enable the plaintiff to complete the investigation within the limitations period.[31] It does not require the plaintiff to be aware of all facts necessary to bring suit[32]—that is, the investigation occurs "after the limitations clock starts."[33] The court reasoned that this rule is particularly apt for an agency that has the "ability to conduct an effective investigation."[34]

As a result, if a court applies the inquiry notice standard to the CFPB SoL, the limitations period begins when the CFPB has actual or constructive knowledge of facts raising sufficient suspicion to cause a reasonable person to investigate to protect his or her legal rights, including public statements regarding the conduct.

B. Actual or Constructive Knowledge: In Context of Private Litigation, *Merck & Co.* Suggests Inquiry Notice Does Not Apply to Statute Referring to "Discovery"

In *Merck & Co.*, investors sued the drug company for securities fraud, claiming Merck

knowingly misrepresented the risks of heart attacks associated with the use of Vioxx.[35] The claims were subject to a statute of limitations from two years "after the discovery of the facts constituting the violation."[36] The district court had held that certain public studies and statements by the company and the FDA had placed the plaintiffs on inquiry notice "to look further," thereby triggering the statute of limitations.[37] The Third Circuit reversed, reasoning that although those events constituted "storm warnings," they "did not suggest much by way of scienter, and consequently did not put the plaintiffs on 'inquiry notice' requiring them to investigate more."[38]

The Supreme Court affirmed under a different interpretation of the statute of limitations. The Court held that the term "discovery" in that statute refers both to the plaintiff's actual discovery of certain facts, and to facts that a reasonably diligent plaintiff would have discovered, mentioning that courts of appeals "unanimously" agreed.[39]

However, the Court rejected Merck's arguments, including that "inquiry notice" was sufficient to trigger the statute of limitations.[40] The Court reasoned that inquiry notice referred to a point where the facts would lead a reasonably diligent plaintiff to investigate further, but that this point was "not necessarily" when the plaintiff would already have discovered facts constituting the violation.[41] Yet, the statute referred to "discovery," and nothing suggested the limitations period could begin sometime *before* discovery, such as when a reasonable plaintiff would have begun investigating.[42]

Although the Court rejected the inquiry notice standard, it acknowledged that inquiry notice standards "may be useful to the extent they identify a time when the facts would have prompted a reasonably diligent plaintiff to begin investigating."[43]

Merck & Co provides persuasive statutory interpretation of the term "discovery" under a standard statute of limitations applicable to private parties.

III. Cases Interpreting "Discovery" in the CFPB SoL

Only a few district courts,[44] and no circuit courts, have applied the CFPB SoL, and applications have differed.[45] Importantly, some suggested that an inquiry notice standard may apply, but one required the CFPB to have actual or constructive knowledge of the facts constituting a violation.[46]

In *Ocwen*, the defendant argued that the three-year CFPB SoL period ran on April 20, 2014, and that the CFPB complaint alleged that Ocwen's unlawful activity stopped in 2013.[47] The court determined that the date of discovery was the date when the CFPB "obtain[ed] 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."[48] The complaint did not allege when the CFPB discovered those unlawful activities.[49] As a result, there was a question of fact as to when the limitations period ran.[50] The court denied a motion to dismiss without further discussion of what Ocwen would need to show to satisfy the discovery rule.[51]

Although *Ocwen* suggests an inquiry notice standard, it does apply that standard to facts. Similarly, *NDG Financial*[52] uses the same standard, but does not extrapolate on when discovery occurs.[53]

In *Nationwide,* the court applied an actual or constructive knowledge standard. There, the defendants argued that the statute of limitations began to run on March 3, 2012, when the CFPB received a consumer complaint about misleading marketing.[54] The CFPB filed a complaint related to deceptive marketing over three years later on May 11, 2015.[55] The court rejected the position that "the mere receipt of a consumer complaint can trigger the statute of limitations against [the] CFPB," finding it "unsupported by authority and . . . unworkable."[56] Instead, that consumer complaint at most put the CFPB on inquiry notice that it should begin investigating, but did "'not automatically begin the running of the limitations period.'"[57] For the limitations period to begin to run, the CFPB must have "thereafter discovered or a reasonably diligent plaintiff would have discovered the facts constituting the violation."[58] Nothing in the record suggested the CFPB "actually discovered the facts, or that a reasonably diligent plaintiff would have discovered the facts, in less than the two-plus months between March 3, 2012 and May 10, 2012."[59] As a result, the action was not time-barred.[60]

Nationwide provides the most detailed analysis on the meaning of "discovery" in the CFPB SoL, largely relying on *Merck & Co.* However, in relying on *Merck & Co.*, *Nationwide* did not address whether the standard applicable in a private right of action should apply identically to the CFPB.

