



Via Electronic Submission

May 4, 2018

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

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

Dear Ms. Jackson:

The Financial Services Roundtable<sup>1</sup> (“FSR”) and the Consumer Bankers Association<sup>2</sup> (“CBA”) appreciate the opportunity to comment on the Bureau of Consumer Financial Protection’s (the “CFPB” or “Bureau”) Request for Information Regarding Bureau Rules of Practice for Adjudication Proceedings (“RFI”). This comment letter responds to the Bureau’s request for whether and how the Bureau might improve its administrative adjudication processes, while continuing to achieve its statutory purposes and objectives.

FSR and CBA’s positions are largely consistent with those expressed in our joint comment letter submitted in response to the Bureau’s Interim Final Rules of Practice Governing

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<sup>1</sup> As *advocates for a strong financial future*<sup>TM</sup>, FSR represents 100 integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America’s economic engine, accounting directly for \$98.4 trillion in managed assets, \$1.1 trillion in revenue, and 2.4 million jobs.

<sup>2</sup> CBA is the only national financial trade group focused exclusively on retail banking and personal financial services—banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation’s largest bank holding companies as well as regional and supercommunity banks that collectively hold two-thirds of the total assets of depository institutions.

Adjudication Proceedings, Docket No. CFPB-2011-0006,<sup>3</sup> which we have included as an Appendix to this letter.

## **I. BACKGROUND**

The Dodd-Frank Act created the Bureau to “regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws.”<sup>4</sup> The Act requires the Bureau to prescribe rules establishing such procedures as may be necessary to carry out hearings and adjudications conducted pursuant to 12 U.S.C. § 5563. The Bureau noted that, in drafting the Rules of Practice for Adjudication Proceedings (“Rules”), it “endeavored to create an adjudicatory process that provides for the expeditious resolution of claims while ensuring that parties who appear before the Bureau receive a fair hearing.”<sup>5</sup>

Although FSR and CBA recognize the importance of expeditious resolution, it urges the Bureau to look to the Federal Rules of Civil Procedure (“FRCP”) and the Federal Rules of Evidence (“FRE”) as benchmarks for specific timelines, breadth of relevant discovery, and other procedural standards. FSR and CBA believe that alignment between the Bureau’s rules on administrative adjudications with the FRCP and FRE would allow respondents to have more clarity regarding the manner in which these proceedings are organized, as most respondents have familiarity with these two standards, and also would provide respondents with more of an ability to appropriately respond to potential charges.

## **II. Any Revised Rules Should Favor Fairness Over Expediency, in Order to Allow Respondents Additional Time to Prepare a Response to a Notice of Charges.**

Consistent with its prior letter, FSR and CBA urge the Bureau to amend the Rules to provide respondents with more time to prepare a response to a notice of charges. Currently, Section 1081.201 requires a respondent to file an answer to a notice of charges that “specifically respond[s] to each paragraph or allegation of fact contained in the notice,” while also requiring them to do so within just fourteen days. As we stated in our previous comment letter, reviewing the notice of charges, investigating the factual and legal allegations, determining the appropriate response, and finally, drafting an answer, takes a considerable amount of time. The failure of a respondent to file a timely answer is deemed a waiver of the right to appear and consent to the entry of an order granting the relief sought by the Bureau, an outcome that is unduly harsh in light of the short timeframe for submitting an answer.

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<sup>3</sup> Joint Comment Letter of the American Bankers Association, the Consumer Bankers Association, the Financial Services Roundtable, and the Mortgage Bankers Association (Sept. 26, 2011), <https://www.regulations.gov/contentStreamer?documentId=CFPB-2011-0006-0005&attachmentNumber=1&contentType=pdf>.

<sup>4</sup> 12 U.S.C. § 5491(a).

<sup>5</sup> Rules of Practice for Adjudication Proceedings, 77 Fed. Reg. 39,058, 39,058 (June 29, 2012).

