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May 4, 2018

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:

On behalf of America's credit unions, I am writing in response to the Consumer Financial Protection Bureau's (CFPB or Bureau) Request for Information (RFI) Regarding Bureau Rules of Practice for Adjudication Proceedings. The Credit Union National Association (CUNA) represents America's credit unions and their 110 million members.

The CFPB has requested additional information concerning whether and how to amend the Bureau's Rules of Practice for Adjudication Proceedings. In response to this RFI, CUNA offers the following comments.

## **I. Executive Summary.**

CUNA and its membership have observed since the Bureau's inception in 2011, that its Rules of Practice for Adjudication Proceedings have room for improvement.

- The CFPB should issue a rule mandating that the statutes of limitations for Administrative Adjudications be the same as for federal court proceedings.
- Rule 206 governing the Bureau's file disclosure can be unfair in practice.
- Rule 110 does not prevent Bureau employees from providing ex parte information to the Bureau Director during the pendency of the adjudication.
- Rule 119 regarding confidentiality protections are unwieldy and could result in unwarranted disclosure of confidential information.

## **II. Credit Unions' Roles in Administrative Adjudications.**

CUNA appreciates the opportunity to comment on the Bureau's Rules of Practice for Adjudication Proceedings. CUNA is the largest trade association in the United States serving America's credit unions. With its network of affiliated state credit union associations, CUNA serves over 5,550 credit unions, which are owned by 110 million members collectively. Credit unions, which may be federally chartered or state chartered, are not-for-profit, tax-exempt

organizations that are owned and operated by their members and operate for the benefit of their members. In contrast, banks and savings associations are for-profit financial institutions that are either investor owned or mutually owned by their customers.

Credit unions could be litigants in an administrative adjudication brought by the CFPB; however, credit unions are more likely to be witnesses or have discoverable information about the respondent's banking activities, which is later used in the administrative adjudication proceedings.

### **III. Basics of Administrative Adjudications.**

The Consumer Financial Protection Act (CFPA) authorizes the Bureau to conduct administrative adjudications in conformance with the Administrative Procedure Act (APA) at chapter 5 of title 5, United States Code.<sup>1</sup> The Bureau's enforcement office prosecutes these adjudications. Obviously, yet importantly, the Bureau may file an administrative Notice of Charges only to enforce compliance with the CFPA or any other federal laws that the CFPA authorizes the Bureau to enforce, including enumerated consumer laws and any regulations or orders prescribed under the CFPA.<sup>2</sup>

In a hearing, an administrative law judge (hearing officer) presides over the presentation of evidence and law by two or more opposing parties and issues a recommended decision.<sup>3</sup> Any party may appeal the recommended decision to the Bureau Director.<sup>4</sup> The CFPB Director will review the recommended decision and may adopt it in whole, in part, or not at all.<sup>5</sup> In the event a party fails to timely file a notice of appeal or perfect an appeal, the Director may either adopt the recommended decision as the Bureau's administrative adjudication decision or order further briefing with respect to any findings of fact or conclusions of law contained in the recommended decision.<sup>6</sup>

Once the Director issues the final decision, the Bureau or any party to the proceeding may appeal to a United States appeals court for either: (1) the circuit in which the principal office of the covered person party resides or (2) in the U.S. Court of Appeals for the District of Columbia Circuit.<sup>7</sup> Once the parties have perfected the appeal, the court can affirm, modify, terminate, or

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<sup>1</sup> 5 U.S.C. §500–596.

<sup>2</sup> 12 U.S.C. §5563(a)(1)–(2).

<sup>3</sup> See 12 C.F.R. Pt. 1081.

<sup>4</sup> 12 U.S.C. §5563(b)(4); 12 C.F.R. §1081.402.

<sup>5</sup> 12 C.F.R. §1090.405(c) (“In rendering his or her decision, the Director will affirm, adopt, reverse, modify, set aside, or remand for further proceedings the recommended decision and will include in the decision a statement of the reasons or basis for his or her actions and the findings of fact upon which the decision is predicated.”).

<sup>6</sup> 12 U.S.C. §5563(b)(3).

