

Comments of
Allied Progress
Americans for Financial Reform
Center for Responsible Lending
Consumer Federation of America
National Association of Consumer Advocates
NAACP
New Yorkers for Responsible Lending
U.S. PIRG
Woodstock Institute

May 7, 2018

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

RE: Request for Information (“RFI”) on CFPB Rules of Practice for Adjudication Proceedings (Docket No.: CFPB-2018-0002)

Dear Ms. Jackson:

The comments below are submitted in response to the Consumer Financial Protection Bureau’s Request for Information (“RFI”) Regarding the CFPB’s Rules of Practice for Adjudication Proceedings (Docket No.: CFPB-2018-0002) on behalf of the undersigned advocacy groups. All of the signatories are joined together by their long history of protecting and defending the rights of consumers through education, advocacy, policy, research, and litigation. Our organizations address a wide variety of consumer issues and have extensive knowledge of the consumer needs addressed by the Consumer Financial Protection Bureau (CFPB), the statutes the CFPB enforces, and the work the agency has accomplished.

The undersigned organizations frequently engage with the CFPB and vigorously support both its mission and independence. Many of our staff have significant experience in public enforcement of consumer protection laws. We appreciate the opportunity to submit these comments for your consideration

I. Overview

The CFPB was created in response to the 2008 financial crisis. This crisis was driven in large part by the failures of existing agencies that did not have the tools, the will, the foresight, or the speed to address

looming problems in the consumer credit markets. Reacting to market and regulatory failures that fueled this “Great Recession,” Congress in 2010 enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (Dodd-Frank Act).

As part of this reform, “Congress saw a need for an agency to help restore public confidence in markets: a regulator attentive to individuals and families. So, it established the Consumer Financial Protection Bureau.”¹ Congress gave the agency both power to improve financial markets for consumers and autonomy to guarantee the agency “the authority and accountability to ensure that existing consumer protection laws and regulations are comprehensive, fair, and vigorously enforced.”² Congress gave the CFPB the authority and discretion to enforce consumer financial protections laws through two different means— filing an action in U.S. district court or initiating an adjudication proceeding before an Administrative Law Judge (“ALJ”). The flexibility in selecting from these different forums is essential to CFPBs effectiveness in fulfilling its mission to protect consumers.

Since its establishment, the CFPB has used its authority effectively to serve the public interest. The CFPB’s supervision and enforcement actions alone resulted in nearly \$12 billion in ordered relief for more than 29 million consumers victimized by unlawful activity.³ The CFPB has carried out much of this work through adjudication proceedings, whether through consent orders or contested adjudication proceedings. Constraining or diminishing the CFPB’s flexibility to enforce through adjudications likely will place consumers at greater risk and delay their compensation for the harm caused by illegal practices.

A. The CFPB should continue to use its authority to enforce through adjudication

Federal court often involves lengthy pre-trial discovery and motion practice in a more crowded litigation docket, whereas adjudications often allow for a prompt resolution of pre-trial issues, including discovery. There are circumstances where action in federal court is the more appropriate means for the CFPB to enforce the law, as evidenced by the numerous CFPB actions filed in court. However, the discretion to enforce the law through adjudication ensures the CFPB has an efficient means by which to address ever-changing schemes that harm consumers and in some cases, to correct action or bring restitution to consumers quickly, minimizing the impact of the violation over a long period of time. Industry generally should be accustomed to the administrative forum, as it is a common avenue for enforcement by federal regulators.

The CFPB has developed extensive rules of practice governing the adjudication process.⁴ These rules address many of the same fundamental aspects as the Federal Rules of Civil Procedure. However, the Rules of Practice also fulfill a statutory goal of the CFPA, by allowing for an expeditious resolution of matters through the administrative forum.

B. The RFI seeks comment before the current Rules of Practice have been significantly tested.

The RFI comes at a time when only a handful of adjudications have been meaningfully litigated under the rules which were adopted in their final form in June 2012.⁵ The CFPB has initiated only eight

¹ PHH Corp. v. CFPB, 881 F.3d 75, 77 (D.C. Cir. Jan. 31, 2018).

² H.R. Rep. No. 111-517, at 874 (2010) (Conf. Rep.); *see generally* PHH, at 77-78.

³ Consumer Financial Protection Bureau, *Factsheet: By the Numbers* (July 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201707_cfpb_by-the-numbers.pdf; Zixta Q. Martinez, *Six Years Serving You*, CFPB (July 21, 2017), <https://www.consumerfinance.gov/about-us/blog/six-years-serving-you/>.

