

April 8th, 2022

Comment Intake
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

**Re: Rules of Practice for Adjudication Proceedings; Docket No.
CFPB-2022-0009.**

To Whom It May Concern:

The undersigned organizations appreciate the opportunity to submit comments to the Consumer Financial Protection Bureau (“CFPB”) regarding its Rules of Practice for Adjudication Proceedings (the “Revised Rules”).¹ Collectively, we represent companies across the consumer financial services landscape. We share a common interest with the CFPB in the fair and consistent enforcement of federal consumer financial laws, including through administrative adjudication.

Administrative adjudication can play an important and valuable role in an effective regulatory system by providing an efficient—and equally fair—alternative to civil litigation. Indeed, properly structured, administrative adjudication can be a preferred forum for all participants—and particularly for routine matters that involve limited legal or factual disputes. But the design and implementation of any administrative adjudication process must afford a fair trial before a neutral decision-maker, providing both efficiency and a fair opportunity for a defendant company to present its defense. As seen recently with the Securities and Exchange Commission, for example, appropriate separation should be maintained between the enforcement and adjudication functions.² Likewise, efficiency must not compromise fairness. Rather, appropriate safeguards should be put in place to make sure that the right matters are brought in that forum and that rules promoting efficiency do not unfairly penalize companies. For example, ensuring that administrative law judges only hear actions that require the application of established law to the facts will play to the strengths of administrative adjudication. Likewise, maintaining access to federal district courts will help ensure due process protections are observed. Moreover, maintaining procedural safeguards equivalent to those in Article III courts will maintain the fairness of administrative proceedings.

¹ See CFPB, Rules of Practice for Adjudication Proceedings, 87 Fed. Reg. 10,028 (Feb. 22, 2022).

² See SEC, Commission Statement Relating to Certain Administrative Adjudication (April 5, 2022) (explaining finding that SEC enforcement staff improperly had access to adjudicatory memoranda).

Congress tasked the CFPB with creating an administrative adjudication system under the Consumer Financial Protection Act and granted the Bureau the authority to use this forum to bring administrative proceedings to address violations of federal consumer financial law.³ We have long had concerns about the rules that the CFPB established to govern its adjudicative process.⁴ Indeed, while the CFPB has used administrative adjudication infrequently, its record has been troubling when it has done so. In one of the few cases where the CFPB did use administrative adjudication, *PHH Corp. v. CFPB*, Director Richard Cordray retroactively imposed his own interpretation of the law and dramatically increased the applicable financial penalties. The U.S. Court of Appeals for the District of Columbia Circuit overturned this decision, finding that the CFPB's order in the case both "violated bedrock principles of due process" and incorrectly interpreted the law.⁵

The Revised Rules are a significant step in the wrong direction. They make critical changes to the existing administrative adjudication process, expanding the Director's powers and reducing protections for defendant companies in ways that will lead to a lack of due process. For example, the Revised Rules expand the power of the Director—who authorized the enforcement action—to review cases by authorizing the Director to: (i) decide a dispositive motion, (ii) refer the motion to the administrative law judge ("ALJ"), or (iii) decide part and refer part. The Revised Rules also permit the Director to bifurcate proceedings to allow for separate decisions on liability and remedies. Moreover, the Revised Rules require defendants to exhaust all arguments before the ALJ to preserve them for appeal before the Director or, eventually, for appeal in federal court. Relatedly, the Revised Rules require defendants to raise any "avoidance" defenses in the defendant's answer to the CFPB,⁶ expanding the prior requirement that defendants raise all affirmative defenses at that time.

Director Chopra recently explained that he sought as Director to establish a "durable jurisprudence."⁷ These changes will undermine that goal. Concentrating new power in a Director who serves at the will of the President to decide the very actions the Director chooses to pursue, the Revised Rules will not enhance the impartiality and fairness that are the hallmarks of sound administrative adjudication processes. Rather,

³ See 12 U.S.C. § 5563.

⁴ See 12 C.F.R. Part 1081.

⁵ See *PHH Corp. v. CFPB*, 839 F.3d 1, 12-13 (D.C. Cir. 2016), vacated Feb. 16, 2017, reinstated in part, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

⁶ An "avoidance" defense is one in which a defendant admits key facts but adds others that would render the defendant's actions justified or excused.

