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Submitted electronically

May 7, 2018

The Honorable J. Michael Mulvaney
Acting Director
Bureau of Consumer Financial Protection
1700 G Street, N.W.
Washington, DC 20552

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

Dear Acting Director Mulvaney:

The Independent Community Bankers of America (ICBA)¹ welcomes the opportunity to provide comment on the Bureau of Consumer Financial Protection's (BCFP or Bureau) request for information (RFI) regarding its rules of practice for adjudication proceedings. As noted in response to the Bureau's RFI regarding civil investigative demands, ICBA and community banks appreciate this wholistic review of the Bureau's policy, structure, and rulemakings. These are important matters that will enable the BCFP to achieve its statutory objectives more effectively.

While the BCFP considers amendments to its rules of procedure, ICBA advocates that the Bureau not only adopt the procedural improvements recently made by other agencies, but also incorporate the recommendations made below. If implemented, these changes will create a fairer and more equitable adjudicative process that will set the standard for other federal adjudicative bodies. Specifically, ICBA urges the Bureau to establish clear 'rules of the road,' provide forum choice, broaden procedural deadlines, expand discovery, limit hearsay, and increase the confidentiality for hearings.

¹ The Independent Community Bankers of America®, the nation's voice for nearly 5,700 community banks of all sizes and charter types, is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education and high-quality products and services. With nearly 52,000 locations nationwide, community banks employ 760,000 Americans, hold \$4.9 trillion in assets, \$3.9 trillion in deposits, and \$3.3 trillion in loans to consumers, small businesses, and the agricultural community. For more information, visit ICBA's website at www.icba.org.

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Background

Enacted in 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) gives the Bureau broad authority to seek legal and equitable relief through enforcement actions, including civil penalties and restitution, and permits the Bureau to adjudicate those actions through the use of administrative hearings.² The Act also permits the Bureau to set rules that govern the procedure of administrative hearings, as authorized under the Administrative Procedures Act (APA).³ These rules govern every facet of a hearing, including the commencement of the action, pleadings, motions, discovery, and timing requirements.

In July 2011, the Bureau issued interim final rules to govern its adjudication proceedings,⁴ then finalized those rules in June 2012 after receiving stakeholder comments.⁵ The Bureau modeled its own rules on the uniform rules and procedures for administrative hearings adopted by the prudential regulators under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), the Rules of Practice for Adjudicative Proceedings adopted by the Federal Trade Commission (FTC), and the Rules of Practice adopted by the Securities and Exchange Commission (SEC or Commission).

In the final rule's preamble, the Bureau frequently referenced these models in justifying its approach. The preamble noted that other agencies attempted to make the process less protracted, and more efficient and effective.⁶ The Bureau stated that it similarly aimed to "strike an appropriate balance between the need for fair processes and [...]the desire for efficient and speedy resolution of matters...".⁷

ICBA Comments

Executive Summary

Nearly 6 years after its final rule, the BCFP's RFI acknowledges that the current administrative adjudication process can result in undue burden, impacts, or costs on the parties that are subject to the proceedings. The Bureau is issuing this RFI to seek public comment on whether and how it might improve its administrative adjudication processes while still achieving its statutory purposes and objectives. To that end, ICBA offers the following recommendations.

² 12 U.S.C. §§ 5563, 5564, 5565.

³ 5 U.S.C. § 500, et seq.

⁴ 76 Fed. Reg. 45338 (July 28, 2011).

⁵ 77 Fed. Reg. 39058 (June 29, 2012).