⁴ Consumer Financial Protection Bureau, Rules of Practice for Adjudication Proceedings, 12 C.F.R. § 1081.101 et seq. (“Rules of Practice”)

⁵ Rules of Practice for Adjudication Proceedings, 77 FR 39057, (June 29, 2012),

<https://www.federalregister.gov/documents/2012/06/29/2012-14061/rules-of-practice-for-adjudication-proceedings>.

adjudication proceedings through the filing of a Notice of Charges, rather than a Consent Order that resolves the matter. Of these eight cases, five were resolved shortly after filing through a stipulated consent order. Respondents have filed an answer to formally respond and contest the adjudication proceeding in only three cases, with one of these having been resolved through consent order shortly after respondent's answer. Thus, the CFPB's RFI seeks comment on rules which to date have rarely been put to use.

C. The CFPB should not alter the existing rules, especially to the detriment of consumers, based on comments from a handful of litigants that have practiced under the current rules.

The public record⁶ in the limited number of contested proceedings provide scant evidence that the CFPB's Rules of Practice have raised of significant controversies or issues. Given the lack of contested adjudication proceedings, the CFPB should exercise caution in acting on the comments it receives, which are likely to be based largely on conjecture. Those industry participants who have been involved in adjudication proceedings and their counsel may take the CFPB's RFI as an invitation to voice concerns based largely on hypotheticals or single examples. However, consumers who have benefitted from these proceedings or could depend on them for recourse in the future understandably may lack awareness of the arcana of CFPB's adjudication procedure such that they might provide comment on how the rules benefit them. Further, it is too early to tell whether single examples demonstrate any pattern of a problem or simply the individual circumstances in one case. Ultimately, however, the Rules of Practice for adjudications will affect the CFPB's ability to protect consumers from harm in the future. Constraining the ability to enforce through adjudication proceedings at the expense of consumers would be a waste of the CFPB's resources and staff and a break with its mission of putting consumers' interests first.

Given this record, the RFI's suggestion that the CFPB consider limiting its use of adjudication proceedings to only those matters that are uncontested is troubling. The Dodd-Frank Act granted the CFPB the authority to bring adjudication proceedings or file actions in federal court in order to ensure that the CFPB has the necessary powers to accomplish its statutory duties. Retreating from the administrative forum would hamper the CFPB's efforts to enforce consumer financial protection laws and could potentially allow egregious abuses to persist for years when a more efficient remedy process is available. Congress clearly intended that the CFPB avail itself of the administrative enforcement process. The CFPB should not make hasty changes to its adjudication procedures based on the experience of less than a handful of litigants, but should continue to ensure that adjudication proceedings remain an effective and fair means of enforcing the law.

D. The CFPB should utilize the adjudication process more frequently in contested matters

We recommend that the Bureau increase the number of contested enforcement actions handled through adjudications. If anything, the Bureau has erred on the side of over-protecting the rights investigation subjects by turning to federal litigation even in situations where the overwhelming evidence supports a violation of law. Adjudication proceedings are particularly appropriate a defendant may be litigious, uncooperative or will attempt to tie the Bureau down in protracted litigation. Where evidence gathered during an investigation overwhelmingly points to a violation of law and there is little or no room for reasonable disagreement on the legality of an investigation subject's practices, federal litigation may prove an inefficient use of resources, especially where it allows a recalcitrant defendant to tie down

⁶ The Bureau provides free public access to its administrative adjudication proceedings, including dockets and pleadings. See <https://www.consumerfinance.gov/policy-compliance/enforcement/actions/>. This is in contrast to the federal courts which require access through PACER, a system which charges fees for searching records or downloading pleadings.

precious federal enforcement resources through tactics which are unlikely to affect the outcome save for the effect of justice delayed.

II. Response to Specific Questions in the RFI

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

In passing the Dodd-Frank Act, Congress made clear that the CFPB could pursue matters in adjudication proceedings and in federal court, whether the matter was to be resolved through a consent order or not.⁷ To the extent the question suggests that the CFPB might abandon administrative enforcement process, it suggests that the CFPB is contemplating neglect of its duties to enforce Federal consumer financial protection laws. Further, this practice would be a departure from similar adjudication processes by the FTC and SEC.

