

April 8, 2022

The Hon. Rohit Chopra
Comment Intake—Rules of Practice for Adjudication Proceedings
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

*Re: Procedural rule to update its Rules of Practice for Adjudication Proceedings (Rules of Practice)
Docket No. CFPB-2022-0009 or RIN 3170-AB08*

Dear Director Chopra:

The American Financial Services Association (“AFSA”)¹ is pleased to have the opportunity to comment on the Consumer Financial Protection Bureau’s (“the CFPB”) proposed update to its Rules of Practice for Adjudication Proceedings.

We are concerned that this procedural rule will be adopted without stakeholder input and changes. AFSA is unaware of any extant emergency requiring rule changes without stakeholder input. We note the Summary preamble states: “The Bureau welcomes comments on this rule, and the Bureau may make further amendments if it receives comments warranting changes.”

While this rule is exempt from the notice-and-comment rulemaking requirements of the Administrative Procedure Act, we believe it would be far better and economical to seek input before changing something as important as the rules under which adjudication of vital issues is undertaken.

1. Rule 204(c) relating to bifurcation is overly broad.

The CFPB differs from most federal enforcement agencies in that it is directed by a single appointee. There are no commissioners as are found in the Federal Trade Commission or the Securities and Exchange Commission. Neither are board members as on the Federal Reserve Board or the Federal Deposit Insurance Corporation.

Instead, Congress chose to put the CFPB in the hands of a single director. The result of this extraordinary grant of authority was described this way by the U.S. Court of Appeals for the District of Columbia:

“Because the CFPB is an independent agency headed by a single director and not by a multi-member commission, the director of the CFPB possesses more unilateral authority – that is, authority to take action on one’s own, subject to no check – than any single commissioner or board member in any other independent agency in the U.S. Government.”²

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.

² *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. 2018). We note that challenges to the Constitutional deficiencies of the Bureau continue. See: *CFPB v. All American Check Cashing, Inc.*, 952 F. 3d 591 (5th Cir. 2020).

This grant of authority to a single individual colors the actions of the Bureau. In the CFPB’s—still relatively brief history—the agency has caromed between competing ideologies. It cannot be a surprise to the staff conducting this process that the founding director, a long-term acting director, and two confirmed directors reflected and now reflect differing policy agendas.³

Rule 204(c) provides for the bifurcation of proceedings at the sole discretion of the Director, “if the Director determines that it would promote efficiency in the proceeding *or for other good cause.*” (Emphasis added).

This change is justified by noting bifurcation “is a standard case-management tool available to Federal district courts.” But the Director is not an impartial Federal judge. The Director sets the policy agenda, decides enforcement priorities, and has used the bully pulpit of the media to further that agenda. For example, Director Chopra has clearly stated his interest in developing jurisprudence on the scope of potential abusiveness found in Section 1031 of the Dodd Frank Act. That is well within his role as an agency head to direct public policy and set agendas. But it is difficult to believe, in a case which factually may be a close call, he would not bifurcate a case to obtain a public result supporting his agenda.

Under Rule 204(c), the Director can now bifurcate a proceeding and rule on dispositive motions *without* waiting for a decision by an initial and impartial hearing officer.

Yet the request for comment describes no failures by hearing officers to act in a timely basis, and it suggests no other dilatory actions by hearing officers. No basis is provided as to why the Director needs this additional authority. The director continues to discuss the need for fairness and transparency in lending, services, and related matters. However, the director in taking this new and novel approach disregards fairness and transparency.

Absent an answer to this question; we urge the Bureau to withdraw Rule 204(c).

2. Rule 206 should not be used to throttle FOIA requests relating to the underlying subject matter of litigation.

Rule 206 discusses categories of documents that may be withheld or information that may be redacted during the discovery. AFSA recognizes the need for the Bureau to redact certain categories of information, but we are concerned the provisions relating to sensitive information invite the Bureau to further block requests for information under the Freedom of Information Act (“FOIA”).⁴

AFSA’s FOIA experience with the Bureau has not been the easiest or most fruitful. A March 10, 2014 request for information relating to statistical disparate impact methodology, including the proxy method, the standards, thresholds, and metrics used by the CFPB related to indirect auto lending was woefully incomplete.

The Bureau refusing to provide these materials—used to support well-publicized litigation against auto lenders, claiming that these metrics were protected by the Deliberative Process Privilege Exemption to FOIA as well as invoking exemptions governing the protection for disclosure of information used for investigatory and law enforcement purposes.

³ The CFPB even had a self-proclaimed Director—the administrative law equivalent of an Anti-Pope. See Renae Merle, *The CFPB Now Has Two Acting Directors. And Nobody Knows Which One Should Lead the Federal Agency*, Wash. Post (Nov. 24, 2017).

⁴ 5 U.S.C. § 552 *et seq.*

Like Rule 206, this allowed the Bureau to conceal information which would allow other consumer creditors to develop robust compliance programs and hindered compliance with statutes, regulations, or policies that supports enforcement actions.

Recognizing the need for confidentiality, we urge the Bureau to follow Attorney General Garland's March 15, 2022 Memorandum on FOIA which noted:

"Information that might technically fall within an exemption should not be withheld from a FOIA requester unless the agency can identify a foreseeable harm or legal bar to disclosure. In case of doubt, openness should prevail. Moreover, agencies are strongly encouraged to make discretionary disclosures of information where appropriate."⁵

As a financial services regulatory agency, the Bureau has both a general regulatory function seeking industry compliance with federal law and public policy as well as an enforcement function. AFSA urges the Bureau to ensure Rule 206 is not misused to hide vital information that would assist industrywide compliance programs.

AFSA appreciates the opportunity to provide feedback on the Bureau's Rules of Practice. Please contact me by phone, 202-776-7300, or email, cwinslow@afsamail.org, with any questions.

Sincerely,

A handwritten signature in black ink that reads 'Celia Winslow'. The signature is written in a cursive, flowing style.

Celia Winslow
Senior Vice President
American Financial Services Association

⁵ Office of the Attorney General, *Freedom of Information Act Guidelines, Memorandum for Head of Executive Departments and Agencies* (March 15, 2022).