⁶ *Id.*

⁷ *Id.*

1. *Establish Clear Rules* - ICBA recommends that the BCFP work with appropriate industry stakeholders to develop authoritative written guidance that provides clear examples of permitted and forbidden practices.
2. *Provide Forum Choice* - ICBA recommends that the Bureau promulgate a rule or framework that provides an avenue for civil hearings when respondents seek the benefit of well-established procedures and due process protections provided in the Federal Rules of Civil Procedure (FRCP) and Federal Rules of Evidence. Justice will still be sought and served regardless of whether an action is brought in Federal court or in an administrative proceeding.
3. *Broaden Procedural Deadlines* - ICBA recommends that the BCFP strike regulatory language that needlessly disfavors extensions of time. Further, ICBA believes that the BCFP should establish procedural timeframes that mirror the Securities and Exchange Commission's (SEC) flexibility, depending on the complexity of the case, so that parties have proper time to prepare. However, the Bureau should recognize that administrative actions are subject to statutes of limitation, just as they would be if brought in Federal court.
4. *Enhance Discovery* - ICBA encourages the Bureau to afford respondents with opportunities to develop the record through depositions. ICBA recommends that BCFP zealously disclose exculpatory information and not wait until requested by a respondent.
5. *Conform to Federal Rules Regarding Admissibility of Evidence* - ICBA recommends that the Bureau adopt the standards laid out in the Federal Rules of Evidence and prohibit the use of hearsay evidence to prove the truth of the matter asserted.
6. *Increase Hearing Confidentiality* - ICBA recommends that the BCFP adopt the pragmatic approach of granting protective orders against disclosure of confidential information when the harm of disclosure outweighs any perceived public benefit.
7. *Reassess Use of Inferior Officers* - ICBA recommends that the Bureau examine its practice of hiring administrative law judges (ALJ) and determine compatibility with recent court decisions.

Establish Clear Rules

ICBA stresses the importance of clear rules and regulations, especially regarding allegations of unfair, deceptive, or abusive acts or practices (UDAAP). Clear regulations are a more efficient and fair way of achieving public policy goals.

Aside from the fact that notice and comment rulemaking is a fundamental principle in due process, clear regulations would obviate the need for many adjudicative hearings and reduce burden for all involved parties.

Reliance on enforcement actions in place of issuing rules and other authoritative guidance creates significant concerns for community banks which do not have teams of attorneys and compliance professionals to parse the BCFP's many decisions for compliance risk. ICBA recommends that the BCFP work with appropriate industry stakeholders to develop authoritative written guidance that provides clear examples of permitted and forbidden practices.

Provide Forum Choice

The Bureau has the option to pursue an enforcement action as a civil matter in a Federal court or by commencing an administrative action using the Bureau's adjudicative authority.⁸ While this RFI seeks feedback on the rules and procedures governing the administrative option, the choice of forum is an important factor to consider. Unfortunately, there is currently no framework that determines whether an action is brought in civil court or through an administrative hearing. Additionally, no option exists for a respondent to remove a matter to Federal court.

Certain venues confer differing benefits. As the Bureau recognized in the preamble to the final rule, an adjudicative hearing can provide the benefit of a quicker and less costly resolution than a full civil hearing.⁹ However, the current construct of the Bureau's administrative hearing holds many downsides, such as limited discovery. Surely there are situations that warrant full civil hearings for respondents that seek the benefit of well-established procedures and due process protections provided in the Federal Rules of Civil Procedure (FRCP) and Federal Rules of Evidence. ICBA recommends the Bureau promulgate a rule or framework that provides an avenue for civil hearings when such situations arise.

This framework should explain what factors are considered in deciding the adjudicative forum. Recently, the SEC acknowledged that while there is no rigid formula dictating the choice of forum, it considers several factors depending on specific facts and circumstances when choosing the forum. The SEC published a memo which highlights four of these factors.¹⁰

The first factor examines the availability of the desired claim and form of relief in each forum, such as the presence of exigent circumstances. The second factor considers whether the charged party is under the SEC's supervisory authority, explaining that the Commission might have the expertise that a court lacks. The third factor is consideration of the efficient and

⁸ 12 U.S.C. §§ 5563, 5564, and 5565.

⁹ *Supra* note 5.

¹⁰ See Thomas Glassman, *Ice Skating up Hill: Constitutional Challenges to SEC Administrative Proceedings*, 16 J. Bus. & Sec. L. 47, 54 (2016), Available at: <http://digitalcommons.law.msu.edu/jbsl/vol16/iss1/2> (citing a SEC memorandum, *permalink* <http://perma.cc/QVQ2-AK9W>).

effective use of the Commission's resources. The final factor assesses which forum would bring about a fair, consistent, and effective resolution of securities law issues and matters. ICBA strongly urges the BCFP to establish a framework, subject to public comment, on how it determines the venue for particular matters.