As discussed above, the Supreme Court in *Gabelli*—citing to *Merck & Co.*—raised questions about how to apply the discovery rule in the context of a government action, remarking "we have never applied the discovery rule in this context, where the plaintiff is not a defrauded victim seeking recompense, but is instead the Government bringing an enforcement action for civil penalties."[61] Although the CFPB SoL expressly includes a discovery rule, the Court's questions in *Gabelli* suggest a different application may be warranted, especially because the agency may seek civil penalties.[62]

IV. *Integrity Advance*: A CFPB Administrative Law Judge Rules That the CFPB SoL Is Not Triggered unless the CFPB Had Actual Knowledge

A CFPB Administrative Law Judge (ALJ) decision in *Integrity Advance*[63] went even further, requiring the CFPB to have *actual* knowledge to trigger the limitations period.[64] The ALJ first addressed *Merck & Co.*, concluding that it did not discuss "or reasonably extend to the context of a case involving a government agency plaintiff."[65]

The ALJ then acknowledged that in *Gabelli*, the Supreme Court "expressed concern" about defendants being exposed to government enforcement actions for an uncertain period and had noted difficulties in applying the discovery rule to government plaintiffs.[66] The ALJ then noted that the CFPB SoL included the word "discovery" but not the phrase "or should have known," implying that Congress did not intend for constructive discovery to be sufficient. As a result, the ALJ concluded that an actual notice standard applied.[67]

As discussed below, an actual notice standard fails to sufficiently address concerns raised by the Supreme Court regarding the application of discovery standards to government agencies.

V. Applying the Inquiry Notice Standard to the CFPB SoL Creates a Workable Standard That Satisfies the Purpose of the Statute and Accounts for the Government's Authority to Seek Penalties

The best reading of the CFPB SoL would interpret the statute as imposing an inquiry notice standard on CFPB UDAAP claims.

Generally, an actual or constructive knowledge standard applies where a statute of limitations imposes a discovery rule,[68] but there are occasions when that standard is not appropriate.[69] The CFPB's own ALJ decision concluded that the CFPB SoL presents such a circumstance due to the difficulties the standard would present in the context of government enforcement actions.[70]

An actual or constructive knowledge standard would incorporate *all* of the concerns identified by the *Gabelli* court. Most importantly, an actual or constructive notice standard would not create a "fixed date when exposure to specified government enforcement efforts ends," thereby "advancing 'the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.'"[71]

Much like in *Gabelli*, defendants would be "exposed to Government enforcement action not only for [three years] after their misdeeds, but for an additional uncertain period into the future. Repose would hinge on speculation about what the government knew, when it knew it, and when it should have known it."[72] Such a rule "would thwart the basic objective of repose underlying the very notion of the limitations period."[73]

Even if the actual or constructive knowledge standard achieved the purpose of the discovery rule, it would still be unworkable in the context of a government agency plaintiff.[74] Moreover, the difficulty courts would face in determining when an agency should have discovered sufficient facts is far greater for a private person facing potential litigation. That potential defendant does not have the benefit of compelled discovery of the agency's knowledge and internal processes until an action is filed, if that material is even discoverable.

Only the inquiry notice standard addresses these issues. As a result, it is the only discovery rule standard that serves the purposes of a statute of limitations in the context of enforcement actions.

An actual knowledge standard presents many of the same challenges as an actual and constructive knowledge standard. A court must still determine when an agency had knowledge, which would include delving into which government official must have the appropriate level of knowledge. The knowledge required would involve analysis of all aspects of the claim, rather than mere awareness of the claim. Most importantly, there would be no fixed date after which a defendant would no longer be exposed to government enforcement action. Instead, that date could be continuously extended until the government is sufficiently aware of all the facts necessary to file a claim. The government could even deliberately set aside certain investigations before learning of sufficient facts to delay the running of the limitations period. Even if a court were to

consider such actions as bad faith and estop the government from raising limitations as a defense, differentiating bad faith and questions of resource allocation within an agency would raise difficult questions for courts.

An inquiry notice standard addresses many of those concerns while also accounting for the punitive enforcement role of the CFPB. The limitations period would generally be easily identifiable by the defendant, the government, and the court. Public statements and news articles alerting the agency, the company, and the public to potential wrongdoing are in the public record.[75] Under CFPB procedures, both the CFPB and companies are made aware of consumer complaints filed with the CFPB, and the CFPB incorporates those complaints into a database.[76] Similarly, exam findings are issued to companies and provide a clear line at least for when the CFPB was on notice of a potential issue. As a result, the inquiry notice standard succeeds where the other standards fail—it satisfies the purposes of the Congressionally mandated statute of limitations by providing a workable standard and imposing a fixed limitations period.