<sup>7</sup> 12 U.S.C. §5563(b)(4); see e.g., *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 15 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017) (the CFPB's single-director structure that permitted removal of the director only “for cause” is unconstitutional; therefore, the court severed the “for-cause” provision at 12 U.S.C. §5491(c)(3), which directs that the “President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.”).

set aside—in whole or in part—the Bureau Director’s order.<sup>8</sup> A panel of three judges decides the appeal. After receiving the appellate panel’s decision, any of the parties can move the court for *en banc* consideration—which requests that the entire court of appellate judges review the matter.<sup>9</sup>

#### **IV. CUNA Recommendations.**

##### **A. Administrative Adjudication Timing Should Be More Flexible.**

Efficiency was a predominant consideration in drafting the Administrative Adjudication Rule. In the 1990s, both the Securities and Exchange Commission (SEC) and the Federal Trade Commission (FTC) revised their administrative adjudication rules to make the process more efficient and effective. In drafting the Adjudication Rule, the Bureau considered and attempted to improve upon these rules and other agencies’ efforts to streamline their processes while protecting parties’ rights to fair and impartial proceedings.

The deadline most fundamental to the administrative adjudication process is the hearing officer’s deadline for issuing the “recommended decision” to the Director.<sup>10</sup> Rule 400 requires the hearing officer to file a recommended decision no later than 90 days after the deadline for filing post-hearing responsive briefs and in no event later than 300 days after the Notice of Charges.<sup>11</sup> In addition, Rule 101 permits the hearing officer or the Director to shorten periods established by the Adjudication Rule with the parties’ consent. This authority applies in proceedings where expedited hearings would serve the public interest or where the issues do not require expert discovery or extended evidentiary hearings.<sup>12</sup> CFPB Section 1053(b) allows expeditious proceedings.<sup>13</sup> These hearing are held no earlier than 30 days nor later than 60 days after the date of service of the Notice of Charges, unless an earlier or later date is set by the Bureau at the request of any party so served.<sup>14</sup>

But no Rule allows a longer adjudication timeline in cases with multiple parties or voluminous records. Rule 400(b) permits the hearing officer to request an extension to the overall 300-day deadline, but the Bureau’s intent is that such extensions will be requested by hearing officers and granted by the Director only in rare circumstances.<sup>15</sup> The Director will extend the deadline only if additional time is “necessary or appropriate in the public interest.”<sup>16</sup> In the Bureau’s first

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<sup>8</sup> 12 U.S.C. §5563(b)(4).

<sup>9</sup> On February 16, 2017, the U.S. Court of Appeals for the D.C. Circuit granted Respondent Consumer Financial Protection Bureau’s (CFPB) petition for rehearing *en banc* of *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. 2017). In doing so, the court vacated its prior order.

<sup>10</sup> 12 C.F.R. §1081.400(a). This section deviates from the analogous SEC Rules in that the SEC offers only one timeline rather than multiple “tracks” or timelines. *See* 17 C.F.R. §201.360. The 90-day timeframe is modeled on the FTC Rules, 16 C.F.R. §3.51(a).

<sup>11</sup> 12 C.F.R. §1081.400(a).

<sup>12</sup> *Id.* §1081.101.

<sup>13</sup> 12 U.S.C. §5563(b).

<sup>14</sup> *Id.*

<sup>15</sup> 12 C.F.R. §1081.400(b).

<sup>16</sup> *Id.*

administrative adjudication proceeding, the hearing officer issued a 105-page recommended decision in a matter that took about nine days of hearings and had over 200 filings.<sup>17</sup> Based on this example, the sheer complexity of the proceedings, without more, is unlikely to form the basis of a successful request for a deadline extension. Therefore, to defend itself on the merits, respondents are required to hire a team of outside counsel with the resources to meet these deadlines. This is unjust.

Stringent deadlines discriminate against small respondents because meeting the current deadlines is impossible for one person or a small entity with finite resources. Rule 400(b) should be amended to allow the hearing officer to request an extension to the overall 300-day deadline if doing so is necessary to provide respondents due process and is in the interests of justice.

### **B. The CFPB Should Issue a Rule Mandating Statutes of Limitations for Administrative Adjudications Be the Same as for Federal Court Proceedings.**

The CFPB should issue a rule that limits the statutes of limitations for administrative proceedings to the same limitations periods for actions in federal court. Some of the statutes under the CFPB's authority, such as the Real Estate Settlement Procedures Act (RESPA) and the Equal Credit Opportunity Act (ECOA), provide time limits on the governments' authority to bring an "action" in federal court, but do not specifically limit the time in which the CFPB must bring an administrative "proceeding." The impact of "actions" versus "proceedings" in statutes of limitations analyses has been the subject of litigation,<sup>18</sup> which causes considerable uncertainty. Relying on court rulings to establish a statute of limitations raises the possibility of circuit splits and a yo-yo effect as the issue is appealed.