Aside from the publication of a transparent framework, ICBA believes that the choice of venue is an important consideration in pursuit of a fair and equitable resolution to any dispute. ICBA recommends that BCFP liberally permit a respondent to remove an action to district court. Justice will still be sought and served regardless of whether an action is brought in Federal court or in an administrative proceeding.

Broaden Procedural Deadlines

The Bureau noted in the preamble to its final rule that it attempts to create an adjudicative process that provides expeditious resolution of claims while ensuring fair hearings.¹¹ Unfortunately, by overweighting expediency, the Bureau has shortchanged the fairness component.

Current Bureau rules provide that motions for extension of time are strongly disfavored and may only be granted after consideration of various enumerated factors.¹² ICBA encourages the Bureau to strike or modify this language. The hearing officer should consider extensions of time on a case by case basis, and the Bureau should broaden procedural deadlines where possible. Following are several procedural elements that would benefit from increased timeframes.

Scheduling Conference

BCFP regulations set forth the scheduling conference deadline and the issues to be discussed at the conference, such as the hearing date.¹³ Excluding cease and desist hearings which generally require a hearing date within a 30-60-day timeframe from the notice of charges, the statute is silent as to when a hearing must be scheduled.¹⁴

In order to provide fair and adequate time for both parties, ICBA recommends that the BCFP establish a timeframe that is flexible, depending on the complexity of the case, the number of respondents, and the use of depositions. This recommendation is supported by the recent actions of other adjudicative bodies that the Bureau emulated in its rulemaking.

For example, the SEC expanded its timeframe in 2016 to allow additional time before hearings are scheduled. Now, a hearing can be scheduled up to 10 months from the date of the Order

¹¹ *Supra* note 5.

¹² 12 C.F.R. § 1081.115.

¹³ 12 C.F.R. § 1081.203(b).

¹⁴ 12 U.S.C. § 1053(b).

Instituting Proceedings (similar to BCFP’s Notice of Charges).¹⁵ Previously, the prehearing timeframe only allotted up to four months from the Order date. ICBA urges the Bureau to follow suit and extend their timeframe for scheduling hearing dates so that all parties may properly prepare.

Answer to Charges

The Bureau’s rules require a respondent to answer a Notice of Charges within 14 days.¹⁶ When the interim final rule was finalized in 2012, the Bureau received comments that criticized the short timeframe to file an answer. The Bureau rebutted these arguments, in part, by noting the creation of the Notice and Opportunity to Respond and Advise (NORA) as mechanism to provide advance notice. The Bureau also referenced the practices of other regulators in defending its short deadline for a response.¹⁷ However, the Bureau’s rationale no longer holds merit and these arguments should be revisited.

One respondent to the interim final rule argued that it takes considerable time to review the Notice of Charges, investigate the allegations, determine the appropriate response, and draft an answer.¹⁸ The Bureau refused, asserting that a NORA notice should be adequate in providing respondents sufficient advance notice of a possible enforcement action, which would practically provide more time to respond that would be technically allowed in a service deadline. However, a NORA notice does not trigger the availability of discovery and affirmative disclosures that would otherwise be needed to provide an informed answer.

Aside from its reliance on NORA, the Bureau also stated that mandatory deadlines for the completion of certain stages of administrative proceedings is necessary to ensure that proceedings are expeditious and fair. Counter to this facial assertion, strict and inflexible deadlines are not fair. If extensions of time are strongly disfavored, as current Bureau policy states, then ICBA recommends the BCFP should either increase the standard response time or repeal the language that strongly disfavors extension of time. Having a short timeframe *and* language that disfavors extension unduly burdens respondents.

Relatedly, while the Bureau relies on standards set by other adjudicative bodies, it provides no justification to deviate from SEC’s standard of 20 days for an answer and the FRCP’s standard of 21 days.

Finally, the Bureau relies on statutory constraints as justification for its compressed timeline for adjudication proceedings. The preamble notes that Dodd-Frank requires a hearing to be held between 30 to 60 days after the service of the Notice of Charges.¹⁹ However, the Bureau’s

¹⁵ 81 Fed. Reg. 50211 (July 29, 2016).

¹⁶ 12 C.F.R. § 1081.201.

¹⁷ *Supra* note 5, at 39068.