## A. The Bureau Should Extend the Filing Deadlines for Answers to Notice of Charges

In light of the importance of the answer, it is only fair that respondents are provided with sufficient time to adequately investigate and prepare a well-informed submission. The existing tight timelines mean that a respondent might not have sufficient information to determine whether an admission would cause substantial prejudice. We urge the Bureau to recognize that the factual and legal issues to be determined in administrative enforcement actions are usually complex and the relief sought may be identical to that sought in a civil action. Therefore, the Bureau should not seek to impose unrealistic filing deadlines, and like the federal banking agencies, the Bureau should grant extensions of time “for good cause shown.” Indeed, we recommend that the Bureau look to the prudential banking regulators in general for guidance in balancing expediency with fairness. For example, the procedural rules of prudential banking regulators typically provide respondents with 20 days to file an answer. Notably, even with this additional response time, those regulators often receive requests for extensions of time, which they generally grant.

FSR and CBA further note that, in spite of the policy disfavoring the granting of requests for extensions to file responses, which we discuss below, in each instance where a respondent in a CFPB administrative enforcement action requested an extension, such extension was granted.<sup>6</sup> As such, we submit that the tight timeline for filing a response only serves to perpetuate unnecessary motion practice, resulting in a misallocation of resources that could otherwise be used to prepare for the case at hand.

While we understand that the underlying statutory regime calls for expediency in the resolution of administrative enforcement matters, expediency does not appear to be impacted by the accelerated filing of an answer. In the two cases where a CFPB Administrative Law Judge (“ALJ”) issued a Recommended Decision (*i.e.*, the cases did not result in a consent order), the respondents in one of the cases requested—and was granted—an extension to file its response, whereas the respondent in the other case filed the response in within the fourteen day timeline.

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<sup>6</sup> See, e.g., *In re* Auto Cash Leasing, LLC, Order Granting Motion to Extend Time to Answer Notice of Charges and to Hold Scheduling Conf., No. 2016-CFPB-0017 (Oct. 14, 2016), [https://www.consumerfinance.gov/documents/1241/2016-CFPB-0017\\_Document\\_013\\_10142016.pdf](https://www.consumerfinance.gov/documents/1241/2016-CFPB-0017_Document_013_10142016.pdf); *In re* Interstate Lending, LLC, Order Granting Respondents Motion to Extend Time to Answer Notice of Charges and Hold Scheduling Conf., No. 2016-CFPB-0018 (Oct. 3, 2016), [https://www.consumerfinance.gov/documents/1091/2016-CFPB-0018\\_Document\\_014\\_10032016.pdf](https://www.consumerfinance.gov/documents/1091/2016-CFPB-0018_Document_014_10032016.pdf); *In re* Oasis Title Loans, LLC, Order Granting Respondents Motion to Extend Time to Answer Notice of Charges and Hold Scheduling Conf., No. 2016-CFPB-0019 (Oct. 6, 2016), [https://www.consumerfinance.gov/documents/1211/2016-CFPB-0019\\_Document\\_011\\_10062016.pdf](https://www.consumerfinance.gov/documents/1211/2016-CFPB-0019_Document_011_10062016.pdf); *In re* Phoenix Title Loans, LLC, Order Granting Respondent’s Motion to File Response Beyond Deadline, No. 2016-CFPB-0020 (Nov. 4, 2016), [https://www.consumerfinance.gov/documents/1467/2016-CFPB-0020\\_Document\\_014\\_11042016.pdf](https://www.consumerfinance.gov/documents/1467/2016-CFPB-0020_Document_014_11042016.pdf); *In re* Presto Auto Loans, Inc., Order Granting Respondents Motion to Extend Time to Answer Notice of Charges and Hold Scheduling Conf., No. 2016-CFPB-0021 (Oct. 3, 2016), [https://www.consumerfinance.gov/documents/1155/2016-CFPB-0021\\_Document\\_015\\_10032016.pdf](https://www.consumerfinance.gov/documents/1155/2016-CFPB-0021_Document_015_10032016.pdf); *In re* Integrity Advance, LLC and James R. Carnes, Order Granting Motion of Extension of Time, No. 2015-CFPB-0029 (Dec. 1, 2015), [http://files.consumerfinance.gov/f/201512\\_cfpb\\_order-granting-motion-of-extension-integrity-advance-llc-james-r-carnes.pdf](http://files.consumerfinance.gov/f/201512_cfpb_order-granting-motion-of-extension-integrity-advance-llc-james-r-carnes.pdf).

