



CENTER FOR CAPITAL MARKETS  
COMPETITIVENESS

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May 7, 2018

Ms. Monica Jackson  
Office of the Executive Secretary  
Consumer Financial Protection Bureau  
1700 G Street, NW  
Washington, DC 20552

**Re: Request for Information Regarding Bureau Rules of Practice for  
Adjudication Proceedings, Docket No. CFPB-2018-0002**

Dear Ms. Jackson:

The U.S. Chamber of Commerce (the “Chamber”) is the world’s largest business federation, representing the interests of more than three million companies of every size, sector, and region. The Chamber created the Center for Capital Markets Competitiveness (“CCMC”) to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy.

CCMC appreciates the opportunity to comment on the request for information (RFI) regarding adjudication proceedings. The current leadership at the Bureau of Consumer Financial Protection (the “Bureau”) has rightly recognized the importance of providing a fair and effective administrative adjudication process. The mission of the Bureau is to protect consumers while providing a level playing field for market participants. This level playing field can occur only if there is a fair and effective enforcement program that helps to keep fraudulent and predatory behavior out of the marketplace.

Administrative adjudication can help the Bureau achieve this mission by providing an alternative to civil litigation. However, the design and implementation of any administrative adjudication process must strike an appropriate balance between efficiency and due process, and provide the opportunity for a company to present a defense. Efficiency must not compromise fairness, which is at the heart of the American judicial system. Thus, to the extent that the Bureau seeks an efficient

administrative adjudication process, it must also provide appropriate safeguards to ensure the process is fair, transparent, and unbiased.

We believe the long-term success of the Bureau's mission depends on a fair and balanced adjudication process. Despite the status of other Bureau reform efforts, we believe that it has the power to make the reforms necessary to strengthen its adjudication process.

To achieve this critical goal, we urge the Bureau to make three reforms:

- Develop internal policies limiting the use of administrative adjudication to ministerial cases that can be resolved expeditiously. The Bureau should establish rules of procedure for non-ministerial cases that are more complex;
- Allow a respondent company to have a limited right of removal to move more complex cases to federal district court; and
- Institute safeguards to avoid abuse in any matter that proceeds in administrative adjudication.

### Discussion

#### **(1) Administrative Adjudication Can Play an Important Role in a Fair and Effective Regulatory System.**

Administrative adjudication is a well-established and widely-used regulatory tool. These proceedings can provide a swifter, lower-cost mechanism for resolving disputes than civil litigation. Moreover, when appropriately trained and educated about the process and agency, administrative law judges ("ALJs") can bring substantial expertise to bear, leading to consistency across comparable matters.<sup>1</sup> Consequently, both the agency and a regulated entity may prefer to adjudicate certain matters in this forum—and particularly routine or ministerial matters that involve limited legal or factual disputes.

Looking towards other agencies, in many cases, neither the Social Security Administration nor the claimant would prefer to dispute a benefits determination in

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<sup>1</sup> See Katie Eyer, *Administrative Adjudication and the Rule of Law*, 60 Admin. L. Rev. 647, 661, 689 (2008).

federal court when the issue could be more easily resolved within the agency. Likewise, the Securities and Exchange Commission (SEC) frequently uses administrative proceedings to terminate the registration of public companies for failing to file periodic reports.<sup>2</sup> Efficient administrative adjudication has advantages in resolving the relevant issue: whether the company filed the required periodic reports. Another instance in which the SEC effectively employs administrative adjudication is barring persons or entities from registration after the prior entry of a civil injunction or criminal injunction. Like the decisions terminating companies' registration, these cases require resolution of a single issue before a decision can be issued.

However, since the passage of the "Dodd-Frank Wall Street Reform and Consumer Protection Act," the SEC has brought cases before ALJs that before 2010 would have been brought to Article III courts. In 2015, the Chamber issued a report with 28 recommendations to improve SEC enforcement policies including administrative proceedings. The SEC moved forward on some of those recommendations including the discovery procedures and limited use of depositions. We have attached a copy of the Chamber report and submit it as a part of the record. These recommendations can be informative to the Bureau as it considers this RFI.

