

May 4, 2018

By electronic delivery to:
www.regulations.gov

The Honorable J. Michael Mulvaney
Acting Director
Bureau of Consumer Financial Protection
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 Acting Director Mulvaney:

The American Bankers Association (ABA)¹ appreciates your leadership in exposing the policies and procedures of the Bureau of Consumer Financial Protection to public comment through the Request for Information (RFI) process. This process provides a transparent, efficient, and timely opportunity for all of those affected by the Bureau's work to help the Bureau identify how it might improve the way it pursues its important mission.

Like all government agencies, the Bureau must strike a balance that allows it to pursue its objectives without undermining other important values, including fairness to those it regulates. As you have noted, the Bureau works for everyone: "those who use credit cards, and those who provide those cards; those who take loans, and those who make them."² Unfortunately, the Bureau's early focus all too often has been on increasing the scope of its authority, rather than on instituting checks and balances to ensure that its authority is exercised wisely and fully for the benefit of consumers and consistent with law and due process. The Bureau's Rules of Practice for Adjudication Proceedings illustrate this pervasive problem, as they sacrifice fairness in the name of expediting enforcement actions.

ABA's goal throughout the RFI process will be to provide constructive feedback on the Bureau's policies and procedures. Our intent is that the Bureau implement programs and policies that are transparent, fully consistent with the law, and focused on promoting the interests of financial consumers in a strong, vibrant, and innovative market that offers the variety of financial products and services that consumers want.

Summary of Comment

Like too many aspects of the Bureau's legacy enforcement process, its administrative adjudication proceedings are designed to provide efficiency for the Bureau at the expense of

¹ The American Bankers Association is the voice of the nation's \$17 trillion banking industry, which is composed of small, regional, and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits, and extend nearly \$10 trillion in loans.

² Mick Mulvaney, Opinion, *The CFPB Has Pushed Its Last Envelope*, Wall St. J., (Jan. 23, 2018), <https://www.wsj.com/articles/the-cfpb-has-pushed-its-last-envelope-1516743561>).

fairness for the regulated, coupled with scant regard for consequences in the consumer markets. In emphasizing streamlining over due process, the Bureau's Rules of Practice for Adjudication Proceedings (Bureau Rules of Practice) reflect an approach to such proceedings that other agencies, such as the Securities and Exchange Commission (SEC), have since reformed. The D.C. Court of Appeals' decisive rejection of the way the Bureau handled its very first administrative proceeding under those rules³ underscores the need for reform at the Bureau.

These reforms should begin with the Bureau adopting written standards governing when it will bring an administrative proceeding rather than proceed in federal court. Moreover, once the Bureau decides to circumvent the judicial system, that choice should not deny respondents critical rights they would have in court. These rights include adequate time for a respondent to defend itself and the ability to conduct robust discovery. A Bureau that uses all the time and resources it needs to investigate and bring charges should not turn around and hamstring those who must respond to those charges.

ABA also believes that the Bureau should rethink the way it *conducts* its administrative proceedings, which proceedings presently ignore long-established norms of our legal system, including rules against hearsay evidence and the protection of statutes of limitations. If the Bureau is not prepared to make administrative proceedings fair, it should not use them at all.

The Bureau's Rules of Practice for Adjudication Proceedings

The Bureau Rules of Practice, finalized in 2012, were modelled on procedures adopted by other regulators, including the Securities & Exchange Commission (SEC) and the Federal Trade Commission (FTC).⁴ Like those agencies at that time, the Bureau focused on streamlining the administrative adjudicative process in the name of efficiency.⁵

That approach, however, preceded growing concern regarding the use of administrative proceedings, most prominently seen with regard to proceedings by the SEC. As the SEC signaled in 2014 its intent to increase its use of administrative proceedings to resolve enforcement actions that historically had been decided by federal courts, "it was as though a dam holding back pent up rage about the fairness of the Commission's administrative proceedings had suddenly burst."⁶ Those concerns were voiced early and prominently by Southern District of New York Judge Jed Rakoff in 2014.⁷ He explained that the combination of loose evidentiary standards and "an administrative law judge appointed and paid by the SEC"

³ See *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (2017), *reinstated in relevant part on reh'g en banc*, 881 F.3d 75 (2018).

⁴ CFPB, *Rules of Practice for Adjudication Proceedings*, 77 Fed. Reg. 39058 (June 29, 2012).

⁵ *Id.*

⁶ Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 Fordham Law Rev. 1143, 1148 (2016) (Grundfest). See also *id.* at 1156-1168 (collecting criticisms); Alexander Platt, SEC Administrative Proceedings: *Backlash and Reform*, The Business Lawyer, Vol. 71, Winter 2015-16.