⁷ See Testimony of Rohit Chopra, Director, Consumer Financial Protection Bureau before the House Financial Services Committee (Oct. 27, 2021)

they will lead to legal interpretations that will be promptly abandoned once the White House changes hands, outcomes driven by policy rather than impartial application of law to the facts of a case, and a frustration of the Due Process that is promised all Americans. In short, the Revised Rules will make it harder for the CFPB to “enforce Federal consumer financial law consistently” as required by Congress in the Dodd-Frank Act.⁸

We accordingly write to make four points:

- Concentrating adjudicative authority in the Director creates legal uncertainty and instability.
- Concentrating adjudicative authority in the Director who authorized the enforcement action risks depriving defendants of due process.
- Meaningful access to Article III courts is critical to sound and fair adjudication of enforcement actions.
- The CFPB should immediately revert to the prior rules while it considers how best to revise its adjudication processes.

Analysis

1. Concentrating adjudicative authority in the Director creates legal uncertainty and instability.

Clear rules of the road allow competition to flourish, giving consumers affordable access to the safe products they want and need. Companies thrive when they can chart a clear path forward, but such competition cannot flourish when the law is unpredictable or unstable. Uncertainty creates confusion in the marketplace, and consumers ultimately lose out because responsible, compliance-minded companies hesitate to invest in new products and services when they are unsure of the potential legal ramifications. We consequently urge the CFPB to take appropriate steps to enhance legal certainty and stability. Unfortunately, by granting unprecedented authority to the Director (who authorized the enforcement action) at all stages of the adjudication process, the Revised Rules will undermine, not advance this important goal.

Most simply, the Director is not an impartial judge who can bring stability to the law. Rather, the Director is a political appointee who serves at the will of the current

⁸ See 12 U.S.C. § 5511(a).

President. Chosen because of his or her alignment with the policy goals of the appointing President, each Director brings that policy perspective to the enforcement actions that he or she pursues, the legal interpretations that he or she adopts, and the priorities that he or she emphasizes. None of this is surprising; rather, it reflects the intended working of our democratic system of government. America’s founders chose to empower voters to choose their President and, indirectly, the officials, accountable to the President, who lead their government. The inevitable consequence of this decision is that the views and judgments of U.S. executive branch officials change by administration. Here, that means that the decisions of the Director in any administrative adjudication will not be viewed as permanent statements of the law, or as impartial applications of settled legal principles to the facts, but as the individual views of a single official that only reflect the policy judgments of the present administration. Rather than creating legal stability and certainty, the Revised Rules’ concentration of adjudicative authority in the CFPB Director will lead to the imposition of legal interpretations that swing, often substantially, under the appointees of one administration to the next. This concentration of authority also will further confuse and mix the distinct functions of investigator, prosecutor, and adjudicator, exacerbating due process risks and undermining the legitimacy and defensibility of the Bureau’s adjudications.

Legal uncertainty and instability will be exacerbated because of the Director’s own limitations as an adjudicator. As we have seen in *PHH Corp. v. CFPB*, granting the Director far-reaching authority in the administrative adjudication process can result in fundamentally flawed judgments. In that case, the CFPB announced a new interpretation of the Real Estate Settlement Procedures Act in an enforcement proceeding against PHH, a mortgage lender—and then Director Cordray unilaterally inflated an ALJ’s fine of \$6 million to \$109 million for conduct that had been legal under regulators’ prior interpretation of the law.⁹ A D.C. Circuit panel unanimously held (in a decision that was left undisturbed by an en banc court) that the lender “did not have fair notice of the [CFPB’s] interpretation” of the law when the lender acted, and that the CFPB “therefore violated due process by retroactively applying its changed interpretation to PHH’s past conduct and requiring PHH to pay \$109 million for that conduct.”¹⁰ The result in *PHH Corp.* should have provided a clear caution sign of the risks of error in administrative adjudication. By granting the Director even greater powers than those held by Director Cordray, however, the Revised Rules increase the

⁹ See *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016), vacated Feb. 16, 2017, reinstated in part, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

¹⁰ See *id.* at 48.

risk of further mistaken judgments, leading to legal challenges and regulatory uncertainty, not settled precedent that establishes clear rules of the road.

2. Concentrating adjudicative authority in the Director who authorized the enforcement action risks depriving defendants of due process.