Moreover, this inquiry suggests the CFPB would abandon enforcing the law in a forum that, if anything, has not been used enough. Of the 119 cases filed administratively by the CFPB, 111 were resolved through immediate entry of a Consent Order, six more settled shortly after filing, and all but two involved contested litigation. This track record suggests that the CFPB's use of the adjudication proceedings is judicious and, if anything, too cautious. The CFPB may well have erred on the side of not bringing contested matters in adjudication proceedings and instead litigating in federal courts, where lengthy discovery and motion practice delay final resolution. No doubt, there are reasons for bringing an action in court – the need for immediate injunctive relief, the involvement of a state or federal partner, the ability to gather additional facts through civil discovery process. However, these benefits come with the risk of inconsistent application of the law, a delay in final resolution, and heightened costs for both the CFPB and the litigant.

Enforcement through the CFPB's adjudication process, will help foster consistent development of the CFPB's legal authorities, by avoiding inconsistent or contradictory outcomes that might arise in different federal district courts. An ALJ conducts the adjudication proceedings and then provides a recommended decision to the Director. The ALJ is more likely to hear matters arising under the CFPB's authority more regularly than a judge in federal court. The final decision, rendered by the Director, is subject to appeal in a similar manner as final decisions of federal district court judges. Moreover, there is significant evidence that ALJs are no less disposed to rule against the government than federal court judges.⁸

At a minimum, it is dubious that proceeding to federal court in all contested cases will better protect the rights of the parties accused of violations of law. If the CFPB were to address contested matters solely through federal court, this would impose additional costs and delay on parties in resolving matters. It is likely these costs would not be borne equally by different institutions. For smaller institutions, these heightened costs could mean the difference between mounting a defense and settling. On the other hand, by choosing beforehand to impose on itself the costs of federal court litigation in contested matters, the CFPB would provide added leverage to larger financial institutions seeking to avoid further investigation or prosecution for suspected violations of law. Larger institutions could use the prospect of expensive, protracted federal litigation to extract a more favorable settlement from the CFPB. Under this regime,

⁷ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 1053, 12 U.S.C. § 5563 (2010) (authorizing the Bureau to conduct adjudication proceedings and permitting parties to appeal any order except Consent Orders).

⁸ See David Zaring, *Enforcement Discretion at the SEC*, 94 Tex. L. Rev. 1155, 1184-85 (2016).

consumers who were harmed by illegal practices would likely see less relief obtained through settlements or years of waiting for any resolution of any contested matter.

Rather than adopt a one-size-fits-all approach, the CFPB should continue to use its discretion to seek to enforce the law in the appropriate forum. The CFPB should aim for a balance that ensures full protection of consumer rights, affords fairness to litigants, avoids unnecessarily burdensome litigation process, promotes partnerships with state and federal regulators, and facilitates consistent application of the law.

2. The Rules' protection of the rights and interests of third parties;

Without more detail, it is very difficult to ascertain the scope of the term “third parties” in this inquiry. However, first and foremost among “third parties” should be those consumers who have been affected by the practices of the respondent in the adjudication. A prompt resolution which seeks to redress to the fullest extent possible the harms to these consumers from violations of the law should be the primary goal of any CFPB enforcement proceeding. The Rules of Practice can address this through ensuring that they do not create opportunities for industry respondents and their counsel to delay or bog down adjudications and ultimately weaken the CFPB’s enforcement authority and its ability to seek restitution on behalf of consumers.

With respect to other “third parties,” we note that various parts of the rules afford non-parties the same or similar rights they may have in federal court. For instance, witnesses are entitled to the same fees for attendance as are available in federal court in proceedings where the United States is a party.⁹ The Rules of Practice provide that parties may seek leave to file an amicus brief, as is the case in federal court.¹⁰ Third parties may also seek a protective order with respect to disclosure of confidential information obtained from them and are entitled to notification by any party that seeks to disclose such information.¹¹ While there may be industry “third parties” that might be affected by the CFPB’s enforcement against their contractual counterparty or by some other relationship to the named respondents, this does not appear to be a difficulty unique to the administrative forum.

3. 12 CFR 1081.200(b)'s requirements for the contents of the CFPB's notice of charges;

The content requirements of § 1081.200(b) are very similar to those adopted by the SEC¹² and the FTC.¹³ The CFPB’s Notice of Charges generally have been fact-laden and include specific citations to all claims for which the CFPB seeks relief. To date, the CFPB has filed only eight Notice of Charges, only three of which resulted in the filing of an answer by the respondent. None of these answers allege the notice of charges was insufficiently pled in a manner typically addressed by rules regarding the content of complaints or other pleadings to initiate an action. Thus, it is unclear what basis the CFPB would have for significant modifying the existing requirements.