⁷ The Honorable Jed S. Rakoff, Practising Law Institute Securities Regulation Institute Keynote Address: *Is the SEC Becoming a Law unto Itself?* (Nov. 5, 2014), (Rakoff Speech), <https://securitiesdiary.files.wordpress.com/2014/11/rakoff-pli-speech.pdf>.

made it “hardly surprising” that the SEC won all of its administrative cases in a given year.⁸ Moreover, he argued that such a closed process was “unlikely . . . to lead to as balanced, careful, and impartial interpretations [of law] as would result from having those cases brought in federal court.”⁹ In short, Judge Rakoff argued that the SEC’s use of administrative proceedings created the risk of an agency becoming “a law unto itself.” The SEC took notice of these critiques, and modified its Rules of Practice in 2016.¹⁰

The Bureau should closely review those changes, as the SEC revised several of the rules that the Bureau had emulated. For example, the SEC rule that served as a model for the Bureau rule discouraging depositions¹¹ was revised to allow multiple depositions.¹² On that issue and others, the Bureau should determine whether the SEC went far enough in responding to concerns about the fairness of administrative proceedings.

The Bureau’s Experience with Administrative Adjudication

The very first Bureau administrative proceeding vividly illustrates some of the problems with such proceedings. In *CFPB v. PHH*, the Bureau alleged that PHH violated the Real Estate Settlement Procedures Act (RESPA). In January 2014, the Bureau decided to initiate an administrative proceeding against PHH.¹³ The administrative law judge found for the Bureau and ordered \$6.4 million in disgorgement. PHH took the only appeal it could—to Bureau Director Richard Cordray. Unsurprisingly, the Director upheld the administrative law judge’s decision. In what appeared to some to be a rebuke to the respondent for even appealing, Director Cordray ordered \$109 million in disgorgement, in part by finding that the statute of limitations was unavailable in the administrative forum.¹⁴ There was little reassurance from this process that appealing within the Bureau’s processes was a likely path for relief from abuse.

Only after the Director’s ruling was PHH allowed to appeal to Federal court. Despite the Bureau’s claim that its Director was entitled to deference,¹⁵ a panel of the Court of Appeals eviscerated Director Cordray’s ruling. On RESPA, the panel opinion found that the Director’s reading of the relevant regulation was “facially nonsensical,”¹⁶ and his decision to apply that

⁸ *Id.* at 7.

⁹ *Id.* at 11.

¹⁰ Amendments to the Commission’s Rules of Practice, 81 Fed. Reg. 50212 (July 29, 2016) (to be codified at 17 C.F.R. § 201).

¹¹ 81 Fed. Reg. 39076 (June 15, 2016).

¹² 81 Fed. Reg. 50215 (July 29, 2016).

¹³ See generally *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F. 3d 1 (D.C. Cir. 2016), *judgment vacated* (2017), *reinstated in part* (2018).

¹⁴ See Decision of the Director (Public Version), *In the Matter of PHH Corporation*, Admin. Proc. File No. 2014-CFPB-0002 at 10-12, https://files.consumerfinance.gov/f/201506_cfpb_decision_by_director_cordray_redacted_226.pdf

¹⁵ *PHH Corp.*, 893 F.3d at 50.

¹⁶ *Id.* at 41, 45.

reading retroactively was “a serious due process violation.”¹⁷ Similarly, the court found that the Director’s refusal to observe the statute of limitations was “flatly wrong.”¹⁸

It very well may be that the Bureau’s treatment of PHH, and the Bureau’s rebuff from the court, informed Acting Director Mulvaney’s announcement that the Bureau will stop “pushing the envelope” on enforcement matters.¹⁹ This commitment also counsels against the Bureau’s use of administrative proceedings. A Bureau that hesitates to bring “the full weight of the federal government down on the necks of the people we serve”²⁰ should also hesitate to box them into a forum that forces them to litigate their case against the Bureau before an Administrative Law Judge and then appeal to the Bureau Director. If the American tradition of fairness to the accused requires that litigation be a “final, last resort,”²¹ then the Bureau should consider whether it *ever* makes sense to impede defendants’ opportunity to defend themselves in court.