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[1] Seila Law LLC v. CFPB, 140 S. Ct. 2183 (June 29, 2020).

[2] *Id.* at 2192.

[3] *Id.* at 2200-01.

[4] *Id.* at 2000; 12 U.S.C. § 5536.

[5] 12 U.S.C. § 5564(g).

[6] *Id.* ("Except as otherwise permitted by law or equity, no action may be brought under [the Consumer Financial Protection Act] more than 3 years after the date of discovery of the violation to which an action relates.")

[7] PHH Corp. v. CFPB, 839 F.3d 1 (D.C. Cir. 2016).

[8] *See e.g.*, CFPB v. Integrity Advance, LLC, CFPB No. 2015-CFPB-0029, p. 12 (Jan. 24, 2020).

[9] *See e.g.*, CFPB v. Nationwide Biweekly Administration, 2017 WL 3948396 (N.D. Cal. 2017).

[10] Gabelli v. SEC, 568 U.S. 442, 452-53 (2013) (discussing discovery rule standard in *Merck & Co. v. Reynolds*, 559 U.S. 633 (2010), discussed *infra* Section II.B).

[11] *Id.* (noting that where Congress has mandated that the discovery rule applies to the government, it has frequently included other provisions specifically providing for its application, such as identifying the official whose knowledge is relevant).

[12] *Id.* at 450-51.

[13] *Id.* at 451 (identifying range of investigative tools including subpoenaing documents and witnesses).

[14] *Id.*; *see also* 3M Co. v. Browner, 17 F.3d 1453 (D.C. Cir. 1994) (doubting whether conducting administrative or judicial hearings to determine whether an agency's enforcement branch adequately lived up to its responsibilities would be a workable or sensible method of administering any statute of limitations).

[15] *Seila Law*, 140 S. Ct. at 2193; *see also* 12 U.S.C. §§ 5562-5564.

[16] *See e.g.*, BP America Production Co. v. Burton, 549 U.S. 84 (2006); Badaracco v. C.I.R., 464 U.S. 386, 391-92 (1984).

[17] For example, where a statute had two statutes of limitations drafted at different times, and the first referred to "discovery . . . or after such discovery should have been made," and the second referred only to "discovery," the absence of the phrase "or after such discovery should have been made" in the latter arguably showed congressional intent to refer *only* to actual knowledge and not constructive knowledge. Merck & Co. v. Reynolds, 559 U.S. 663 (2010) (Scalia, J. concurring).

[18] Merck & Co. v. Reynolds, 559 U.S. 663 (2010).

[19] *Id.*

[20] Fujisawa Pharmaceutical Co. Ltd. v. Kapoor, 155 F.3d 1332 (7th Cir. 1997) (Posner, J.) (explaining that inquiry notice standard applied "not when the fraud occurs, and not when the fraud is discovered, but when (often between the date of occurrence and the date of the discovery of the fraud) the plaintiff learns, or should have learned through the exercise of ordinary diligence in the protection of one's legal rights, enough facts to enable him by such further investigation as the facts would induce a reasonable person to sue within [the limitations period].") *abrogated by* Gabelli v. SEC, 568 U.S. 442 (2013).

[21] SEC v. Koenig, 557 F.3d 736, 739-40 (7th Cir. 2009) *abrogated by* Gabelli v. SEC, 568 U.S. 442 (2013).

[22] *Id.* at 740.

[23] SEC v. Fisher, 2018 WL 2062699 (N.D. Ill. 2008) (relying on Fujisawa Pharmaceutical Co. Ltd. v. Kapoor, 155 F.3d 1332 (7th Cir. 1997) (Posner, J.) *abrogated by* Gabelli v. SEC, 568 U.S. 442 (2013)).

[24] *Id.* at *1.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* at *1-*2, *6.

[29] SEC v. Fisher, 2018 WL 2062699, *5 (N.D. Ill. 2008) (discussing that general rule for

private plaintiffs depends as "ill-fitting where, as here, the plaintiff is a federal agency like the SEC.").

[30] *Id.* (reviewing specific facts disclosed at that time).

[31] *Id.*

[32] *Id.*

[33] *Id.* at *6.

[34] *Id.*

[35] *Merck & Co.*, 559 U.S. at 637.

