

May 7, 2018

VIA ELECTRONIC SUBMISSION

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C., 20552

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

The Electronic Transactions Association (“ETA”) submits these comments in response to the Consumer Financial Protection Bureau (“CFPB”) Request for Information (“RFI”) Regarding Bureau Rules of Practice for Adjudication Proceedings.

ETA is the leading trade association for the payments industry, representing over 500 companies that offer electronic transaction processing products and services. ETA’s members include financial institutions, mobile payment service providers, mobile wallet providers, and non-bank online lenders that make commercial loans, primarily to small businesses, either directly or in partnership with other lenders. ETA member companies are creating innovative offerings in financial services, revolutionizing the way commerce is conducted with safe, convenient, and rewarding payment solutions and lending alternatives.

ETA and its members support the Bureau’s consumer protection mission. This mission, however, must be conducted in ways that comport with fundamental fairness and due process. The current framework for CFPB enforcement actions provides the Bureau with unilateral authority to bring identical cases in either federal court or the agency’s administrative forum. In this way, the CFPB may seek identical remedies regardless of whether it files actions in federal court or in its administrative forum.¹ However, unlike defendants in federal court, respondents in an administrative forum lack many due process protections.² Of particular concern, the Bureau has never provided rules or guidelines governing when it will bring an enforcement action in court versus its administrative forum. The lack of guidance or consistency risks creating an inequitable distribution of justice, as some parties are allowed the protections inherent to the civil judicial system, while others are subject to a stripped-down version, with no recourse to the federal courts until the adjudication has run its course and the Bureau enters a final order.

¹ 12 U.S.C. § 5565(a)(1).

² See, e.g., 12 C.F.R. § 1081.400(a) (expedited process); § 1081.400(c)(1) (lack of trial by jury); § 1081.303(b)(4) (lack of Federal Rules of Civil Procedure and Federal Rules of Evidence protections). The Bureau has also argued previously that no statute of limitations applies to cases filed in its administrative forum—notwithstanding the limitations on an identical case if it were filed in federal court. *In the Matter of PHH. Corp.*, No. 2014-CFPB-0002, at 10 (June 4, 2015).

Accordingly, in ETA's view, the Bureau should pursue contested matters only in federal court, unless the covered party assents to administrative adjudication. Such a revision to the Bureau's rules would preserve any benefits from a streamlined adjudicative process, while protecting the fundamental due process rights of parties to CFPB enforcement actions. However, even if the Bureau retains the unilateral ability to decide between the federal courts and its administrative forum, its Rules of Practice for Adjudication Proceedings should be revised to incorporate procedural protections similar to those provided through the Federal Rules of Civil Procedure and Federal Rules of Evidence.

COMMENTS IN RESPONSE TO CERTAIN RFI QUESTIONS

ETA respectfully provides the following responses to the Bureau's questions seeking input on all aspects of its adjudication process, including:

1. Whether, as a matter of policy, the Bureau should pursue contested matters only in Federal court rather than through the administrative adjudication process.

The Bureau should pursue contested matters only in federal court, unless the covered party assents to administrative adjudication. As discussed in the general comments above, it is necessary to allow all parties subject to the CFPB's enforcement authority equal access to a federal judge to hear and decide contested cases. A stratified system in which the Bureau brings some enforcement actions through civil litigation, and others through administrative adjudication, creates the potential for unbalanced and unfair outcomes. On the other hand, requiring contested cases to be brought in federal court, unless the defending party assents to administrative adjudication, would preserve any benefits from the expedited adjudicatory process, while also ensuring the fair application of the Bureau's enforcement authority.

5. 12 CFR 1081.206's requirements that the Bureau make documents available for copying or inspection, including whether the Bureau should produce those documents in electronic form to respondents in the first instance, at the Bureau's expense.

Although counsel for the CFPB's Bureau of Enforcement often provide electronic documents pursuant to 12 C.F.R. § 1081.206 (Rule 206), ETA suggests that Rule 206 be amended to expressly require that the Bureau be required to provide electronic documents.