¹⁸ *Id.*

¹⁹ *Id.*

reliance on this requirement is only correct in part. While Dodd-Frank does provide a prescriptive timeframe, that constraint only applies to ‘cease and desist’ proceedings, and not to every proceeding as the preamble cites.²⁰ It is improper to apply a limiting factor to general hearings when Congress intended for the constraint to only be applied to special circumstances.

ICBA urges the Bureau to revisit its statutory interpretation and acknowledge that such a compressed timeline is only mandated in cease and desist proceedings, which is more limiting on the flexibility that the Bureau has for general adjudicative proceedings. The Bureau has the statutory flexibility to extend the timeframe for hearings, which implicitly enables the Bureau to extend the deadline for answers.

Decisions

Under section 1081.400 of the Bureau’s regulations, the hearing officer will file a recommended decision in each case no later than 90 days after the deadline for filing post-hearing responsive briefs and in no event later than 300 days after service of the notice of charges. The 300-day timeframe was taken from the SEC’s rule and the 90-day timeframe was taken from the FTC. However, since the Bureau finalized its rule, the SEC has amended its own.

The SEC extended their timeframe to allow for the inclusion of depositions. Rather than requiring a hearing and decision within 300 days from the Commission’s Order Instituting Proceedings, the Commission grants a hearing officer has up to 120 days to come to a decision for the most complicated cases.²¹ ICBA strongly recommends that the Bureau follow suit and amend its regulations to provide a similar timing framework.

Time-Barred Actions

Under previous leadership, the Bureau contended that administrative proceedings are not subject to the same statute of limitations that are present in civil cases. The BCFP alleged that there is no statute of limitations for any BCFP administrative action to enforce any consumer protection law.

Fortunately, a D.C. Circuit Court panel found this interpretation of Dodd-Frank to be flawed, stating, “the Dodd-Frank Act incorporates the statutes of limitations in the underlying statutes enforced by the BCFP in administrative hearings.” This was a welcome decision that recognized that the Bureau is not a limitless power. However, there is currently no language or provision in

²⁰ 12 U.S.C. § 1053(b).

²¹ 17 C.F.R. §201.360(a)(2).

the current rules of procedure that acknowledge this limit. As such, ICBA urges the Bureau to amend its regulations in response to the Court's holding.

Enhance Discovery

Current BCFP regulations do not provide for traditional forms of pre-trial discovery, such as interrogatories and depositions.²² As explained in the preamble to the final rule, the Bureau believes that the marginal benefits of prehearing depositions are not justified by their likely cost in time and expense, and referenced the absence of depositions in other federal administrative proceedings.²³ It also explained its belief that the Bureau's affirmative disclosure of exculpatory evidence sufficiently justifies limiting discovery.²⁴ ICBA takes exception or has concerns with each of the rationales offered.

First, depositions are a powerful discovery tool. Depositions provide parties with the opportunity to learn the facts of a case and develop a strategy in response to allegations. Despite the availability of witness transcripts, respondents are at a disadvantage if they are not able to depose a witness before a hearing.

Second, in citing the absence of depositions in other administrative procedures, the BCFP should reconsider its stance in light of recent SEC actions. The SEC previously only allowed parties to depose material witnesses that were unavailable for the hearing. But in 2016, the SEC changed course and opted to allow up to three persons to be deposed in single-respondent, 120-day proceedings.²⁵

While ICBA understands that Bureau enforcement actions are premised on evidentiary records that are generally available to respondents, we believe that a limited allotment of depositions could supplement the record. ICBA encourages the Bureau to adopt the SEC's revised approach and afford respondents additional opportunities to develop the record through depositions.

Finally, the affirmative disclosure of exculpatory evidence is not a sufficient replacement for full discovery. The Bureau's stated goal in adopting affirmative disclosure is to ensure that respondents have prompt access to the non-privileged documents underlying the BCFP's decision to commence enforcement proceedings, while eliminating the expense and time associated with pre-trial discovery.

The Bureau's Office of Enforcement has an affirmative obligation to provide access to materials gathered in the course of its investigation. However, the Bureau's rules do not require the Office of Enforcement to affirmatively disclose exculpatory information that is located in files of

²² *Supra* note 5, at 39059.

