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June 23, 2016

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 held April 12, 2016)

Dear Mr. Langer:

Pursuant to Rule 28(j), PHH respectfully submits *Encino Motorcars, LLC v. Navarro*, No. 15-415 (U.S. June 20, 2016), which supports its position that the Director's interpretation of 12 U.S.C. § 2607 should not receive *Chevron* deference, and other positions.

In *Encino*, the responsible Department of Labor official "issued an opinion letter" in 1978 interpreting a provision of the Fair Labor Standards Act and confirmed that interpretation in 1987 "by amending its Field Operations Handbook." Op. 4-5. In 2011, however, the Department promulgated a final rule that "changed course" and "took the opposite position." Op. 5. The Supreme Court held that, because the Department did not "explain why it deemed it necessary to overrule its previous position," on which the regulated industry had relied for years, the rule was arbitrary and capricious, and thus "*Chevron* deference is not warranted." Op. 8. The Court also emphasized that, when changing its position, an agency must "be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into

account,'" and "'a reasoned explanation is needed for disregarding'" those interests. Op. 9-10.

As in *Encino*, the Director reversed a longstanding interpretation of Section 2607 on which the entire industry had relied for years, as PHH and *amici* explained. *See* Br. 6-10; Reply Br. 5. The Director, however, barely acknowledged PHH's reliance interests, spurning them as "not particularly germane." Dec. 19 (JA19).

Encino confirms both that agencies must seriously consider regulated parties' reliance on existing interpretations, and that justifiable reliance extends to agency interpretations announced in relatively informal (but nonetheless official) documents—such as a "[h]andbook" or (like here) an "opinion letter." Op. 4-5; *see* Reply Br. 1-2, 6-7.

Those holdings are flatly contrary to the Director's summary dismissal of the well-documented reliance interests in this case, his decision to apply his new interpretation retroactively, and his imposition of more than $100 million of liability for conduct the government expressly and repeatedly condoned. Op. 9-11; *see* Br. 24-32.

Encino therefore reaffirms that the Director's interpretation is arbitrary and capricious and "receives no *Chevron* deference." Op. 10; *see* Br. 42-43; Reply Br. 20.

Respectfully submitted,

/s/ Theodore B. Olson
Theodore B. Olson

CERTIFICATE OF SERVICE

I hereby certify that, on June 23, 2016, 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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