The Bureau's adjudication process can have equivalent strengths and should be preferred by covered businesses in some circumstances. For example, in cases where there is only a limited set of factual questions, and no substantial legal questions at issue in a particular enforcement action; adjudication would make it easier to bring those factual questions to prompt resolution.

However, adjudication processes built for efficiency may not be the best process to use when the case has substantive legal issues or conflicting law. By the time an agency brings an enforcement action, it has already assembled a factual record based on its investigation. If this record contains numerous contested facts, the defense may not have the time or the procedural tools necessary to assemble its own facts or otherwise defend against the agency's accusations. Since the same agency hearing the case is the one who initially brought the case, it is imperative to establish concrete guardrails to ensure a fair hearing. Administrative adjudication can also limit due process when it is used to advance novel interpretations of the law. A basic

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<sup>2</sup> U.S. Chamber Center for Capital Markets, EXAMINING U.S. SECURITIES AND EXCHANGE COMMISSION ENFORCEMENT 13 (July 2015).

requirement of due process is fair notice of what the law requires. Fair notice is especially important in the administrative context, where agencies can unilaterally establish binding standards through adjudication. Moreover, the use of an administrative action to break new ground poses the risk of unprincipled revision of existing legal policy that should be accomplished through notice and comment rulemaking.

The design and implementation of an administrative adjudication process, thus, is a matter of balance. We fully support procedural efficiency. However, we hope the Bureau will carefully find the balance for a transparent process that establishes a fair process for both sides. The broader the set of issues the Bureau hears through the adjudication process, the more it should offer procedural protections in line with those available in federal court. Fail to get the balance right, and the Bureau risks denying respondents the due process the Constitution guarantees.

**(2) The Bureau’s Existing Administrative Adjudication Process Does Not Properly Balance Efficiency and the Opportunity to Offer a Defense.**

Congress granted the Bureau the authority to bring administrative proceedings to address violations of federal consumer financial law.<sup>3</sup> Consistent with this authority, the Bureau established procedures for its adjudication process<sup>4</sup> that designed this process to be quick. For example, as a part of this scheme, the Bureau did not provide robust discovery and requires hearing officers to “adhere to a policy of strongly disfavoring granting [motions for an extension].”<sup>5</sup> Likewise, the rules require that the hearing officer decide any motion for summary disposition within 30 days and disfavor motions to extend the length of such motion. Thus, the Bureau’s adjudication proceedings are efficient. However, depending on the complexity of the matter, the process may deny the flexibility necessary to accommodate extenuating circumstances.

The Bureau’s design of its administrative adjudication process was unnecessarily restrictive and it imposed very short and unreasonably inflexible deadlines, limits, and requirements. Moreover, the Bureau has not limited itself to simple matters that could be fairly accommodated within such a process. Rather, it

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<sup>3</sup> 12 U.S.C. § 5563.

<sup>4</sup> 12 C.F.R. Part 1081.

<sup>5</sup> 12 C.F.R. § 1081.115.

has demonstrated its willingness to litigate matters of enormous complexity in administrative proceedings. Even more troublingly, the prior leadership of the Bureau demonstrated a willingness to intervene in administrative proceedings in a manner that deprived them of the hallmarks of impartiality that due process requires. As the ultimate authority in these proceedings belongs to the Bureau's Director, who reviews the recommended decisions of the Bureau hearing officers and decides any appeal, the Director must exercise that authority in a manner that respects due process for all parties.

The *PHH* case highlighted the issue with this process when the Director heard the appeal and increased the money judgment imposed on the company by a factor of eighteen from the amount recommended by the presiding ALJ. *PHH Corp. v. Consumer Financial Protection Bureau* raised serious questions about the impartiality of the Bureau's process. In the decision, the Director announced a new interpretation of the Real Estate Settlement Procedures Act—and then the Director unilaterally inflated an ALJ's order for disgorgement of \$6 million to \$109 million for conduct that had been legal under long-standing precedent from the Department of Housing and Urban Development.<sup>6</sup> A D.C. Circuit panel unanimously held (in a decision that was left undisturbed by the en banc court) that the Bureau “violated due process by retroactively applying its changed interpretation to PHH's past conduct and requiring PHH to pay \$109 million for that conduct.”<sup>7</sup> The Director's unilateral actions in *PHH* made clear the immense power held by the Director and the need so construct robust guardrails to ensure adjudication proceedings are fair and transparent. The Bureau must avoid any similar mistakes in the future, and should commit itself to fair enforcement of the law consistent with the requirements of the Constitution.