4. The policy, expressed in 12 CFR 1081.101 for administrative adjudication proceedings to be conducted expeditiously, including:

a. 12 CFR 1081.201(a)'s requirement that respondents file an answer to a notice of charges within 14 days;

⁹ See Consumer Financial Protection Bureau, Rules of Practice for Adjudication Proceedings, 12 C.F.R. § 1081.116.

¹⁰ 12 C.F.R. § 1081.216.

¹¹ 12 C.F.R. § 1081.119.

¹² Securities and Exchange Commission, 17 C.F.R. § 201.200(b).

¹³ Federal Trade Commission, Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 3.11(b).

There is little evidence to support altering § 1081.201(a), which is consistent with the FTC's rules and only modestly shorter than federal court. The time period provided is only seven days shorter than the time period allowed for under the Rules of Federal Civil Procedure. The shorter time-period for adjudication proceedings serves the policy of the Rules, stated in § 1081.101, to conduct proceedings "fairly and expeditiously."

Furthermore, it is unlikely that, upon service of a Notice of Charges from the CFPB, a respondent is unaware of the nature of the pending litigation. The CFPB usually initiates adjudication proceedings after an extensive investigative process, subject to the CFPB investigative rules.¹⁴ In addition, the Office of Enforcement has a policy, while not mandatory, that provides for advance notice to a Respondent of the possible claims and bases for such action prior to filing any enforcement action.¹⁵ Notably, the three adjudication proceedings that have been contested in any way have given scant indication that § 1081.201(a) affords respondents an unreasonably short time to answer the Notice of Charges. In one proceeding, the respondent filed a dispositive motion two days after filing of the Notice and one day after service.¹⁶ In another, Respondent's counsel filed a motion for extension of time five days after service of the Notice of Charges. The motion requested that the Respondent have one additional week to respond, was unopposed by the CFPB, and promptly granted.¹⁷ In the other matter, multiple parties filed answers within the 14-day period following service.¹⁸

Three cases hardly constitute a rigorous sample from which to draw conclusions. However, the most reasonable conclusion that can be drawn from these cases is that, given the nature of the CFPB's investigations, the timing requirements under § 1081.201(a) are appropriate and do not unduly burden respondents.

b. 12 CFR 1081.115(b)'s requirement that the hearing officer in administrative adjudications strongly disfavor motions for extensions of time except upon a showing of substantial prejudice;

Section 1081.115(b) provides a similar set of guidelines for granting extensions of time as under the FTC's and SEC's rules. It is also notable that to date, no request for an extension has been denied by a hearing officer in an adjudication proceeding. Thus, the concerns expressed by industry commenters to the Interim Final Rule, that the rule may impose unrealistic filing deadlines, have not yet borne out. Section 1081.115(b) requires that the hearing officer take into consideration several factors which provide ample guidance to avoid overly harsh denials of extension requests without opening the door to delay tactics aimed at hindering the objectives of § 1081.101. Moreover, in the few cases that have been litigated, the CFPB and the presiding ALJ have generally been accommodating of requests for an extension of time.

c. 12 CFR 1081.212(h)'s requirement that the hearing officer decide any motion for summary disposition within 30 days; and

¹⁴ Consumer Financial Protection Bureau, Rules Relating to Investigations, 12 C.F.R. Part 1080.

¹⁵ CFPB Bulletin 2011-04, Notice and Opportunity to Respond and Advise (November 7, 2011, updated January 18, 2012), <https://files.consumerfinance.gov/f/2012/01/Bulletin10.pdf>.

¹⁶ See Respondent's Motion to Dismiss, CFPB v. PHH, et al., No. 2014-CFPB-0002, (filed January 31, 2014) https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201402_cfpb_0002_motion-to-dismiss-alternative-for-summary-disposition.pdf.

¹⁷ See Order Granting Motion for Extension of Time to Respond to CFPB's Notice of Charges, CFPB v. Integrity Advance, LLC and James Carnes, No. 2015-CFPB-0029 (November 30, 2015).

¹⁸ See CFPB v. 3D Resorts-Bluegrass, LLC, No. 2013-CFPB-0002.