Further, Rule 206(c) provides that "[t]he hearing officer may require the Office of Enforcement to produce a list of documents or categories of documents withheld pursuant to [Rule 206(b)]."³ This includes, inter alia, privileged documents and other internal materials that may not be intended to be submitted as evidence, but are nonetheless important parts of the Bureau's case. ETA feels that leaving the disclosure of the existence of such documents to an individual hearing officer's discretion could result in inequitable results—as some administrative law judges may require compliance, and others may not. ETA believes that the Bureau should amend Rule 206(c) to

³ See 12 C.F.R. § 1081.206(c).

require Enforcement Counsel to provide a list of withheld documents to the hearing officer and provide a privilege log to all parties.

9. 12 CFR 1081.210(c)'s requirements for expert reports, including whether that paragraph should expressly incorporate the requirements of the Federal Rules of Civil Procedure relating to the required disclosures of expert witnesses.

As discussed in the general comments above, ETA believes that if the CFPB can seek identical remedies in either federal court or its administrative forum, it should be held to the same procedural standards in both forums; this is essential to ensure fairness and due process. Moreover, the Federal Rules of Civil Procedure operate as a common frame of reference for all litigants. Applying the standards enunciated in those Rules to the administrative forum would ensure consistency of approach across cases, regardless of the forum in which cases are litigated.

11. 12 CFR 1081.303(b)'s rules pertaining to admissible evidence in administrative adjudications, including: a. Whether, in general, the Bureau should expressly adopt the Federal Rules of Evidence; and b. whether, if the Bureau does not expressly adopt the Federal Rules of Evidence, the acceptance of prior testimony hearsay evidence pursuant to 12 CFR 1081.303(b)(3) should comply with the requirements of Federal Rule of Evidence 804(b)(1).

As discussed in the general comments above, ETA believes that if the CFPB can seek identical remedies in either federal court or its administrative forum, the CFPB should be held to the same procedural standards in both forums. Specifically, the Federal Rules of Evidence provide standard guidance for all parties engaged in federal district court litigation, and they should apply to the CFPB's administrative forum, as well. The Federal Rules of Evidence regarding admissibility are clear and well-established through years of common law jurisprudence. In contrast, administrative law judges in administrative adjudications have substantially more discretion in making evidence admissibility determinations than judges have in federal district court. This level of discretion can render the playing field less fair for respondents and is likely to result in widely inconsistent outcomes across forums. This is especially true when admissibility determinations affect key matters of evidence, such as data that support a damages analysis. And, at the very least, ETA believes that the Bureau should expressly adopt the Federal Rules of Evidence governing admissibility of hearsay evidence. Hearsay rules under the Federal Rules of Evidence exist, of course, to test the reliability of out-of-court statements. Current adjudication rules allow parties to introduce into evidence hearsay that is not subject to any exception and not otherwise pressure-tested as to reliability.

13. Whether respondents should be afforded the opportunity to stay a decision of the Director pending appeal by filing a supersedeas bond, consistent with Federal Rule of Civil Procedure 62(d).

As discussed in the general comments above, ETA believes that if the CFPB can seek identical remedies in either federal court or its administrative forum, it should be held to the same procedural standards in either forum. The Federal Rules of Civil Procedure enable non-government parties to obtain a stay of a judgment pending appeal when that party posts a supersedeas bond. A stay, in turn, ensures that a party's appeal rights are not rendered functionally moot. In the absence of a stay in federal district court, a judgment might take effect before disposition of the appeal, which could ultimately overturn all or some of the underlying decision. For this same reason, respondents should be afforded the opportunity to stay a decision of the Director pending appeal by filing a supersedeas bond.

* * *

We appreciate you taking the time to consider these important issues. If you have any questions or wish to discuss any issues, please contact me at Stalbott@electran.org.

Respectfully submitted,

Scott Talbott
Senior Vice President of Government Affairs
Electronic Transactions Association