### **(3) The Bureau Should Take Concrete Steps to Reform its Administrative Adjudication Process.**

Questions about the fundamental fairness of the Bureau's adjudication process will persist as long as a single director has ultimate authority for the enforcement actions and administrative adjudications. Structural reform of the Bureau to incorporate a multi-member commission structure, thus, is the most important step

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<sup>6</sup> Decision of the Director, *In re PHH Corp.*, CFPB File No. 2014-CFPB-0002, Doc. No. 226 (June 4, 2015).

<sup>7</sup> *PHH Corp. v. Consumer Fin. Protection Bureau*, 839 F.3d 1, 48 (D.C. Cir. 2016), *vacated* Feb. 16, 2017, *reinstated in part*, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

that can be taken to put the Bureau's adjudication system on a sound footing. Still, the Bureau itself can take concrete and practical steps now to reform its administrative adjudication process. We describe three categories of reforms below.

- a. **The Bureau should develop internal policies limiting the use of administrative adjudication to ministerial cases that can be resolved expeditiously. The Bureau should establish rules of procedure for non-ministerial cases that are more complex.**

As discussed above, decisions that the Bureau makes about how to structure its adjudication process will inform the types of matters that the Bureau should bring in that forum. The Bureau consequently should develop internal policies to ensure that only appropriate cases are brought in the administrative forum that can adequately be resolved through more expedited means. These policies should require the Bureau to refrain from using its administrative forum as an avenue to adopt new interpretations of federal consumer financial law or to apply existing interpretations in novel ways. Specifically, we recommend that these policies require that:

- The proceeding is based upon well-established legal principles that have been adopted by Article III courts, not on claims that have not been fully considered by courts (e.g., abusiveness);
- The factual predicate for the alleged violations is substantially equivalent to those successfully litigated in past enforcement actions;
- The matter does not entail an extensive investigative record such that considerations of fairness warrant providing a company with the fuller procedural protections available in federal court; and
- The Bureau will not seek civil penalties against the respondent company.

The *PHH* case demonstrated the risks associated with misuse of the administrative adjudication process to hear highly complex matters or adopt novel legal theories. To prevent this misuse from occurring again, the Bureau should adopt policies to ensure only the matters outlined above are adjudicated in an administrative forum.

**b. The Bureau should allow a respondent company to have a limited right of removal to move more complex cases to federal district court.**

The adjudication of certain cases in an administrative forum can unfairly favor the Bureau. In addition to establishing policies to prevent any imbalance, the Bureau should also provide a method for defendants to remove the case to federal court in case such policies are not followed.

Congress granted the Bureau discretion to choose to bring an enforcement action in a judicial or administrative forum and to obtain the same remedies administratively as in federal court. In light of the Bureau's exercise of this discretion to date and absent action by Congress to provide more guidance to the Bureau, we recommend creating a procedural opportunity for respondents to remove their non-ministerial action from adjudication to federal court similar to the Federal Rules of Civil Procedure (Fed. Rules of Civ. Pro.), which outlines how defendants can remove a case from state to federal court.<sup>8</sup>

In this instance, however, we ask that the notice of removal be first filed with the Bureau. We believe it should start with the Bureau to be handled internally instead of utilizing valuable court resources. The notice of removal should be filed within 10 business days (or within a mutually agreed upon time) after the institution is notified of the impending action against them. Similar to Rule 11 of Fed. Rules of Civ. Pro., the statement should include a "short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action." The Bureau should have 10 business days to act upon the request, and issue an order granting or rejecting the notice.