Section 1081.212 addresses dispositive motions before a hearing, the hearing officer's recommendation, and the ultimate decision by the Director. A 30-day time-frame for the hearing officer to decide the motions after full briefing by the parties appears consistent with the CFPB's stated policy goal to conduct adjudication proceedings fairly and expeditiously.¹⁹ While also facilitating prompt resolution and, where the CFPB prevails, prompt remediation of consumer harm, a short period for the hearing officer to decide summary dispositions means that parties defending themselves against CFPB actions are able to more quickly obtain favorable judgment when the CFPB is not successful. As the CFPB noted in its final rule adopting the Rules of Practice, the timelines on decisions "should help ensure that a party ultimately determined to be entitled to dismissal is not required to engage in the adjudicative process for a lengthy period of time."²⁰ There appears to be no evidence from the record of the CFPB's adjudication proceedings thus far to adjust this requirement.

d. The CFPB's implementation of the requirement in 12 U.S.C. 5563(b)(1)(B) that hearings take place within 30 to 60 days of the notice of charges, unless the respondent seeks an extension of that time period;

Again, this question seeks comment on the effect of a process that has not been tested very often. As is contemplated by the statute,²¹ the CFPB's rules provide for a later date to be determined at the scheduling conference required by § 1081.203(b)(1). To date there have been only two full adjudication hearings conducted by the CFPB. One of these hearings was commenced within the 60 day time-frame envisioned by the notice content requirements of the Dodd-Frank Act, while the other hearing was conducted more than 7 months after the notice of charges. In both cases, the timing of the hearing followed a scheduling conference where the CFPB and other parties were able to argue for an earlier or a later date. From these meager results, it appears the CFPB's adjudication procedures allow for significant flexibility to the hearing schedule by leaving to the ALJ the ability to determine a date and time for hearing, having heard the parties' concerns through the scheduling conference.

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

This inquiry suggests that the Office of Enforcement currently does not provide documents in electronic form as part of its affirmative disclosure obligations under § 1081.206. However, the preamble to the 2012 Final Rule addressed this concern in direct response to a commenter:

The Bureau adopted the language regarding photocopying from the SEC Rules, but as indicated in the preamble to § 1081.206, the Bureau anticipates providing electronic copies of documents to respondents in most cases. The Bureau is retaining the language regarding photocopying in order to retain its discretion, particularly in cases where the safekeeping of documents subject to inspection and the cost of production may be of particular concern. The Bureau expects these cases to be rare.²²

¹⁹ See 12 C.F.R. § 1081.101.

²⁰ 77 FR 39057, at 39078.

²¹ 12 U.S.C. §5563(b)(1)(B) (2018) ("...such hearing to be held not earlier than 30 days nor later than 60 days after the date of service of such notice, unless an earlier or a later date is set by the CFPB, at the request of any party so served.")

²² *Id.*, at 39075.

The CFPB's Enforcement manual reiterates that providing documents in electronic form is to be the norm.²³ From review of the CFPB's dockets, it appears that the Office of Enforcement has adhered to this policy. The pleadings in the PHH case indicate the CFPB provided the affirmative disclosures electronically. While formally codifying this in the text of § 1081.206 may make this policy more clear to future litigants, the CFPB would be well-advised to take into account the concerns noted in the 2012 Final Rule before taking such a step.

6. 12 CFR 1081.208's requirements for issuing subpoenas, and whether counsel for a party should be entitled to issue subpoenas without leave of the hearing officer;

The 2012 Final Rule notes that "[t]he Bureau had considered whether to permit parties to issue subpoenas."²⁴ The CFPB declined to do so because a hearing officer can help ensure that subpoenas are not "unreasonable, oppressive, excessive in scope, or unduly burdensome."²⁵ Notably, virtually all subpoenas requests from respondents have been granted. The only outright denial of a request was without prejudice and due to errors in form. As with many aspects of this RFI, to the extent this question raises an issue, there is little or no evidence that there is a problem to address, at least as indicated by the limited sample of contest proceedings.