Reforming Administrative Adjudication

Reforming administrative adjudication requires that the Bureau strike a new balance between efficiency and fairness. The Bureau repeatedly claims that it balances these goals, and that its process is designed to “provide for the expeditious resolution of claims while ensuring that parties who appear before the Bureau receive a fair hearing.”²² However, the Bureau cites the goal of “expeditious resolution” to justify a host of limitations on a respondent’s ability to defend itself in an administrative proceeding. For example, the Bureau rationalizes limiting appeals of dispositive motions as “most expeditious,”²³ denying discovery to eliminate “expense and delay,”²⁴ and disfavoring extensions as “necessary to ensure that these proceedings are expeditious and fair.”²⁵

It may be true that reducing a respondent’s ability to defend itself speeds the process. However, as Justice Felix Frankfurter once explained, “mere speed is not [a] test of justice. Deliberate speed is. Deliberate speed takes time. But it is time well spent.”²⁶ Indeed, the Bureau’s four years of fruitless wrangling with PHH demonstrates that moving quickly is not the same as making progress. When the Bureau has a genuine need for immediate adjudication of some issue, it may avail itself – like every litigant – of a judicial system that provides immediate injunctive relief where appropriate. In all other cases, the Bureau Rules of Practice should

¹⁷ *Id.* at 48.

¹⁸ *Id.* at 52 (The Bureau appealed this decision to the D.C. Circuit Court of Appeals en banc, which vacated the panel decision prior to rehearing, but then reinstated the portions of the panel opinion quoted herein); See *PHH Corp. v. CFPB*, 881 F.3d 75, 83 (D.C. Cir. 2018).

¹⁹ Mulvaney, *supra* note 2.

²⁰ *Id.*

²¹ *Id.*

²² 81 Fed. Reg. 39058 (June 15, 2016)..

²³ 81 Fed. Reg. 39058 (June 15, 2016).

²⁴ 81 Fed. Reg. 39059 (June 15, 2016).

²⁵ 81 Fed. Reg. 39065 (An extension may be granted only if “the moving party makes a strong showing that denial of the motion would substantially prejudice its case.”); 12 C.F.R. § 1081.115(b) (2012) (While nominally applicable to both sides of the proceeding, the Bureau has the luxury of choosing when it is ready to bring charges.).

²⁶ *First Iowa Hydro-Elec. Co-Op. v. Fed. Power Comm’n*, 328 U.S. 152, 188 (1946) (Frankfurter, J., dissenting).

reflect important values beyond speed alone, such as due process, that are the foundations of the Federal Rules of Civil Procedure.

The Decision to Bring Administrative Proceedings

As the *PHH* case makes clear, the Bureau's decision to bring its claims to an administrative proceeding rather than a court can have enormous consequences for the respondent. However, the respondent typically has no choice but to proceed in the forum chosen by the Bureau. Such unilateral power raises special concerns. As former SEC Commissioner Grundfest explained:

Typically, when a plaintiff selects a forum, the fact-finder is not in the plaintiff's employ, the appeal is not to the plaintiff itself, and the plaintiff does not control the rules governing the proceeding. The appearance of impropriety under these circumstances is clear, even if one believes that the administrative process is itself largely fair and efficient.²⁷

A decision of such importance should be governed by written standards rather than wholly unbounded discretion. Among other things, such standards would provide transparency and thereby help reduce bias from infecting the process. To that end, the SEC issued an explanation of the factors it considers in determining whether to bring an administrative action.²⁸ The Bureau should at least do the same.

Timing in the Administrative Proceeding

The Bureau Rules of Practice sharply limit the time available for a respondent to mount a defense. For example, once the Bureau files charges, the respondent has just 14 days to file an answer.²⁹ This tight deadline stands in stark contrast to the unlimited time available to the Bureau Staff to prepare the charges to be filed. By comparison, the time to respond to the Bureau in an administrative proceeding is less than the twenty days that defendants have for responding in federal court or before the Office of the Comptroller of the Currency or the SEC.³⁰ Similarly, extensions are "strongly disfavored" under the Bureau Rules of Practice, even where there is a showing of prejudice.³¹ In contrast, extensions may be granted for "good cause" in federal court.³²

The Bureau should review the timetable for administrative actions to ensure that it is genuinely fair to respondents and supportive of the interests of having all of the relevant facts and information available in the adjudication. In particular, we urge the Bureau to follow the example

²⁷ Grundfest, *supra* note 6, at 1153.

²⁸ Division of Enforcement, *Division of Enforcement Approach to Forum Selection in Contested Actions*, <https://www.sec.gov/divisions/enforce/enforcement-approachforum-selection-contested-actions.pdf> (last visited Dec. 2, 2016).

²⁹ See 12 C.F.R. § 1081.201(a) (2012).

³⁰ See, e.g., Fed. R. Civ. P. 12; 12 C.F.R. § 109.19 (2011) (OCC); 17 C.F.R. § 201.220 (2016) (SEC).

³¹ 12 C.F.R. § 1081.115(b) (The Bureau Rules of Practice require a "strong showing that the denial of the motion would *substantially* prejudice its case.") (emphasis added).