Notably, in each of the cases, the Recommended Decisions were entered approximately ten months after the respective Notices of Charges were filed.<sup>7</sup>

### **B. The Bureau Should Amend the “Affirmative Disclosure” Process for Discovery**

The Rules’ “affirmative disclosure” process for discovery puts an additional strain on a respondent’s ability to sufficiently prepare an informed answer. Though the Office of Enforcement is required to make various documents available to a respondent for inspection and copying, pursuant to Section 1081.206(d), the Office is only *required* to make such information available to the respondent seven days after service of the notice of charges, unless otherwise ordered. This means that during half of the time that the respondent has to draft an answer, the respondent may not have access to material evidence relied on by the Bureau in its decision to initiate an enforcement action, and in order to review that evidence, a respondent must go to the Bureau, in person, and copy the Bureau’s files. FSR and CBA recommend that the Rules be amended to reflect the importance of the timely receipt of these materials.

### **C. The Bureau Should Withdraw its Policy of Disfavoring the Granting of Requests for Extensions to File Responses**

As an additional burden, the regulations explicitly disfavor the granting of requests for extensions to file responses.<sup>8</sup> FSR and CBA emphasize that the Bureau’s policy of disfavoring requests for extensions does not stem from any statutory language. Indeed, the language that the Bureau appears to use as the basis for its expedited timeline permits the Bureau to amend the timeline for the initiation of the proceedings “at the request of any party so served” by a notice of charges.<sup>9</sup> As such, FSR and CBA urge the Bureau to amend the Rule to eliminate the language requiring the “Director or the hearing officer [to] adhere to a policy of strongly disfavoring granting such motions, except in circumstances where the moving party makes a strong showing that the denial of the motion would substantially prejudice its case.”

## **III. The Bureau Should Produce Documents to Respondents in Electronic Form in the First Instance, at the Bureau’s Expense**

As noted above, Section 1081.206 requires the Bureau to make documents and materials available for copying or inspection by a respondent, and places the financial responsibility for the copying on the respondent. In light of the availability and efficiency of technological

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<sup>7</sup> See *In re Integrity Advance, LLC and James R. Carnes*, No. 2015-CFPB-0029, <https://www.consumerfinance.gov/administrative-adjudication-proceedings/administrative-adjudication-docket/integrity-advance/> (Notice of Charges filed on November 18, 2015; Recommended Decision filed on September 27, 2016); *In re PHH Corp. et al*, No. 2014-CFPB-0002, <https://www.consumerfinance.gov/administrative-adjudication-proceedings/administrative-adjudication-docket/phh-corporation/> (Notice of Charges filed on January 29, 2014; Recommended Decision filed on November 25, 2014).

<sup>8</sup> 12 CFR § 1081.115(b).

<sup>9</sup> 12 U.S.C. § 5563(b)(1)(B).

solutions for information sharing and discovery, we urge the Bureau to adopt, as a default, an electronic method of document production. This would also be more efficient and cost-effective. Moreover, adoption of a default electronic document production method could help speed up the process by which the Bureau is able to make documents available to a respondent, particularly in light of the short timeline for filing an answer.