²³ *Id.*

²⁴ *Supra* note 5, at 39073.

²⁵ *Supra* note 15.

other divisions or offices of the Bureau. The Office of Enforcement is only required to turn over material exculpatory information in the Office of Enforcement's possession.

While ICBA does not expect every department in the Bureau to scrounge every record it might have on a respondent, ICBA recommends that BCFP zealously disclose exculpatory information. Under the *Brady* standard, the government's duty should reflect the fact that the administration of justice suffers when any accused is treated unfairly, and that winning should not be sought at all costs, but that the government wins whenever justice is done.²⁶

ICBA supports the BCFP seeking justice by liberally applying the *Brady* standard to its own internal policy and adjudicative procedures by conferring a duty on the enforcement team to reasonably pursue and disclose exculpatory evidence held by other divisions, in addition to the Enforcement Division. Further, ICBA advocates that the Enforcement Division affirmatively disclose all non-privileged information, exculpatory, neutral, or otherwise. BCFP should not wait until the respondent's request before providing the information.

Conform to Federal Rules Regarding Admissibility of Evidence

Current Bureau rules allow for the admissibility of hearsay, which is a direct contravention of the prohibition of its use in Federal hearings under the rules set forth in the Federal Rules of Evidence. The general inadmissibility of hearsay evidence is a longstanding tenet designed to increase accountability and protect against violations of due process. The total lack of any limit on its use in an administrative hearing is worrisome. ICBA recommends that the Bureau adopt the standards laid out in the Federal Rules of Evidence.

Increase Hearing Confidentiality

The Bureau modeled its confidential information and protective orders rules on the FTC's rules rather than on the SEC's. The FTC rules provide that a hearing officer may grant a protective order only upon a finding that public disclosure will likely result in a clearly defined, serious injury to the person requesting confidential treatment, or after finding that the material constitutes sensitive personal information. The SEC's standard similarly provides that documents and testimony introduced in a public hearing are presumed to be public. But in contrast to the FTC standard, a motion for a protective order shall "be granted only upon a finding that the harm resulting from disclosure would outweigh the benefits of disclosure."

The Bureau chose the FTC's standard rather than the SEC's, believing that the FTC's standard comports with the Bureau's goals of balancing the public's interest. The Bureau also explained that like FTC adjudications, these are civil matters.

²⁶ *Brady v. Maryland*, 373 U.S. 83 (1967).

However, the FTC is limited to cease and desist actions without court intervention and approval.²⁷ In contrast, the Bureau has the authority to issue civil money penalties. Although there is a rational basis for adjudicating cease and desist matters *pari passu* with the FTC's practices, that same logic does not hold with civil money penalty determinations. ICBA recommends that the BCFP adopt the SEC's more pragmatic approach of simply weighing the harm of disclosure against the benefit.

Reassess Use of 'Inferior Officers'

Constitutional challenges to the SEC's practices for hiring Administrative Law Judges (ALJ) are currently pending. Regardless of the eventual outcome of cases that are being litigated as of the date of this letter, significant concerns remain. In particular, respondents could doubt the reliability or finality of a decision made by an ALJ if current practices are found to be invalid. ICBA recommends that the Bureau examine its own use of ALJs and determine whether its hiring practices should be revised to assuage any concern.

Conclusion

ICBA applauds the Bureau's review efforts. We are optimistic that the result will lay the groundwork for a more measured and tailored approach to promulgating and enforcing consumer protection rules for subsequent BCFP administrations.

We look forward to providing additional feedback in response to the remaining RFIs. In the meantime, should you have any questions or would like to discuss anything further, please do not hesitate to contact me at Michael.Emancipator@icba.org or at 202-821-4469.

Sincerely,

/s/

Michael Emancipator
Assistant Vice President and Regulatory Counsel

²⁷ See 15 U.S.C. § 53(b), which authorizes the Commission to seek preliminary and permanent injunctions to remedy "any provision of law enforced by the Federal Trade Commission." Even where the Commission determines through adjudication or rulemaking that a practice is unfair or deceptive, the Commission must still seek the aid of a court to obtain civil penalties or consumer redress for violations of its orders to cease and desist or trade regulation rules.