A rule setting the statute of limitations the same for administrative proceedings as for federal court proceedings would provide certainty and clarity to both respondents and witnesses. Further, establishing the same statutes of limitations for administrative adjudications as federal proceedings assists financial institutions in deciding how long they must retain records.

### **C. Rule 206 Governing the CFPB's File Disclosure Can Be Unfair in Practice and Can Result in the Unwarranted Disclosure of Confidential Information.**

Rule 206 governing the CFPB's file disclosure in administrative adjudications requires rewriting.

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<sup>17</sup> Recommended Decision (Doc. 205), *In re PHH Corp.*, Admin. Proc. 2014-CFPB-0002, at 2 (Nov. 25, 2014).

<sup>18</sup> *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016), r'hearing en banc (No. 15-1177) (Jan. 31, 2018).

CFPB administrative adjudications have no interrogatories, document requests, or percipient witness depositions.<sup>19</sup> Rather, Rule 206 requires Enforcement to “make available for inspection and copying by any respondent documents obtained by Enforcement prior to the institution of proceedings, from persons not employed by the Bureau, in connection with the investigation leading to the institution of proceedings.”<sup>20</sup> In essence, Enforcement turns over its entire investigative file with a few exceptions for “documents that may be withheld.” Documents in the file may include confidential or financial records from witnesses, such as credit unions.

Enforcement must make the documents available for inspection and copying at the Bureau’s offices “no later than seven days after service” of the Notice.<sup>21</sup> Thereafter, documents and testimony introduced in a public hearing, or filed in connection with an adjudication proceeding, are presumed to be public.<sup>22</sup>

The Rules that provide for the issuance of a protective order for confidential information are not well-designed for their purpose.<sup>23</sup> Rule 119(a) provides that any party who intends to disclose information obtained from a third party that is subject to a claim of confidentiality must provide notice to the third party at least ten days prior to the proposed disclosure of the information. If an agreement on the terms of the protective order cannot be reached within ten days, then the third party must intervene in the proceeding to file a motion requesting a protective order.<sup>24</sup> Thus, on the one hand, Rule 206 requires the CFPB to disclose documents within *7 days* of filing the notice of charges; on the other hand, Rule 119(a) requires that third-party witnesses are to receive *10 days* to decide whether to intervene to protect their records. The Bureau simply cannot follow both rules simultaneously.

Not only is this conflict untenable, ten days is an overly short time frame for a witness to understand the issues and decide to intervene. Delay could result in credit unions’ information being posted online for the general public to view before the credit union has the opportunity to agree to a protective order. These strict time limits are unworkable and impractical, and should be extended and streamlined so the Rules do not permit the unwarranted disclosure of any confidential information prior to the entry of a protective order.

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<sup>19</sup> The Adjudication Rule 209, *id.* §1081.209, does, however, provide for the deposition of witnesses unavailable for trial. Rule 208 authorizes the hearing officer to issue subpoenas for trial testimony. *Id.* §1091.208. Rule 210 allows limited expert witness discovery. *Id.* §2081.210. Compare to FED. R. CIV. P. 26, 30, and 31.

<sup>20</sup> *Id.* §1081.206(a)(1).

<sup>21</sup> 12 C.F.R. §1081.206(d)–(f). Enforcement staff have the discretion to make electronic copies of documents available. *Id.* §1081.206(f).

<sup>22</sup> *Id.* § 1081.119(c).

<sup>23</sup> *See id.* § 1081.119(a).

<sup>24</sup> *Id.* §1081.119(b).

**D. Rule 110 Does Not Prevent CFPB Employees from Providing *Ex Parte* Information to the Bureau Director During the Pendency of the Adjudication.**

The CFPB Administrative Adjudication Rule at 12 C.F.R. §1081.110 prohibits non-employees from engaging in *ex parte* communications with administrative proceeding decision makers, including the Director, but does not set the same rules for employees. In practice, when the Bureau's enforcement office initiates an administrative proceeding, the office erects an information "wall" between the adjudication's enforcement activities and the Bureau's front office. But there is no rule requiring the wall. Enacting a rule to prevent employee *ex parte* contacts would enhance the impartiality of the administrative adjudication. Therefore, the Rule should be amended to bar all *ex parte* communications with the Director, regardless of whether the *ex parte* communication is with a CFPB employee or not.

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CUNA respectfully urges the Bureau to address the issues we identified. On behalf of America's credit unions and their 110 million members, thank you for your consideration.

Respectfully submitted,

Elizabeth A. Eurgubian  
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