**IV. The Rules Should Be Amended to Provide Respondents with More Expansive Discovery, Including the Ability to Issue and Enforce Subpoenas for Documents and Testimony Without Leave of the Hearing Officer.**

As we noted in our previous comment letter, the Rules do not permit respondents to take depositions (other than for witnesses unavailable for the hearing) or serve interrogatories, and subpoenas can only be enforced by the hearing officer. This, combined with the timeframe in which a respondent may receive discovery materials from the Bureau, places the respondent at a significant disadvantage as compared to the Bureau. Indeed, the Bureau does not need discovery, because it gathers relevant information from sources such as examinations, consumer complaints, and civil investigative demands, before initiating a proceeding.

In civil and criminal cases, this informational imbalance is addressed through the discovery mechanism. Indeed, the Supreme Court has said that where government action, including administrative action, “seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue.”<sup>10</sup> Here, in spite of the threat of penalties similar to those in civil cases, the Rules significantly restrict a respondent’s ability to defend itself. As a result, and to ensure that a respondent has the information necessary to adequately prepare for a hearing, we urge the Bureau to allow respondents to depose third parties who have direct knowledge of matters that are non-privileged, relevant, and material to the proceeding, to issue and enforce subpoenas for documents and testimony, and to serve third parties with interrogatories as necessary to ensure that a respondent has an adequate opportunity to marshal evidence in support of its defense.

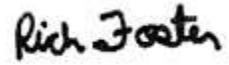
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If it would be helpful to discuss our specific or general views on the RFI, please contact [Richard.Foster@FSRoundtable.org](mailto:Richard.Foster@FSRoundtable.org) or [sziesel@consumerbankers.com](mailto:sziesel@consumerbankers.com). We appreciate your consideration and look forward to working with you on this important matter.

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<sup>10</sup> Goldberg v. Kelly, 397 U.S. 254, 270 (1970) (quoting Greene v. McElroy, 360 U.S. 474, 496-97 (1959)) (internal quotations omitted).

Sincerely Yours,

A handwritten signature in black ink that reads "Rich Foster". The signature is written in a cursive, slightly slanted style.

Richard Foster  
Senior Vice President & Senior Counsel for Regulatory and Legal Affairs  
Financial Services Roundtable

A handwritten signature in black ink that reads "Steven I. Zeisel". The signature is written in a cursive, slightly slanted style.

Steven I. Zeisel  
General Counsel & Executive Vice President  
Consumer Bankers Association

## APPENDIX A

September 26, 2011

**By electronic delivery to:**

[www.regulations.gov](http://www.regulations.gov)

Ms. Monica Jackson  
Office of the Executive Secretary  
Consumer Financial Protection Bureau  
1801 L Street, N.W.  
Washington, D.C. 20036

Re: Interim Final Rules on Investigations, Docket No. CFPB-2011-0007, and Interim Final Rules of Practice Governing Adjudication Proceedings, Docket No. CFPB-2011-0006

Ladies and Gentlemen:

The American Bankers Association,<sup>1</sup> the Consumer Bankers Association,<sup>2</sup> the Financial Services Roundtable<sup>3</sup>, and the Mortgage Bankers Association<sup>4</sup> (collectively, the

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<sup>1</sup> The American Bankers Association (ABA) represents banks of all sizes and charters and is the voice for the nation's \$13 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than \$165 million in assets.

<sup>2</sup> The Consumer Bankers Association (CBA) is the only national financial trade group focused exclusively on retail banking and personal financial services — banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include most of the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

<sup>3</sup> The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for \$92.7 trillion in managed assets, \$1.2 trillion in revenue, and 2.3 million jobs.

<sup>4</sup> The Mortgage Bankers Association (MBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership and extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, Wall Street

Associations) appreciate the opportunity to comment on the Consumer Financial Protection Bureau's (Bureau) Interim Final Rules on investigations<sup>5</sup> and the Interim Final Rules of Practice Governing Adjudication Proceedings.<sup>6</sup> Due to the close association between administrative investigations and adjudications, as well as the commonality of the concerns our members have with the proposed procedures for each, we are submitting one comment letter that addresses both interim final rules (collectively, the Rules).