7. 12 CFR 1081.209(g)(3)'s provision that failure to object to a question or document at a deposition is, with some exception, not deemed a waiver of the objection;

Section 1081.209(g)'s provision is common among rules for federal agencies' adjudication proceedings. The CFPB's rules provide that objections shall be noted by the deposition officer, but limit rulings on the competency, materiality, or relevance of evidence to the ALJ when serving as the deposition officer. Sec. 1081.209(g)(3) then limits waiver of objection to situations where ground for the objection might have been avoided if the objection had been timely presented. The SEC and FTC similarly limit waiver of objection to testimony to instances where the objection is not timely made.²⁶

8. 12 CFR 1081.210(b)'s limitation on the number of expert witnesses any party may call at a hearing, absent "extraordinary circumstances";

This inquiry again invites abandonment of a rule that has not yet been tested. The 2012 Final Rule noted that the limitation in § 1081.201(b) is consistent with FTC rules. The CFPB adopted § 1081.201(b) unchanged from the Interim Final Rule after receiving no comments and stating that the "limitation will provide the parties with a sufficient opportunity to present expert testimony without unduly delaying the proceedings."²⁷ To date, no adjudication proceeding has involved a motion for leave to call an additional expert witness above the five experts parties are already permitted to call. If any conclusion can be drawn

²³ Consumer Fin. Protection Bureau, Office of Enforcement, Policies and Procedures Manual Version 3.0, https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/201710_cfpb_enforcement-policies-and-procedures-memo_version-3.0.pdf. ("However, the Office of Enforcement has committed to making documents available to the respondent as soon as possible (but in any event commencing no later than seven days after service of the notice of charges) and to producing the information in electronic format, unless electronic production is not feasible.")

²⁴ 77 FR 39057, at 39073

²⁵ *Id.*

²⁶ See Securities and Exchange Commission (SEC), Rules of Practice, 17 C.F.R. § 201.233(i) (2016) ("An objection to a deponent's competence - or to the competence, relevance, or materiality of testimony - is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time"), and Federal Trade Commission, Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 3.33(g) (2015) (stating that such objections as to competence, relevance or materiality are "not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.").

²⁷ 77 FR 39057, at 39076

from the history of the adjudication proceedings thus far, the rule seems appropriate and does not unduly burden litigants.

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;

It is not necessary or advisable for the Bureau to amend 12 CFR § 1081.210(c) to expressly incorporate the requirements of the Federal Rules of Civil Procedure relating to the required disclosures of expert witnesses. The Bureau's Rules of Practice for Adjudication Proceedings on this point are modeled on the FTC's rules.²⁸ Both the Bureau and the FTC's rules are very similar to the Federal Rules of Civil Procedure. All three sets of rules require that experts sign a report with complete statement of all opinions to be expressed with the expert's basis and reasons.²⁹ Each requires that expert reports include disclosure of facts or data considered by the expert.³⁰ Each requires that expert reports disclose any exhibits to be used at trial or an administrative hearing respectively.³¹ Each requires disclosure of the witness's qualifications, including a list of all publications authored in the previous 10 years and previous cases in which the witness testified as an expert during the previous four years.³² And, each requires that reports include a statement of the expert witness's compensation.³³ Given these similarities, the Bureau's Rules of Practice for Adjudication Proceedings are sufficient to provide a comparable level of notice and transparency to defendants as the Federal Rules of Civil Procedure.

However, taking the additional step of expressly tying the Bureau's rules to those used in each federal district court throughout the country would introduce an unnecessary new level of formality and complexity to interpreting these currently straightforward provisions. For example, federal district courts and circuit courts of appeal occasionally reach different results in interpreting the Federal Rules of Civil Procedure. Neither the Bureau's staff nor the administrative hearing officer should be expected to study the expert witness disclosure jurisprudence of every federal circuit. Indeed, smaller defendants with fewer resources should also prefer the flexibility of the Bureau's current expert disclosure rules. The point of an administrative enforcement system is to create a simpler, more flexible, and faster method of enforcing federal law. Expressly tying the Bureau's rules to the Federal Rules of Civil Procedure risks unproductive collateral litigation, delays, and added work for Bureau staff with little or no actual improvement in the administration of justice.

Moreover, in subparagraph (a)(2)(C)(i), the Federal Rules of Civil Procedure explicitly cross references the Federal Rules of Evidence.³⁴ But, the Bureau's Rules of Practice for Adjudication Proceedings expressly set out different rules of evidence for administrative hearings that are designed to facilitate the cases and fact finding suited to the Bureau's administrative enforcement mission. Thus, tying expert witness disclosures to the Federal Rules of Civil Procedure could risk importing certain elements of the Federal Rules of Evidence that may be in tension with the standards and procedures in 12 CFR § 1081.303.