The Director has vast authority to set rules and expectations, either through informal guidance or formal rulemaking; to choose which enforcement actions to pursue (including in which forum); and to resolve actions. The Revised Rules further expand this authority, allowing the Director to serve as both prosecutor and judge. While the Revised Rules are purportedly based on similar ones at the Securities and Exchange Commission (“SEC”)¹¹ and the Federal Trade Commission (“FTC”), power resides in multi-member commissions at both the SEC and the FTC, not in one person. The Revised Rules also give the Director greater authority than sole heads of other agencies. For example, the Office of the Comptroller of the Currency’s (“OCC’s”) regulations authorize the Comptroller to issue a final order on summary dispositions only if the ALJ first determines that summary disposition of the entire case is appropriate.¹² This unprecedented concentration of power in the CFPB’s Director risks depriving defendants of due process.

The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. As the Supreme Court has held, “[t]his requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process.”¹³ The Director is no impartial arbiter. Rather, the Director, who personally approved the filing of the enforcement action, has a vested interest in the success of each enforcement action that the Director serves. Given these risks, a well-designed CFPB adjudication process would emphasize the role of ALJs, not the Director, and would limit the issues that may be resolved in the administrative adjudication process. The Revised Rules unfortunately do the opposite, greatly

¹¹ See U.S. Chamber of Commerce, *Examining U.S. Securities and Exchange Commission Enforcement: Recommendations on Current Processes and Practices* (July 2015) (recommending that “persons and entities seeking a jury trial . . . immediately have the case removed to a federal court, conditioned on a timely filing of a notice of removal for a jury trial”), https://www.centerforcapitalmarkets.com/wp-content/uploads/2015/07/021882_SEC_Reform_FIN1.pdf

¹² See 12 C.F.R. §§ 109.29, 109.30.

¹³ See *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

increasing the risk that administrative proceedings before the CFPB will not provide due process to defendant companies.

When combined with the enormous potential liability under federal consumer financial laws, rule changes that tip administrative adjudication in the CFPB's favor will create enormous pressure on companies to settle claims brought by the CFPB in the administrative forum. The CFPB should not confuse this ability to force companies into settlement with the creation of principled or permanent jurisprudence or the administration of justice. Such outcomes will be unfair to the defendant company, reflecting only the practical realities that the company faces, not any principled resolution consistent with the best traditions of our system of government. Ultimately, the heightened legal risk caused by these rules changes will discourage companies from investing in new products and services, to the detriment of consumers.

3. Meaningful access to Article III courts is critical to sound and fair adjudication of enforcement actions.

Administrative adjudication should not unfairly advantage either side. But, as described above, implementation of the Revised Rules may unfairly favor the Bureau in many cases. Meaningful access to Article III courts mitigates the risk of such inappropriate outcomes. Courts offer defendants appropriate rights and protections while also allowing the CFPB to vigorously pursue its actions. Whether by allowing a defendant company to elect to remove a case to federal district court or by providing robust appellate rights, meaningful access to Article III courts supports the sound and fair administrative adjudication of enforcement actions.

Here again, the Revised Rules are a step in the wrong direction. The Revised Rules make it harder to exhaust claims and preserve them for appeal. In this way, the Revised Rules exacerbate the problems caused by the lack of ready access to federal courts, compounding the effect of the Director's increased authority and increasing the risk that defendant companies will be subject to unfair proceedings in the CFPB's administrative forum.

4. The CFPB should immediately revert to the prior rules while it considers how best to revise its adjudication processes.

We appreciate the opportunity to comment on the Rules of Practice for Adjudication Proceedings. However, the CFPB should have solicited comments on the adjudication procedures before taking action considering the interests at stake. Given the concerns described above, we strongly urge the CFPB to rescind the Revised Rules and begin a new notice and comment process to develop a more fair and sound adjudicative process with input from stakeholders. In doing so, we would urge the

Bureau to clearly identify the problems it perceives with the current rules that it would intend to address with the rules revision.

This approach would be consistent with those of other regulators. For example, the prudential regulators issued an interagency proposal to update certain parts of their policies and procedures governing administrative proceedings on March 22, 2022.¹⁴ The Bureau should take a similar approach here, drawing upon the considered comments of a broad range of stakeholders before finalizing any revisions to its adjudication processes.

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Thank you for considering these comments. We would be happy to discuss these issues further.

Sincerely,

American Bankers Association

Bank Policy Institute

Consumer Bankers Association

Mortgage Bankers Association

U.S. Chamber of Commerce

¹⁴ OCC, Federal Reserve System, Federal Deposit Insurance Corporation, National Credit Union Administration, Rules of Practice and Procedure (Mar. 22, 2022), <https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20220322a1.pdf>.