We recognize that the resulting Rules are largely a blend of existing agency procedures and that the Bureau has applied those elements of existing procedural rules, often using identical language, that it believes will best promote administrative efficiency "while protecting parties' rights to fair and impartial proceedings."<sup>7</sup> Nevertheless, we offer the following comments to further improve upon the Rules to help ensure the reasonableness of civil investigative demands, the confidentiality of investigations, and that the Bureau's emphasis on speed and efficiency does not come at the expense of due process and does not impede the development of a fair and complete administrative record.

### **Comments on the Interim Final Rules on Investigations**

The interim final rules on investigations (Investigation Rules) are designed to implement the Bureau's authority to conduct investigations pursuant to section 1052 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (DFA).<sup>8</sup> As the Bureau notes in the supplemental materials, the Bureau drew most heavily from the FTC's nonadjudicative procedures in promulgating these rules.<sup>9</sup> The Investigation Rules are intended to describe the Bureau's authority to conduct investigations and the rights of persons from whom the Bureau seeks to compel information in response to a civil investigative demand (CID). Our comments focus on three areas of opportunity for improving the Investigation Rules: (1) timing of petitions to modify or set aside CIDs; (2) scope of CIDs; and (3) confidentiality protections.

1. *The Investigation Rules should be amended to provide that extensions of time to file a Petition modifying or setting aside a CID will be liberally granted.*

The Investigation Rules describe how an entity will be notified of an investigation; section 1080.5 provides that "Any person compelled to furnish documentary material, tangible things, written reports or answers to questions, or any combination of such

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conduits, life insurance companies and others in the mortgage lending field. For additional information, visit MBA's Web site: [www.mortgagebankers.org](http://www.mortgagebankers.org).

<sup>5</sup> 76 Fed. Reg. 45168 (July 28, 2011).

<sup>6</sup> 76 Fed. Reg. 45338 (July 28, 2011).

<sup>7</sup> *Id.* at 45338.

<sup>8</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1337, *to be codified at* 12 U.S.C. §1052.

<sup>9</sup> See 16 C.F.R. Part 2 *et seq.*

material ... shall be advised of the nature of the conduct constituting the alleged violation that is under investigation and the provisions of law applicable to such violation.”<sup>10</sup> Thus, a respondent’s first notice that it is the subject of an investigation may be upon receipt of a notice and a CID requiring production of a broad and exhaustive list of documentary material, tangible things, written reports and answers to questions, and prescribing the date, time, and place at which oral testimony will be required.<sup>11</sup> Experience with CIDs issued by the FTC demonstrates that CIDs are intentionally broad and open-ended, requiring respondents to undertake an extensive, labor-intensive and time-consuming review of policies, procedures, processes, operations, and record-keeping systems of the responding entity and its service providers to begin to identify the range of responsive materials, to determine what to produce, and to generate the necessary copies and reports. Often, these reviews are further complicated by the fact that mergers and acquisitions require the review of legacy operations and record-keeping systems which complicate efforts to access documents and to generate copies and reports.

The Investigation Rules state that a CID shall provide a “reasonable” period of time within which the material demanded is to be assembled and made available for inspection and copying. In addition, they authorize the Assistant Director of the Division of Enforcement (Assistant Director) “to negotiate and approve the terms of satisfactory compliance with civil investigative demands and, for good cause shown, [to] extend the time prescribed for compliance.”<sup>12</sup> Other provisions of the rule, however, work to limit the period of time within which a respondent must file a petition for an order modifying or setting aside a civil investigative demand, thereby undermining the requirement for a “reasonable” time to respond. Section 1080(d) requires that such a petition be filed within *twenty days* of service of the CID *or less*, if the return date on the CID is less than twenty days after service. Moreover, section 1080(d)(2) provides that requests for extension of time to file a petition are disfavored.<sup>13</sup>

Thus, in reality, respondents will need to complete the arduous and time consuming review and identification of responsive materials described above within approximately two weeks, leaving less than a week to make decisions about what documents are privileged or otherwise protected and to draft and file a motion articulating the legal and factual basis for all assertions of privilege and all objections to the scope and breadth of the demand.<sup>14</sup>

Anticipating the breadth of documents and information requested by CIDs, we believe that twenty days often will be an impossibly short period of time to complete these

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<sup>10</sup> 12 C.F.R. §1080.5.

