

May 7, 2018

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

Re: *RFI Regarding Bureau Rules of Practice for Adjudication Proceedings*
[Docket No. CFPB-2018-0002]

Dear Ms. Jackson,

The American Financial Services Association (“AFSA”)¹ appreciates the Bureau of Consumer Financial Protection’s request for comments and information to assist the Bureau in considering whether and how to amend the Bureau’s Rules of Practice for Adjudication Proceedings (“Rules”). After operating under the Rules for several years, it is appropriate to review the administrative adjudication process. We are grateful for this opportunity to discuss how the Bureau’s processes and rules could be updated, streamlined, or revised to better achieve the Bureau’s statutory objectives: to minimize burdens, impacts, or costs on financial institutions; to align the Bureau’s rules more closely with those of other agencies; and to better provide fair and efficient process to individuals and entities involved in the adjudication process.

Our comments focus on three areas: (1) the fact that with a single-director structure, there is no meaningful appeals process for adjudication proceedings; (2) that the vast majority of actions should be brought in court as opposed to in an administrative forum; and (3) that the Bureau should keep records of its enforcement adjudication process and make certain statistics regarding those records public.

I. No True Appeals Process

The main problem with the Bureau’s Rules is something that the Bureau cannot fix itself. The problem is that there is no meaningful appeals process for adjudication proceedings. A decision in an administrative adjudication can only be appealed to the CFPB Director. The Director of the Bureau, who oversees the Office of Enforcement, also acts as the chief adjudicatory official.

This singular process means that the appeal is to the decision-maker. Let’s take the PHH case as an example. The Bureau began an enforcement proceeding against PHH. The Bureau, with the Director’s knowledge, decided to bring the enforcement action in an administrative proceeding, rather than in court. The Bureau’s decision to proceed administratively also meant that the Bureau Director — rather than a court — would hear the appeal of that initial decision. The administrative law judge ruled against PHH and ordered \$6.4 million in disgorgement.

¹ Founded in 1916, AFSA is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance. Our members have a keen interest in the outcome of these deliberations and in the operation of the Rules.

PHH appealed. The Director then ruled against PHH and actually increased the penalty. Then-Director Richard Cordray ordered \$109 million in disgorgement.

To put it mildly, this is not fair. Ask any person whether the prosecutor should also be the judge and decide the penalty. We submit that virtually no one would approve of that process. PHH should have been able to appeal to someone other than the person who authorized the investigation in the first place. Such an appeal is not possible with a single-director at the head of the Bureau. This demonstrates why a commission structure would be better. For example, at the Federal Trade Commission, an appeal can go to a Commissioner who was not involved in the enforcement action.

While we understand that the Bureau cannot undertake this structural change itself, we urge it to endorse legislation to replace the current single regulator structure with a bipartisan five-member commission similar to that in place in other independent regulatory agencies. We note that only a commission structure will provide the necessary safeguards to stop the Bureau from exceeding its statutory authority and will give a meaningful administrative appellate process.

II. Enforcement Actions Should Be Brought in Court

The Bureau should generally bring actions in federal court as opposed to in an administrative forum. Our reasons are twofold. First, bringing actions using administrative proceeds leads to regulatory policy being set outside the notice and comment process. Second, bringing an action using administrative proceedings usurps the defendants' right to a jury trial in a case brought by the government.

As to the first point, agencies, including the Securities and Exchange Commission ("SEC") and the Bureau itself, have been criticized for using administrative proceedings to create regulatory policy outside of the notice and public comment process. In the Bureau's case, the enforcement action brought by the Bureau against PHH dramatically disrupted long-settled understandings of what the Real Estate Settlement Procedures Act permits and prohibits, caused serious uncertainty, and chilled lawful, economically valuable transactions. That the Bureau did so without prior notice—or input from stakeholders—significantly compounded its negative impact.

Moving on to the second point, bringing enforcement actions in an administrative forum usurps the defendants' right to a jury trial. The Supreme Court has held that a defendant is entitled to a jury every time the government demands a civil penalty. Various circuit courts of appeal have held in recent years that "penalties" include injunctions, professional bars, and other relief, not just monetary sanctions. Through the choice of forum, the Bureau can deny the defendant its right to a jury.

To avoid these harms, the respondents should have the opportunity to opt-out of administrative proceedings. The Bureau should adopt a policy that any party named in an administrative proceeding that desires a jury trial may file a notice to remove the proceeding to federal district court. The Bureau should create a procedure to enable respondents to challenge the choice of forum by filing a motion for change of forum with the Director prior to institution of the proceeding.

Upon the Bureau's authorization of an administrative proceeding and prior to publicly instituting the proceeding, the Office of Enforcement should notify named respondents and inform them that they may challenge the choice of forum by filing a motion to remove to federal district court.

III. Bureau Transparency and Recordkeeping

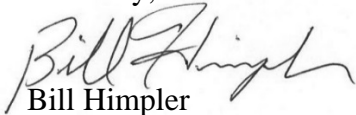
The Bureau should keep records of its enforcement adjudication process and make public certain statistics regarding those records. The statistics should include:

- For the most recently completed fiscal year, the number of proceedings instituted in an administrative forum, and the number instituted in federal court, both in absolute numbers and as a percentage of all proceedings instituted.
- For the most recently completed fiscal year, the average number of proceedings instituted in an administrative forum and the average number of federal district court proceedings, sorted by general broad substantive categories, and also sorted by the nature of the respondents involved (*e.g.*, directly supervised or non-supervised entities).
- For administrative proceedings initiated during the immediately preceding fiscal year, the percentage of those proceedings involving solely the settlement of Bureau charges, as well as the percentage of those that are correlative “follow-on” or related proceedings to other actions.
- For proceedings previously initiated in an administrative forum, the average length of time elapsed from the filing of the proceeding until its conclusion, and the same statistics for proceedings previously initiated in a federal district court.
- For all matters resolved during the most recently completed fiscal year, excluding matters filed solely to memorialize a settlement of Bureau charges or to impose correlative “follow-on” proceedings, the average length of time elapsed for the completion of the investigation prior to the institution of the Bureau’s proceedings, sorted by those proceedings initiated in an administrative forum, and those initiated in a federal district court.
- As a percentage of all administrative proceedings instituted during the preceding year, the number of administrative proceedings directing an initial decision in 120, or 210, or 300 days.
- The number of administrative proceedings resolved during the immediately preceding fiscal year, as a percentage of all administrative proceedings resolved in the immediately preceding fiscal year, in which the initial timeframe mandated by the Bureau for the issuance of Administrative Law Judge decisions was extended, and the average number of times the prescribed timeframe was extended.

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AFSA appreciates the opportunity to comment on the Rules and is happy to discuss them further. Please contact me by phone, 202-466-8616, or email, bhimpler@afsamail.org, with any questions.

Sincerely,



Bill Himpler

Executive Vice President

American Financial Services Association