Of course, nothing in existing Bureau rules prevents defendants from citing cases interpreting the Federal Rules of Civil Procedure as persuasive authority. And because the Bureau's rules on this point are

²⁸ See 77 FR 39057, at 39076 ("This section of the Interim Final Rule is modeled after the FTC Rules, 16 CFR 3.31A.")

²⁹ Compare FED. R. CIV. P. § 26(2)(B)(i) with 12 CFR § 1081.210(c) and 16 CFR § 3.31A(c).

³⁰ Compare FED. R. CIV. P. § 26(2)(B)(ii) with 12 CFR § 1081.210(c) and 16 CFR § 3.31A(c).

³¹ Compare FED. R. CIV. P. § 26(2)(B)(iii) with 12 CFR § 1081.210(c) and 16 CFR § 3.31A(c).

³² Compare FED. R. CIV. P. § 26(2)(B)(iv), (v) with 12 CFR § 1081.210(c) and 16 CFR § 3.31A(c).

³³ Compare FED. R. CIV. P. § 26(2)(B)(iv), (vi) with 12 CFR § 1081.210(c) and 16 CFR § 3.31A(c).

³⁴ FED. R. CIV. P. § (a)(2)(C)(i).

virtually identical to the FTC's rules, defendants also have the benefit of persuasive authority from the FTC's long-standing practices. Changing the Bureau's expert witness disclosure rules is unnecessary at this time and would be a distraction from other more pressing Bureau priorities.

10. 12 CFR 1081.212(e)'s instruction that extensions of the length limitation for motions for summary disposition are disfavored;

This question seeks comment on a provision that is similar to the SEC's rule³⁵ and more tolerating of extensions than the FTC's rule.³⁶ Section 1081.212(e) has not been the subject of any contention in adjudication proceedings to date and provides for 35-page limit for briefs in support and in opposition to a motion, with 10 pages allowed for the moving party's reply brief. While shorter page-limits than some local court rules allow, these limits seem to provide an adequate length for parties to present their arguments for and against motions.

11. 12 CFR 1081.303(b)'s rules pertaining to admissible evidence in administrative adjudications, including:

a. Whether, in general, the CFPB should expressly adopt the Federal Rules of Evidence; and

b. whether, if the CFPB 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);

The CFPB adopted § 1081.303(b) to establish rules of evidence that were "consistent with general administrative practice."³⁷ The Bureau's rules on this point are essentially the same as those set forth in the FTC and SEC Rules.³⁸ While it is to be expected that some litigants before the CFPB would prefer that the more extensive Federal Rules of Evidence be brought into adjudication proceedings, those rules might introduce complexity and added litigation that would likely delay final resolution. This would not be consistent with the expeditious proceedings contemplated under the Dodd-Frank Act.

12. The Rules' lack of authorization for parties to conduct certain discovery, including deposing fact witnesses or serving interrogatories; and

The 2012 Final Rule addressed a comment similar to this inquiry, noting:

The Bureau considered allowing third-party depositions or interrogatories but declined to do so because the need for these third-party discovery tools will likely be met through the discovery mechanisms that are available under the Final Rule, and because of the potential for third-party depositions and interrogatories to delay the proceedings.

The 2012 Final Rule noted that parties could subpoena witnesses for testimony at the hearing, under § 1081.208, and depose the witness if unavailable for the hearing. Interrogatories, while a useful tool in civil litigation, also tend to be the subject of significant dispute. Thus, limiting testimony outside of trial

³⁵ SEC Rules of Practice, 17 C.F.R. § 201.250(e) (2016) ("Requests for leave to file motions and accompanying documents in excess of 9,800 words are disfavored.")

³⁶ FTC Rules of Practice, 16 C.F.R. § 3.22(c) (2015) ("Documents that fail to comply with these provisions shall not be filed with the Secretary.")

³⁷ 77 FR 39057, at 39079.

³⁸ *Id.*

and not permit interrogatories helps facilitate the expeditious proceeding contemplated by the Dodd-Frank Act and by § 1081.201.

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).

Thus far, only one matter has involved a request for a stay on appeal under § 1018.407 to which this inquiry seems to apply. Though the Director denied the requested stay, he delayed the effectiveness of his order to allow the respondent to seek a stay from the Court of Appeals, which ultimately stayed the Director's order. It unclear what harm or disadvantage the CFPB believes may be occurring that merits reconsideration of the CFPB's previous determination not to provide what would be unique powers to obtain a stay.