<sup>11</sup> 12 C.F.R. §1080.6.

<sup>12</sup> §1080.6(c).

<sup>13</sup> §1080.6(d)(2).

<sup>14</sup> §1080.6(d)(1). In addition, section 1080(d)(1) requires that each Petition be accompanied by a signed statement representing that counsel has conferred with counsel for the Bureau in a good faith effort to resolve by agreement the issues raised by the Petition and has been unable to reach such an agreement.

tasks, yet the failure to do so will risk the disclosure of privileged or otherwise protected information. We also note that it is at odds with the underlying statute which clearly authorizes a date for filing a petition in excess of twenty days. DFA §1052 permits a “period exceeding 20 days after service ... as may be prescribed in writing, subsequent to service, by any Bureau investigator named in the demand.”<sup>15</sup> Finally, other provisions of section 1080.6 grant the Assistant Director general authority “to negotiate and approve the terms of satisfactory compliance with civil investigative demands, and for good cause shown, to extend the time prescribed for compliance.”<sup>16</sup>

Accordingly, the Associations urge the Bureau to delete the statement that extensions of time are disfavored and to expressly recognize that fairness and the parties’ mutual interests in developing a complete investigative record require liberal periods of time to respond to CIDs and, when necessary, to file a petition to modify or set aside the CID.

2. *The Investigation Rules should be amended to limit the scope of CIDs and to require that the Bureau confer with respondents to set expectations on what respondents are required to produce.*

To further ensure the efficiency of the process, and to provide protection to respondents against unreasonable and burdensome investigative demands, the Associations propose that the Bureau amend the language of section 1080.6 to state that a CID shall not be unreasonable or unduly burdensome and to require that all requests for documents, tangible things, written reports or answers to questions, and oral testimony be reasonably related to the matter under investigation and not excessive in scope.

In addition, building on section 1052(f)’s express authorization for extension of the time period for filing a petition, we suggest that within ten days of service of the notice and CID, the Bureau *require* a conference between the respondent and the Assistant Director to negotiate and approve the terms of satisfactory compliance. We envision a conference analogous to the discovery planning conference under the Federal Rules of Civil Procedure<sup>17</sup> at which the parties discuss the requests for information; appropriate limitations on the scope of requests; issues about the disclosure or discovery of electronically stored information, including the form in which it should be produced; issues regarding claims of privilege or the protection of confidential information; and a reasonable time period for compliance. We believe that such a conference will better ensure the prompt and efficient production of material and information germane to the investigation than the unilateral imposition of rigid time periods within which to comply with a CID or file a petition to modify the demand.

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<sup>15</sup> See 12 U.S.C. §1052(f)(1).

<sup>16</sup> §1080.6(c).

<sup>17</sup> See Fed. R. Civ. P. 26(f).

3. *The Investigation Rules should be amended to provide stronger confidentiality protections for respondents.*

As discussed at length in the joint comment letter filed by the Associations in response to the Interim Rule on the Disclosure of Records and Information,<sup>18</sup> we strongly urge the Bureau to provide the maximum protection for confidential and proprietary documents and information obtained from covered persons during the course of an investigation. Section 1080.14(a) provides: “Documentary materials and tangible things the Bureau receives pursuant to a civil investigative demand are subject to the requirements and procedures relating to the disclosure of records and information set forth in part 1070 of this chapter.” Without repeating our comments to the interim final rules on confidentiality, we refer the Bureau to the Associations’ comment letter, attached.