If the Bureau grants the notice, the case should be filed in the proper federal court. However, if the Bureau rejects the notice, the organization should have the ability to appeal to the federal court if there is reason for removal and reason to believe the Bureau will not hear the matter in a fair and unbiased manner.

This approach will both ensure that the adjudication process is used for appropriate matters and also ensure that a respondent company can present its case to a civil jury when applicable. Under the Bureau's current policy, the government

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<sup>8</sup> 28 U.S.C. § 1446.

controls the decision to have a jury trial. If the Bureau's staff believe it is advantageous to have a jury, it controls that decision by having the Bureau authorize a civil action. If the Bureau's staff prefers not to have a jury, then it may choose an administrative proceeding. The defendant, for whom access to a jury is intended as protection against government overreach, has no control over this critical decision. This is why it is critical that the Bureau allow companies to choose to present their cases to a jury in matters, especially because many may result in multi-million dollar penalties.

The purpose of administrative adjudication is to provide an alternative to federal court litigation. When used appropriately, both sides benefit from the speed and efficiency of resolving disputes in an administrative forum. By instituting the policies described here, the Bureau could achieve that goal while retaining the advantages of its efficient adjudication process with the appropriate ministerial matters, and better protect the rights of defendants.

**c. The Bureau should institute safeguards to avoid abuse in any matter that proceeds in administrative adjudication.**

We welcome the Bureau's interest in ensuring that its adjudication procedures better protect the rights of respondent businesses. In addition to removal of proceedings, we recommend that the Bureau build additional safeguards into the adjudication system to make it more balanced and efficient.

First, the Bureau should adopt rules that give ALJs more flexibility to manage deadlines, page limits, and other restrictions as appropriate during an administrative adjudication. Many of the Bureau's procedural rules only allow for exceptions in extraordinary circumstances. For example, ALJs are only supposed to grant motions for extensions of time "when the moving party makes a strong showing that the denial of the motion would substantially prejudice its case."<sup>9</sup> In contrast, the Federal Trade Commission only requires a showing of "good cause" for an extension.<sup>10</sup> Lowering the burden for granting an extension of time to a "good cause" standard would better protect defendants without compromising the goal of providing a speedy adjudication. Likewise, the Bureau should:

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<sup>9</sup> 12 C.F.R. § 1081.115(b).

<sup>10</sup> 16 C.F.R. § 4.3(b).

- Amend 12 C.F.R. § 1081.212(e) to allow a hearing officer to grant extensions of the length limitation for motions for summary disposition in his or her discretion, thereby eliminating the guidance that such motions are disfavored; and
- Allow the hearing officer to deviate from 12 C.F.R. § 1081.212(h)'s requirement that the hearing officer decide any motion for summary disposition within 30 days if the hearing officer concludes that the interests of justice so dictate.

Second, the Bureau should build more flexibility into its rules so that defendants can have greater access to discovery when necessary. The limited discovery available under the current rules is sufficient in straightforward matters, but is overly restrictive in complex ones. In actions involving an extensive factual record or many disputed facts, the defendant may require additional discovery to be able to adequately build a defense. Additional discovery can help level the playing field in these cases considering the Bureau's ability to gather evidence prior to instituting an administrative proceeding. Thus, while we first recommend that such complex cases be adjudicated in federal court rather than an administrative forum, the rules should provide protections for when a complex matter nonetheless is adjudicated in an administrative proceeding. To achieve these goals, the Bureau should amend its rules to:

- Permit the use of fact witness depositions, written interrogatories, and requests for admissions;
- Allow the hearing officer to permit a party to call an appropriate number of expert witnesses at a hearing, irrespective of whether "extraordinary circumstances" exist within the meaning of 12 C.F.R. § 1081.210(b); and
- Require the Bureau to make appropriate documents available for copying or inspection, including by producing those documents in electronic form to respondents in the first instance, at the Bureau's expense.

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By providing this additional discovery, the Bureau would ensure defendants can more effectively respond to the Bureau's claims without excessively delaying the adjudication.

We thank you for the opportunity to submit these comments.

Sincerely,

A handwritten signature in black ink, appearing to be 'TK' followed by a long horizontal flourish.

Tom Quaadman