³² Fed. R. Civ. P. 6(b).

of the SEC and adopt a timeline for a final decision that is measured from the completion of dispositive motions rather than the filing of charges.³³ The SEC found that such a change – which need not change the outer time limit for the entire proceeding – would increase the flexibility of the administrative proceeding timeline to accommodate deposition discovery and additional time for prehearing preparation, promoting fairness for all.³⁴

Discovery in the Administrative Proceeding

The Bureau has extensive authority to compel the production of documents, answers to questions, written reports, and witness testimony prior to any administrative proceeding. In contrast, respondents in a Bureau administrative hearing do not have the right to conduct depositions of fact witnesses or propound interrogatories. The Bureau justifies these limitations on discovery by noting that it provides the respondent with the Bureau's investigative record.³⁵ However, that record was created to bring a case—not to defend one.

In particular, the Bureau has decided that requests by respondents to take pretrial depositions are “not justified by their likely cost in time, expense, collateral disputes and scheduling complexities.”³⁶ This is the same Bureau that may bring civil contempt charges against any witness who decides that a Bureau demand for that testimony is not justified by its likely cost in time and expense.³⁷ Instead of defending this lopsided approach to pre-hearing discovery, the Bureau should follow the lead of the SEC, which recently amended its Rules of Practice allow respondents to conduct depositions.³⁸

The Administrative Proceeding

In his recent *Wall Street Journal* editorial, Acting Director Mulvaney quoted a passage from *A Man for All Seasons*, in which St. Thomas Moore explains how laws should not be casually discarded:

This country is planted thick with laws, from coast to coast -- Man's laws, not God's -- and if you cut them down do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil the benefit of the law, for my own safety sake.³⁹

Unfortunately, one hallmark of the Bureau's administrative proceedings is the extent to which it jettisons long-standing norms designed to protect defendants. For example, the rule against hearsay evidence dates back five centuries,⁴⁰ but it has been discarded by the Bureau's Rules

³³ See Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50212, 50213 (July 29, 2016) (to be codified at 17 C.F.R. § 201).

³⁴ *Id.*

³⁵ 77 Fed. Reg. 39076 (June 29, 2012).

³⁶ *Id.*

³⁷ See 12 C.F.R. § 1080.10 (b)(2) (2012).

³⁸ 81 Fed. Reg. 50212 (July 29, 2016)

³⁹ Mulvaney, *supra* note 2.

⁴⁰ Wigmore, Evidence §§ 1364, 1365 (Chadbourn Rev. 1974).

of Practice.⁴¹ Similarly, “statutes of limitation . . . are found and approved in all systems of enlightened jurisprudence,”⁴² but the Bureau has argued that they are inapplicable when the Bureau pursues an administrative adjudication.⁴³

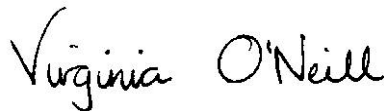
The Bureau’s administrative adjudication process also prevents a respondent from immediately going to federal court to protest the results of an administrative proceeding. Instead, the party being sued by the Bureau first must appeal to the Bureau Director who authorized the underlying enforcement action.⁴⁴ Added to this unpromising venue is the fact that the tone, content, and bottom line of Director Cordray’s *PHH* decision strongly suggest that such appeals are unlikely to be fruitful—and may be hazardous. Moreover, as Judge Rakoff explained with regard to the SEC, such a closed system can jeopardize “the impartial development of the law in an area of immense practical importance.”⁴⁵

Conclusion

In these and many other ways, the Bureau’s administrative adjudication process knocks down large swaths of the hedges of rules that protect all participants in our judicial system and that are designed to promote just results. In the short run, Bureau administrative proceedings pose the risk that financial institutions will be denied a fair opportunity to defend themselves. Unjust decisions that harm providers of financial services cannot fail to harm the consumers who rely upon that supply of financial services. Moreover, administrative proceedings under these rules will erode the Bureau’s credibility in the long run—both with the federal appeals courts that must eventually hear these cases and with the public at large. The *PHH* case demonstrates that the Bureau’s enforcement efforts can avoid neutral outside scrutiny for only so long, and that shortcuts may turn out to be costly mistakes.

ABA respectfully recommends that the Bureau reform its administrative proceedings to ensure that they provide the due process protections afforded by courts -- or simply decide always to trust those courts to hear the Bureau’s cases. If you have any questions about these comments or would like to discuss anything further, please contact Virginia O’Neill at 202-663-5073 or voneill@aba.com.

Sincerely,



Virginia O’Neill
Senior Vice President, Center for Regulatory Compliance

⁴¹ See 12 C.F.R. § 1081.303.

⁴² *Wood v. Carpenter*, 101 U.S. 135, 139 (1879).

⁴³ See *PHH Corp.*, 839 F.3d at 50.

⁴⁴ 12 C.F.R. § 1081.403.

⁴⁵ Rakoff Speech, *supra* note 6, at 11.