However, not only must the Bureau protect confidential and proprietary documents and information received during the course of an investigation from disclosure, the Bureau must also ensure the confidentiality of the investigation itself. To fail to permit an entity to respond to charges in a confidential setting risks inflicting significant reputational damage on the entity that cannot be undone, even if it is later found not to have committed the alleged violation. In addition, the failure to conduct investigations confidentially will increase litigation risk. The Investigation Rules, however, do not guarantee this confidentiality. Instead, section 1080.14(b) provides that “Bureau investigations *generally* are non-public. Bureau investigators may disclose the existence of an investigation to potential witnesses or third parties to the extent necessary to advance the investigation”(emphasis added). We urge the Bureau to delete this language and replace it with language similar to that of the FDIC, “Investigations conducted pursuant to section 10(c) shall be confidential.”<sup>19</sup>

Finally, section 1080.11 governs the disposition of investigations. Subparagraph (a) describes the Bureau’s authority to file a judicial or administrative enforcement action, and it concludes with the following statement, “Where appropriate, the Bureau also may refer investigations to appropriate federal, state, or foreign governmental agencies.” We urge the Bureau to amend this language to ensure the confidentiality of investigations and the materials in an investigative file. We do not support the referral of investigations and investigatory files except where expressly authorized by DFA Title X, the Consumer Financial Protection Act (CFPA). Thus, we urge the Bureau to amend section 1080.11 as follows, “When expressly permitted by the Consumer Financial Protection Act, any Enumerated Consumer Law, as defined in section 1002 of the Consumer Financial Protection Act, or other Federal law, the Bureau also may refer investigations to appropriate federal, state, or foreign governmental agencies.”

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<sup>18</sup> 76 Fed. Reg. 45,372 (July 28, 2011).

<sup>19</sup> 12 C.F.R. §308.147.

## Comments on the Interim Final Rules of Practice for Adjudication Proceedings

The interim final rules of practice for adjudication proceedings (Adjudication Rules) are intended to govern administrative proceedings brought under DFA section 1053 which authorizes the Bureau to use administrative adjudications to ensure or enforce compliance with the CFPA, rules prescribed by the Bureau under the CFPA, and any of the enumerated consumer laws or regulations the Bureau is authorized to enforce.<sup>20</sup> In the supplemental materials, the Bureau explains that it “endeavored to create a process that simultaneously provides for expeditious resolution of claims and ensures that parties who appear before the Bureau receive a fair hearing.”<sup>21</sup> In support of the expeditious resolution of claims, the Adjudication Rules set an ambitious 300-day time period (after service of the notice of charges) within which an adjudication must be resolved. This arbitrary time frame, in turn, requires all stages of the proceedings to be placed on an accelerated schedule, one that the Associations believe may compromise the fairness of the proceedings and the development of a complete administrative record. In particular, we note three shortcomings that appear to be driven by the 300-day timeframe currently set forth in the Adjudication Rules: (1) the time to file an answer or appeal an adverse decision; (2) the availability of extensions of time or other postponements or adjournments of proceedings; and (3) the scope of discovery afforded to respondents.

1. *The Adjudication Rules should be amended to provide respondents with at least 20 days to file an answer and 30 days to file a notice of appeal.*

Section 1081.201 requires a respondent to file an answer to the notice of charges, but it allows only 14 days for the respondent to do so. As the Bureau recognizes, the answer is important as it helps focus and narrow the matters at issue. Accordingly, section 1081.201 requires an answer to “specifically respond to each paragraph or allegation of fact contained in the notice,” and states that denials must “fairly meet the substance of each allegation of fact denied.”<sup>22</sup> Reviewing the notice of charges, investigating the factual and legal allegations, determining the appropriate response, and finally, drafting an answer takes a considerable amount of time; however, as stated above, the answer must be filed within 14 days of service of the notice of charges.<sup>23</sup> Moreover, the failure of a respondent to file an answer within the time provided is deemed a waiver of the right to appear and consent to the entry of an order granting the relief sought by the Bureau.<sup>24</sup>

As a practical matter, the Bureau’s proposed adoption of an “affirmative disclosure” process for discovery further limits the useful time available for preparing an answer. Pursuant to the affirmative disclosure discovery process outlined in these rules, the

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<sup>20</sup> 12 U.S.C. §1053.