[36] *Id.* at 648 (citing 28 U.S.C. § 1658).

[37] *Id.* at 642-43.

[38] *Id.* (discussing that scienter is necessary element of securities fraud action).

[39] *Id.* at 644, 647.

[40] *Id.* at 651.

[41] *Merck & Co.*, 559 U.S. at 651.

[42] *Id.*

[43] *Id.* at 653.

[44] CFPB v. Ocwen Fin. Corp., 2019 U.S. Dist LEXIS 152336 *65 (S.D. Fla. Sept. 5, 2019); CFPB v. NDG Fin. Corp, 2016 WL 7188792 (S.D.N.Y. 2016); CFPB v. Think Fin., 2018 WL 3707911 (D. Mont. 2018); CFPB v. Nationwide Biweekly Admin., Inc., 2017 WL 3948396 (N.D. Cal. 2017).

[45] *Compare* CFPB v. Ocwen Fin. Corp., 2019 U.S. Dist LEXIS 152336 *65 (S.D. Fla. Sept. 5, 2019) *with* CFPB v. Nationwide Biweekly Admin., 2017 WL 3948396 (N.D. Cal. 2017).

[46] *Compare* CFPB v. Ocwen Fin. Corp., 2019 U.S. Dist LEXIS 152336 *65 (S.D. Fla. Sept. 5, 2019) *with* CFPB v. Nationwide Biweekly Admin., 2017 WL 3948396 (N.D. Cal. 2017).

[47] *Ocwen Fin. Corp.*, 2019 U.S. Dist LEXIS 152336 at *66.

[48] *Id.*

[49] *Id.*

[50] *Id.* at *66-*67.

[51] *Id.*

[52] CFPB v. NDG Fin. Corp, 2016 WL 7188792, *19 (S.D.N.Y. 2016).

[53] *Id.* Another court denied a motion to dismiss on limitations grounds for multiple reasons without providing a standard. CFPB v. Think Fin., 2018 WL 3707911 (D. Mont. 2018).

[54] CFPB v. Nationwide Biweekly Admin., 2017 WL 3948396, *10 (N.D. Cal. 2017).

[55] *Id.*

[56] *Id.*

[57] *Id.* (quoting Merck & Co. v. Reynolds, 559 U.S. 633, 653 (2010)).

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Gabelli*, 568 U.S. at 449.

[62] Although not addressed in this article, those facing a CFPB action that seeks civil penalties may argue in the alternative that, even if the CFPB SoL does not apply, a catch-all, five-year statute of limitations related to "any civil fine, penalty, or forfeiture, pecuniary or otherwise" may limit certain CFPB enforcement. 28 U.S.C. § 2462; *see Gabelli*, 568 U.S. at 445. This article also does not address use of equitable defenses such as laches. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 & n.12 (2002) (discussing possibility laches could be applied to sovereign to provide relief to defendants against inordinate delay by agency).

[63] CFPB v. Integrity Advance, LLC, CFPB No. 2015-CFPB-0029 (Jan. 24, 2020).

[64] *Id.* at 12.

[65] *Id.* at 16.

[66] *Id.* at 17.

[67] *Id.* at 18-19. Note that CFPB ALJ rulings are not binding and are ultimately subject to the director's decision and appellate review of that decision. 12 C.F.R. §§ 1081.400 *et seq.*

[68] *See Merck & Co.*, 559 U.S. at 656 (Scalia, J. concurring) (remarking that "in context of statutes of limitations 'discovery' has long carried an additional meaning [beyond actual discovery]: it also occurs when a plaintiff, exercising reasonable diligence, *should have* discovered facts giving rise to his claim").

[69] *Id.* (discussing unusual statutory language in context of statute's history which suggested Congress intended only actual notice standard).

[70] CFPB v. Integrity Advance, LLC, CFPB No. 2015-CFPB-0029, 15-18 (Jan. 24, 2020).

[71] *Gabelli*, 568 U.S. at 448-49 (noting that statutes of limitations "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared," which provides "security and stability to human affairs" and makes them "vital to the welfare of society").

[72] *Id.* at 452.

[73] *Id.* (quoting *Rotella*, 528 U.S. 549, 554 (2000)).

[74] *See*, *supra*, Section I.

[75] *See e.g.*, SEC v. Fisher, 2018 WL 2062699 (N.D. Ill. 2008) (relying on corporate press releases to trigger limitations period and finding inquiry notice standard appropriate for government given agency's "ability to conduct an effective investigation").

[76] CFPB, Consumer Tools, *Learn How the Complaint Process Works* (last visited July 29, 2020).

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