<sup>21</sup> 76 Fed.Reg., *supra* at 45338.

<sup>22</sup> §1081.201(b).

<sup>23</sup> §1081.201(a).

<sup>24</sup> §1081.201(d)(1).

Division of Enforcement will provide any party to an adjudicative enforcement proceeding with an opportunity to inspect and copy certain non-privileged materials gathered during the course of an investigation, including documents gathered from other entities, and certain categories of non-privileged documents created by the Bureau. However, section 1081.206 imposes a seven day delay after service of the notice before the Division of Enforcement is required to make these documents available to the respondent. As a result, during half of the time that the respondent has to draft an answer, the respondent will not have access to material evidence relied on by the Bureau in its decision to initiate an enforcement action.

We note that the procedural rules of the federal banking agencies allow 20 days for the filing of an answer, and even with the extra time, respondents usually need – and are routinely granted – extensions of time. The Adjudication Rules, in contrast, shorten this time period by six days and strongly discourage motions for extension of time.<sup>25</sup> Similarly, the rules shorten another important time period, the time for filing a notice of appeal. Section 1081.402 provides that a party must file a notice of appeal with the Executive Secretary within 10 days of service of the hearing officer’s recommended decision, 20 days less than allowed by the federal banking agencies. The Associations urge the Bureau not to trade speed and efficiency for due process; we request that the Bureau grant respondents at least 20 days to file an answer and 30 days to file a notice of an appeal.

*2. The Adjudication Rules should be amended to permit extensions of time or other postponements or adjournments “for good cause shown.”*

In addition, we request that the Bureau delete section 1081.115(b) which directs the Director or hearing officer to “adhere to a policy of strongly disfavoring granting [motions for postponement, adjournment, or extension of time] except in circumstances where the moving party makes a strong showing that the denial of the motion would substantially prejudice its case” and describes the factors relevant to such a determination. Instead, we urge the Bureau to recognize that the factual and legal issues to be determined in administrative enforcement actions are usually complex and the relief sought may be identical to that sought in a civil action. Therefore, the Bureau should not seek to impose unrealistic filing deadlines, and like the federal banking agencies, we believe the Bureau should grant extensions of time “for good cause shown.”

*3. The Adjudication Rules should be amended to provide respondents with more expansive discovery.*

Similarly, the Associations urge the Bureau to reconsider its decision not to allow discovery except for the previously described “affirmative disclosure” required of the Bureau. Under the Adjudication Rules, there are no depositions (other than depositions

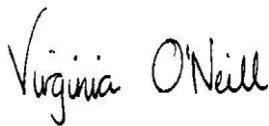
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<sup>25</sup> See §1081.115.

of witnesses unavailable for the hearing) or interrogatories, and subpoenas can only be enforced by the hearing officer. Clearly, this places the respondent at a significant disadvantage to the Bureau. After all, the Bureau does not need discovery; before initiating a proceeding, it will have gathered all of the information it needs through examinations and investigative proceedings as well as through its broad powers to collect consumer complaints and to collect information from covered persons.<sup>26</sup> Again, we caution the Bureau against choosing speed and efficiency over fairness and the development of a complete administrative record. We urge the Bureau to allow respondents to depose third parties who have direct knowledge of matters that are non-privileged, relevant, and material to the proceeding, to issue and enforce subpoenas for documents and testimony, and to serve third parties with interrogatories as necessary to ensure that a respondent has an adequate opportunity to marshal evidence in support of its defense

Thank you again for the opportunity to share our views with you on these important matters. If you have any questions, please feel free to contact any of the trade associations listed below.

Sincerely,



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<sup>26</sup> See 12 U.S.C. §1022.